A New Challenge to *Miranda*: Evaluating the Effectiveness of Mid-Interrogation Miranda Warnings and the Admissibility of Subsequent Confessions: *Missouri v. Siebert*

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A New Challenge to *Miranda*: Evaluating the Effectiveness of Mid-Interrogation *Miranda* Warnings and the Admissibility of Subsequent Confessions: *Missouri v. Seibert*

**DUE PROCESS – FIFTH AMENDMENT – PRIVILEGE AGAINST SELF-INCRIMINATION – MIRANDA:** The Supreme Court held that, in a continual custodial interrogation, when *Miranda* warnings are given after a suspect has confessed they do not effectively protect the privilege against self-incrimination and that any subsequent confessions made should be suppressed.


When Patrice Seibert awoke on February 12, 1997, she found that her son Jonathan had died in his sleep.¹ Jonathan was afflicted with cerebral palsy.² Seibert feared that she would be accused of neglecting him due to the bedsores on his body.³ While in her company, two of Seibert’s older sons and a pair of their friends discussed a plan to hide the circumstances of Jonathan’s death by burning down the family trailer.⁴ The plan also included leaving Donald Rector, a mentally ill teenager living with Seibert, in the trailer as well, so that it would appear that the severely handicapped Jonathan had not been left alone.⁵ In accordance with the plan, Seibert’s son Darian and one of his friends set the fire later that afternoon and Donald Rector died.⁶

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² *Seibert*, 124 S. Ct. at 2605.
³ *Id.*
⁴ *Id.* Upon the discovery that Jonathan was dead, Seibert’s son Michael was sent to find his older brother Darian. *State v. Seibert*, No. 23729, 2002 WL 114804, at *1 (Mo. Ct. App. Jan. 30, 2002). Darian was at his friend Derrick Roper’s house where the two of them and another friend, Jeremy Batcher, had been drinking alcohol and smoking marijuana. *Id.* Darian initially told his mother to call the police and then he returned to Roper’s house, but Michael again asked him to return to the trailer after Seibert refused to call the police because she was afraid of being charged with neglecting Jonathan. *Id.* This was when the plan was first devised and when Seibert gave Darian and Roper money to buy gasoline to set the fire. *Id.*
⁵ *Seibert*, 124 S. Ct. at 2605-06. The group chose Donald because they knew that he was on medication that normally caused him to take a nap after school. *State v. Seibert*, 2002 WL 114804, at *1.
⁶ *Seibert*, 124 S. Ct. at 2606.
Five days later, while at the hospital where Darian was undergoing treatment for burns, Seibert was arrested.\(^7\) Seibert was not given *Miranda*\(^8\) warnings at the time of her arrest.\(^9\) After her arrival at the police station, Seibert was left alone for approximately twenty minutes before Officer Hanrahan began to interrogate her.\(^10\) After almost forty minutes of questioning, Seibert stated that she knew Donald was supposed to die in the fire.\(^11\) She was given a twenty minute break to smoke a cigarette and have some coffee.\(^12\) When she returned, Hanrahan turned on a tape recorder, administered *Miranda* warnings to Seibert, and Seibert signed a waiver of rights.\(^13\) Hanrahan resumed the interrogation with a reference to the earlier conversation, then confronted Seibert with the statements she had made minutes earlier and she confessed a second time.\(^14\)

Seibert was charged with first-degree murder for the death of Donald Rector.\(^15\) A suppression hearing was held, in which Seibert attempted to have both of her confessions excluded.\(^16\) Officer Hanrahan testified that he intentionally withheld the *Miranda* warnings.\(^17\) The trial court suppressed Seibert’s pre-warning statement but allowed the jury to hear the confession she made after the warnings were given.\(^18\) Seibert was convicted of second-degree murder.\(^19\)

\(^7\) *Id.* Darian had fallen asleep while Roper was preparing the trailer for the fire, and he awoke as gasoline was being poured on him. *State v. Seibert*, 2002 WL 114804, at *2. The trailer caught fire before Darian got out. *Id.*

\(^8\) *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court held that police officers are required to inform a suspect of his rights to silence and assistance of counsel prior to any custodial interrogation. *Miranda*, 384 U.S. at 437.

\(^9\) *Seibert*, 124 S. Ct. at 2606. The hospital where Darian was treated was in St. Louis, outside the jurisdiction of Officer Hanrahan, the Rolla, Missouri officer who was investigating the trailer fire. *State v. Seibert*, 2002 WL 114804, at *4. Hanrahan arranged to have a St. Louis officer arrest Seibert and specifically advised that officer not to give her *Miranda* warnings. *Id.*

\(^10\) *Id.*, 124 S. Ct. at 2606.

\(^11\) *Id.* During this initial questioning, Officer Hanrahan continually squeezed Seibert’s arm and repeated “Donald was also to die in his sleep.” *Id.*

\(^12\) *Id.*

\(^13\) *Id.*

\(^14\) *Id.*

\(^15\) *Seibert*, 124 S. Ct. at 2606.

\(^16\) *Id.*

\(^17\) *Id.* at 2606. Officer Hanrahan acknowledged that the goal of this question-first technique was to obtain a confession, give the warnings, and then repeat the questions until the same confession was given a second time. *Id.*

\(^18\) *Id.*

\(^19\) *Id.*
The Missouri Court of Appeals affirmed the conviction. The Supreme Court of Missouri reversed. It held that *Elstad* was distinguishable from this case, focusing on the seemingly continuous nature of the interrogation to which Seibert was exposed and the intentional withholding of *Miranda* warnings by Officer Hanrahan. The United States Supreme Court granted certiorari to decide the issue of whether mid-interrogation *Miranda* warnings, given after a suspect has confessed, effectuate the purposes of the warning.

Justice Souter wrote the plurality opinion of the Court. Part II of the opinion began with a recitation of *Miranda* and its underlying mandate. The Court then noted that while failure to give *Miranda* warnings and get a waiver usually requires the exclusion

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20. *Seibert*, 124 S. Ct. at 2606. That court ruled that the facts of Seibert's case were indistinguishable from those of *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, while officers were arresting the defendant in his home, one officer made a statement that he believed that the defendant was involved in a robbery, and Elstad stated that he was in fact present at the time the robbery took place. *Elstad*, 470 U.S. at 301. Upon arrival at the police station Elstad was advised of his *Miranda* rights, he signed a waiver and made a confession regarding his participation in the robbery. *Id.* at 301-02. The court excluded the statement Elstad made in his home but allowed the confession made at the police station to be admitted, holding that it was freely given and in no way tainted by his previous admission. *Id.* at 302.


22. *Seibert*, 124 S. Ct. at 2606-07. The Missouri Supreme Court stated that the essential issue was whether the presumed involuntariness of the first statement carried over to the second statement. *Seibert*, 93 S.W.3d at 701. In holding that the involuntariness did carry over to the second confession the court ruled that the intentional withholding of *Miranda* warnings had the purpose of weakening Seibert's ability to exercise her rights. *Id.* at 705. The court also held that the circumstances of the two confessions must be considered, namely the temporal and spatial proximity of the second confession to the first. *Id.* The majority stated that if there is sufficient time between the unwarned and warned confessions, then it is more likely that the accused voluntarily chose to confess the second time. *Id.* This court found that no such separation occurred and, in fact, Seibert's interrogation was nearly continuous. *Id.* at 705-06.

23. Certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

24. *Seibert*, 124 S. Ct. at 2607. The Court noted that "the threshold issue . . . is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 2610.

25. *Id.* at 2605. The plurality consisted of Justices Souter, Stevens, Ginsburg and Breyer. *Id.* Justice Breyer wrote a concurring opinion and Justice Kennedy also wrote an opinion concurring in the judgment. *Id.* Justice O'Connor wrote the dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. *Id.*

26. *Id.* at 2607-08. Part I of the plurality opinion was a recitation of the facts and procedural history. *Id.* at 2605-07. Justice Souter recounted that *Miranda*, with the purpose of restricting those interrogation practices that hinder a suspect's ability to make a rational decision regarding his right to remain silent, requires that an individual be "adequately and effectively" made aware of his rights. *Id.* at 2608 (citing *Miranda*, 384 U.S. at 467).
of any statement made by a suspect, a proper application of such warnings and obtaining a waiver almost always results in admissibility. According to the plurality, this outcome is the natural result of the fact that *Miranda* warnings are most often given as they were intended; at a time when the accused still has a real choice to remain silent.

In the next part of the opinion, the plurality addressed the voluntariness of the statements. The Court recalled that after *Miranda* was decided, Congress attempted to bypass it with legislation that would allow for the voluntariness to be litigated, rather than presumed based on warnings. Justice Souter stated that the technique of questioning suspects, warning them, and then continuing the interrogation presented a fresh challenge to *Miranda*.

According to the Court, when the confession at issue is obtained under these circumstances, the conflicting objectives of *Miranda* and question-first must be weighed. The plurality held that the essential inquiry is whether *Miranda* warnings given in the middle of an interrogation could realistically alert a suspect to his right of silence, even if he had made previous statements. Justice Souter stated that if a suspect is not in a position to make an informed choice after mid-interrogation warnings, then there is no justification for holding the warnings as valid according to *Miranda*, nor is there justification for treating the second stage of the interrogation as separate from the first, unwarned stage. The Court ruled that when the circumstances of this case are viewed objectively, warnings given only after the suspect has confessed are unlikely to sufficiently prepare the suspect to exercise

27. Seibert, 124 S. Ct. at 2608. The Court noted that "maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." Id.
28. Id.
29. Id.
30. Id. Congress enacted 18 U.S.C. § 3501, but it was declared unconstitutional by the Supreme Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000).
31. Seibert, 124 S. Ct. at 2608. There was testimony at trial that this question-first technique was not limited to the Rolla, Missouri police department but was in fact gaining popularity and was being taught by a national police training unit. Id. at 2608-09.
32. Id. at 2609. The Court stated that the objective of *Miranda* is to insure that police interrogations do not undermine an individual's ability to make an informed decision regarding his or her choice to talk or remain silent, while the purpose of question-first is to acquire the initial confession, thereby rendering *Miranda* warnings futile. Id. at 2609-10.
33. Id.
34. Id. at 2610.
his rights in subsequent interrogation. The more likely result, according to the plurality, is that telling a suspect that they have the right to remain silent after they have just confessed would leave them confused, and confusion is not a suitable mindset for making a well-informed decision.

In the final part of the opinion, the Court addressed the State of Missouri's contention that under the principles of Oregon v. Elstad, the confession should be admissible. The plurality held that this case was not governed by Elstad because the cases are factually distinguishable. Justice Souter wrote that a comparison of Elstad to the present case reveals a series of factors that may determine whether the post-confession Miranda warnings effectively achieved their purpose. The Court, applying these factors, compared the two cases and found them to be on opposite ends of the spectrum. Upon this finding, the Court ruled that the question-first technique used on Seibert undermined the purpose of Miranda and held that the warnings given to her minutes after

35. Id. The Court noted that the reason for the popularity of the question-first technique is that it succeeds in eliciting confessions that would not have been made if the suspect fully understood his rights from the beginning. Id. at 2610-11.
36. Seibert, 124 S. Ct. at 2611. The Court also pointed out that it is perfectly reasonable for a suspect to infer that his silence will not help him when he is told that anything he says can be used against him and the confession he just made is not excused. Id. Further, the plurality held that since Miranda warnings given under these circumstances undermine the suspect's ability to make an informed decision, it would be "unrealistic" to find the two halves of a coordinated and ongoing interrogation as separate and distinct simply because the warnings were given in the middle. Id.
38. Seibert, 124 S. Ct. at 2611.
39. Id. at 2611-12. Justice Souter particularly focused on the Elstad Court's finding that the failure to provide Miranda warnings initially was an "oversight." Id. at 2611 (quoting Elstad, 470 U.S. at 315-16). In Seibert, however, the interrogating officer's failure to give Miranda warnings was intentional. Id. at 2612-13.
40. Seibert, 124 S. Ct. at 2612-13. Those factors were: [The completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. Id. at 2612.
41. Id. at 2612-13. The Court specifically noted that the interrogations in Elstad occurred in distinctly different locations (the defendant's home and the police station) and that there was a significant time lapse between the two. Id. at 2612. In Seibert's case, however, the interrogations were nearly continuous, they took place in the same location, they were executed by the same officer, and that officer made specific references to Seibert's previous confession. Id. at 2612-13.
her initial invalid confession were ineffective. Therefore, the post-Miranda confession was inadmissible.

Justice Breyer concurred with the result of the plurality opinion. According to Justice Breyer, absent a showing that the failure to warn was in good faith, any statements or confessions which ultimately result from an unwarned interrogation ought to be excluded. Justice Breyer espoused this to be a simple rule that courts could easily follow and advocated the need for a less complex rule.

Justice Kennedy authored a concurring opinion, which Justice Breyer also joined. Justice Kennedy wrote that Elstad reached the correct result and that the Court was justified in focusing on the good faith mistake of the arresting officer. Because the officer in this case deliberately attempted to circumvent the protections of Miranda, Justice Kennedy believed that the plurality's decision was correct. Justice Kennedy stated, however, that the objective "effectiveness" test of the plurality was too broad a standard because it would be applied to both intentional and unintentional Miranda violations. Justice Kennedy advocated that the plurality's analysis should be applied on a more limited basis when intentional violations are involved, and that Elstad should continue to govern the admissibility of post-warning statements.

Justice O'Connor began her dissent by agreeing with the plurality that the "fruit of the poisonous tree" theory does not apply in this case, and that the subjective intent of the interrogating officer should not be used as a factor. Justice O'Connor wrote in dis-
sent, however, because she believed that the plurality’s result adopted an argument that the Supreme Court had expressly rejected in *Elstad*. Justice O'Connor argued that the proper analysis would subject the interrogation to the voluntariness standards of the Fifth Amendment, which were reinforced by *Elstad*. Under this analysis, if Seibert’s first statement is found involuntary then the Court can determine whether the taint was mitigated through curative measures or changed circumstances. Accordingly, Seibert’s second statement should only be excluded if the Court finds that it was involuntary even though *Miranda* warnings had been given.

Prior to *Miranda*, there was not a decision by the United States Supreme Court that required police to inform the accused of his rights of silence and assistance of counsel as constitutional prerequisites to admissibility of statements made by the accused at trial. The admissibility of confessions was evaluated under the voluntariness test, which the Court developed from the Fifth and Fourteenth Amendments to the United States Constitution.

In 1966, The Supreme Court decided *Miranda v. Arizona*, in which it consolidated four cases dealing with the same issue: the admissibility of statements made by suspects during custodial interrogations. The Court held that statements made by a defen-

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54. *Id.* at 2619 (O'Connor, J., dissenting). According to Justice O'Connor, the Supreme Court rejected the position taken by the Court of Appeals of Oregon in *Elstad* that “the coercive impact of the unconstitutionally obtained statement remains, because in a defendant’s mind it has sealed his fate.” *Id.* (quoting State v. Elstad, 658 P.2d 552, 554 (Or. Ct. App. 1983)). Justice O'Connor repeated the Court’s position in *Elstad*, stating that if the Court gave constitutional protection to the psychological effect of “let[ting] the cat out of the bag,” then suspects would be virtually immune to the consequences of their subsequent, warned confessions. *Id.* (O'Connor, J., dissenting).

55. *Seibert*, 124 S. Ct. at 1629 (O'Connor, J., dissenting).

56. *Id.* (O'Connor, J., dissenting).

57. *Id.* (O'Connor, J., dissenting).


61. *Miranda*, 384 U.S. at 439. The first of the four cases joined in this opinion was *Miranda v. Arizona*. *Id.* at 491. In *Miranda* the defendant, Ernesto Miranda, was convicted of kidnapping and rape. *Id.* at 492. He was arrested, identified by the complaining witness, and then interrogated for two hours without being advised that he had the right to an attorney. *Id.* at 491. When it affirmed his conviction, the Supreme Court of Arizona
dant while under custodial interrogation\footnote{Duquesne Law Review Vol. 43} may not be used against him at trial, unless the prosecution proved that certain procedural safeguards were implemented to ensure that the constitutional privilege against self-incrimination was protected.\footnote{Duquesne Law Review Vol. 43} The Court mandated that it was essential that the protections provided in the Constitution be more than words, and so in order for the privilege against self-incrimination to carry full force, a suspect must be made aware of his right to silence.\footnote{Duquesne Law Review Vol. 43} The Court concluded that the judgments in three of the four cases consolidated in this opinion were reversed.\footnote{Duquesne Law Review Vol. 43}

As a result of the decision in \textit{Miranda}, Congress passed 18 U.S.C \textsection 3501.\footnote{Duquesne Law Review Vol. 43} This statute was a congressional attempt to over-
rule *Miranda*; however, the question of its ultimate success in doing so was not answered until the statute was finally invoked in *Dickerson*. The issue presented to the Supreme Court in *Dickerson* was whether Congress had constitutional authority to supersede *Miranda*'s requirement of pre-interrogation warnings. Chief Justice Rehnquist delivered the holding of the Court, which said that *Miranda* did announce a constitutional rule, and Congress did not have the authority to overrule it. The Court looked to the language of the *Miranda* opinion in order to determine whether the *Miranda* Court thought that it was announcing a constitutional rule. Chief Justice Rehnquist then stated that, as the Court did find that *Miranda* announced a constitutional rule that replaced the traditional totality-of-the-circumstances voluntariness test, the statute seeking to reinstate that test must be invalidated if *Miranda* continues to be the law. As a result of the

(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 account 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 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.


67. *Dickerson*, 530 U.S. at 437. Dickerson was charged for several offenses in connection with a bank robbery. *Id.* at 432. Dickerson moved to suppress a statement he made on the grounds that he had not been given *Miranda* warnings and the district court granted that motion. *Id.* The Government appealed and the United States Court of Appeals for the Fourth Circuit held that under 18 U.S.C. § 3501 the statement was voluntarily made. *Id.* The court of appeals then concluded that *Miranda* was not a constitutional holding, thus the statute prevailed and the court reversed the suppression order. *Id.* at 432.

68. *Id.* at 437.
69. *Id.* at 444.
70. *Id.* at 439. Chief Justice Rehnquist began this inquiry by noting that the opinion of *Miranda* begins with a statement that the Court was going to "give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* (quoting *Miranda*, 384 U.S. at 441-42). The Court then noted the language of *Miranda*, which stated that the circumstances of that case "did not meet the constitutional standards for protection of the privilege." *Id.* at 440. (quoting *Miranda*, 384 U.S. at 491). The Court also pointed out the *Miranda* Court's ruling that Congress could take legislative action to protect the constitutional privilege. *Id.*

71. *Dickerson*, 530 U.S. at 442-43. Chief Justice Rehnquist stated that stare decisis "weighed heavily against overruling [Miranda] now." *Id.* at 443. Stare decisis is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial deci-
Court's reaffirmation of Miranda in Dickerson, the admissibility at trial of statements made by an accused during interrogation remains dependent upon the existence of pre-interrogation warnings.\(^7\)

In 1985, the Supreme Court decided the case of Oregon v. Elstad.\(^7\) The issue in Elstad was whether the failure of an interrogating officer to issue Miranda warnings rendered subsequent statements, made after Miranda warnings were administered and a waiver of rights obtained, inadmissible.\(^7\) The Court ruled that a suspect who had previously responded to unwarned, but non-coercive, questioning was not disabled from subsequently waiving his rights and making a valid confession after being given Miranda warnings.\(^7\) The Court dealt first with the argument for suppression that the statement should be excluded under the "fruit of the poisonous tree" doctrine.\(^7\) The Court rejected this argument and noted that the difference between the "fruits" exclusionary rule and the Miranda exclusionary rule is that Miranda warnings themselves, unlike the Fourth Amendment's protection against illegal search and seizure, are not protected constitutional rights.\(^7\) The second argument that the Court re-

\(^{72}\) Dickerson, 530 U.S. at 444.

\(^{73}\) Elstad, 470 U.S. at 303. Michael Elstad was arrested at his home for the robbery of a neighbor's house. \textit{Id.} at 300. While in the house, one of the arresting officers stated that he believed Elstad was involved in the robbery, to which Elstad replied "I was there." \textit{Id.} at 301. About an hour later, Elstad was advised of his Miranda rights; he waived those rights and signed a typed confession. \textit{Id.} The trial court suppressed the statement Elstad made while in his house but admitted the typed confession into evidence. \textit{Id.} at 302. The Oregon Court of Appeals reversed Elstad's conviction, holding that the taint of the first conviction was not sufficiently dissipated by an adequate passage of time. \textit{Elstad}, 470 U.S. at 303. The Oregon Supreme Court declined review and the United States Supreme Court granted certiorari after a petition from the State of Oregon. \textit{Id.}

\(^{75}\) Id at 307.

\(^{76}\) Id. at 303.

\(^{77}\) Elstad, 470 U.S. at 304-05. Instead, the Court noted, "Miranda warnings ... are measures to insure that the [constitutional] right against compulsory self-incrimination [is] protected." \textit{Id.} at 305 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)). The Court furthered this rationale by stating that failure to give Miranda warnings creates a presumption of compulsion, and although the inadmissibility of those statements cannot be cured, the presumption is overcome with regard to later statements when they are made after an informed waiver of rights. \textit{Id.} at 307-09. The presumption is only that the privilege against self-incrimination has not been intelligently waived, not that the statements were actually coerced. \textit{Id.} at 310.
jected was the psychological effect of “let[ting] the cat out of the bag.” The Court held that if this argument were accepted, then a suspect would be given too much protection from the consequences of his subsequent statements made after an informed waiver of rights. The Court specifically noted that the rule from *Miranda* was in no way affected by this decision, but it held that there was no necessity for presuming a coercive effect with regard to the warned statements if the initial statements were voluntary, although technically in violation of *Miranda*. As a result, the Court concluded that the Court of Appeals of Oregon’s decision was reversed.

Since *Elstad*, there has been a split in the circuit courts as to how *Elstad* should be applied, and that was the reason that the Supreme Court decided to grant certiorari in the case against Patrice Seibert. In *United States v. Carter* the United States Court of Appeals for the Eighth Circuit was faced with a mid-interrogation *Miranda* warning scenario. The Court ruled that the *Elstad* argument, although not raised in the district court, did not require reversal. The Court came to that conclusion after distinguishing the facts of *Elstad* from what happened to Carter.

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78. *Elstad*, 470 U.S. at 311. The “cat” argument was that once a confession is made the psychological effect of that cannot be overcome. *Id.*

79. *Id.* at 312. The Court also noted that “the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best.” *Id.* at 313-14.

80. *Id.* at 317-18. The Court noted that the Fourteenth Amendment due process voluntariness test remains the standard for determining voluntariness of an unwarned statement even though the admissibility of that statement is now governed by *Miranda*. *Id.* at 308-09.

81. *Id.* at 318.

82. *Seibert*, 124 S. Ct. at 2607.

83. 884 F.2d 368 (8th Cir. 1989).

84. *Carter*, 884 F.2d. at 369. The defendant Carter was discovered to have stolen some marked bills and a bearer check from the bank where he worked. *Id.* Upon this discovery, he was interrogated in the bank manager’s office by two inspectors. *Id.* After forty-five minutes of interrogation, Carter complied with a request to search his wallet in which were found the marked bills. *Id.* Carter was then given *Miranda* warnings, he signed a waiver and wrote out a confession. *Id.* at 369. At trial the district court granted Carter’s motion to suppress the statements and the physical evidence. *Carter*, 884 F.2d at 369. The district court ruled that the interrogation was a custodial setting and *Miranda* warnings should have been given. *Id.*

85. *Id.* at 372.

86. *Id.* at 373. Of particular note to the Court was the fact that in *Elstad* there was a significant passage of time between the voluntary, though unwarned, confession and the warned confession, whereas here no such passage of time existed. *Id.* at 373. The Court also noted that there was a concern in *Elstad* that *Miranda* violations may occur when the police erroneously determine whether or not a suspect is in custody and that concern could
The Court found that, applying the voluntariness test of the due process clause, both the initial and subsequent warned confessions were involuntary despite the warnings, and also found that Elstad did not establish a rule permitting an "end run" around Miranda.\(^7\)

A similar interpretation of Elstad was reached in United States v. Gale.\(^8\) In Gale, the defendant made three statements prior to being given Miranda warnings and one after.\(^9\) The district court ruled that under the rule in Elstad, the statement made after Miranda warnings were given was admissible.\(^9\) The Court rejected Gale’s argument that he was subjected to the “intimidating and inherently coercive” practices contemplated in Elstad when he gave his second and third statements such that his fourth statement, though given after Miranda warnings, should be suppressed.\(^9\) Gale also argued that the ruling in Carter required the exclusion of his fourth statement.\(^9\) The Court rejected this argument as well, noting that unlike in Carter, the statement Gale made after Miranda warnings were issued was significantly later in time than his previous statements.\(^9\) The Court clearly stated that it was not condoning the officer’s failure to give Miranda warnings, but concluded that since the unwarned, suppressed statements were voluntarily made, no “end run” around Miranda

\(^7\) Gale also argued that the ruling in Carter required the exclusion of his fourth statement. The Court rejected this argument as well, noting that unlike in Carter, the statement Gale made after Miranda warnings were issued was significantly later in time than his previous statements. The Court clearly stated that it was not condoning the officer’s failure to give Miranda warnings, but concluded that since the unwarned, suppressed statements were voluntarily made, no “end run” around Miranda.

87. Id. at 373. The Court also noted that the decision in Miranda was influenced by dissatisfaction with case-by-case determinations of voluntariness. Id. at 374. According to the Court, the ease of Miranda’s application is one of its advantages and if it were to permit this “end run” around Miranda then courts would be back to performing case-by-case evaluations. Id.


89. Gale, 952 F.2d. at 1414. Gale was stopped by an officer who had received a tip from an informant that Gale was in possession of drugs. Id. at 1413. While in his car, Gale admitted to the officer that he had drugs. Id. at 1414. After he was ordered out of the car, Gale then admitted to having drugs in his crotch and in the trunk of his car. Id. Gale was then taken to the police station, and fifty minutes after the original stop he was given Miranda warnings, waived his rights, and admitted that he intended to sell the drugs. Id. at 1414.

90. Id. The district court granted Gale’s suppression motion with regard to the first three, unwarned statements but found that since those three statements were not coerced, the fourth statement was admissible according to the rule announced in Elstad. Id.

91. Id. at 1417. The Court’s reasoning for rejecting Gale’s argument was that every post-arrest interrogation is inherently coercive, but Elstad required actual coercion in order to find the post-warning statements involuntary. Id. The Court found no support in the record to suggest that the district court’s ruling that no such actual coercion took place was in error. Id.

92. Id. at 1417.

93. Id at 1418.
was present; therefore, the fourth statement made by Gale was admissible. 94

*United States v. Esquilin*, decided in 2000, also involved statements made before and after *Miranda* warnings were issued. 95 At trial, Esquilin sought suppression of all statements he made, even though the Government did not seek admission of the pre-warning statements. 96 The district court denied the motion. 97 Esquilin argued on appeal that *Elstad* required a time lapse between the unwarned and warned statements, and that that element was not present in this case. 98 The Court rejected this argument and stated that the lapse of time considered in *Elstad* is only relevant as a factor when the statement was actually coerced. 99 Esquilin’s next argument was that the deliberate withholding of *Miranda* warnings by the police constituted a per se “improper tactic,” which required a presumption of compulsion regarding the warned statement. 100 In rejecting this argument, the Court noted that *Elstad* should be read on the whole, and that “deliberately coercive or improper tactics” are two ways of describing the same type of conduct. 101 The Court concluded that the district court was correct in ruling that Esquilin’s post-warning statements were admissible. 102

The same issue, whether a confession made after *Miranda* warnings were given should be suppressed because of statements

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94. *Gale*, 952 F.2d at 1418. The Court found that the principles of *Elstad* were not violated in this case because the first three statements, though technically in violation of *Miranda*, were voluntary under the due process test and thus did not affect the voluntariness of the post-*Miranda* statement. *Id.* at 1417.

95. 208 F.3d 315 (1st Cir. 2000). In *Esquilin*, police were notified of possible drug activity occurring at a motel by the motel manager. *Esquilin*, 208 F.3d. at 316. When they arrived, Esquilin consented to an officer and a drug-sniffing dog entering his room to ask him a few questions. *Id.* at 317. Esquilin then consented to a search of his room and the dog found a plastic bag containing white powder, which Esquilin admitted was cocaine. *Id.*

96. *Esquilin*, 208 F.3d at 317.

97. *Id.*

98. *Id.* at 319.

99. *Id.* Considering whether the taint of coercion has been dissipated is only necessary upon a finding that the initial, unwarned statements were actually coerced. *Id.*

100. *Id.*

101. *Esquilin*, 208 F.3d at 320. The Court stated that “it is part and parcel of the *Elstad* holding that a failure to give *Miranda* warnings does not, without more, make a confession involuntary.” *Id.* at 321. Further, the Court noted, a subjective intent by the officer to deliberately violate *Miranda* cannot affect the free will of the suspect. *Id.* at 321.

102. *Id.*
made prior to the warnings, was presented to the United States Court of Appeals for the Ninth Circuit in United States v. Orso.\textsuperscript{103} At trial, Orso sought suppression of all the statements she made, but the district court denied that motion.\textsuperscript{104} The court of appeals found that the questioning that took place in the police vehicle was custodial, therefore the absence of Miranda warnings rendered all statements made by Orso during the ride inadmissible.\textsuperscript{105} The court rejected, however, Orso's claim that her full confession, which she made after Miranda warnings were given, should have been suppressed.\textsuperscript{106} To reach this conclusion, the court relied on the Elstad rule that the court should determine whether the initial, unwarned statement was actually coerced before determining the admissibility of the post-warning statement.\textsuperscript{107} Orso argued that this was an improper reading of Elstad and that she was also entitled to the "fruits" analysis if the police used "improper tactics."\textsuperscript{108} The court rejected this interpretation of Elstad and, applying the Elstad rule, found that since her unwarned statements were not actually coerced, her subsequent informed confession was admissible.\textsuperscript{109}

The purpose of the rule announced in Miranda was to prevent involuntary confessions from being used against a suspect at trial.\textsuperscript{110} To that end, the Supreme Court came to the correct conclusion that Patrice Seibert's post-warning statements should be excluded.\textsuperscript{111} It is easy to reach that conclusion based on the facts

\begin{itemize}
\item \textsuperscript{103} 266 F.3d 1030, 1032 (9th Cir. 2001). Orso was arrested for robbing a postal carrier. Orso, 266 F.3d at 1032. She was handcuffed, placed in the backseat of a car, and driven to the police station which took between twenty-five and thirty-five minutes. Id. During the ride, the investigators discussed the robbery with Orso and she made inculpatory statements, including: "Well, if the letter carrier said it's me, then it must be me" when told she had been identified. Id. Upon arrival at the police station, Orso was read Miranda warnings, she waived her rights, and over the next hour and a half she confessed. Id. at 1033.
\item \textsuperscript{104} Orso, 266 F.3d. at 1033.
\item \textsuperscript{105} Id. at 1033-34.
\item \textsuperscript{106} Id. at 1040.
\item \textsuperscript{107} Id. at 1035.
\item \textsuperscript{108} Id. at 1035-36. Orso contended that Elstad's language of "deliberately coercive or improper tactics" implied two circumstances in which the presumption of compulsion could apply, not one. Id. at 1036 (citing Elstad, 470 U.S. at 314). The court rejected this reading of Elstad and held that when read in context, "improper tactics" was meant to define those police activities which render unwarned statements involuntary. Id. at 1036-37. Additionally, Orso argued that the policy goal of deterring police misconduct was furthered by application of the "fruits" analysis. Id. at 1036. The court rejected this argument as well, noting that it was expressly rejected by the Supreme Court in Elstad. Orso, 266 F.3d. at 1038.
\item \textsuperscript{109} Orso, 266 F.3d. at 1039-40.
\item \textsuperscript{110} Seibert, 124 S. Ct. at 2608.
\item \textsuperscript{111} Id. at 2613.
\end{itemize}
of Seibert. Seibert was placed under a custodial interrogation in which the interrogating officer continually squeezed her arm and repeated the same question until she confessed.\textsuperscript{112} This can undoubtedly be characterized as an intimidating setting that would make someone who was not apprised of his or her rights feel pressured to talk. After a short break, \textit{Miranda} warnings were issued. Seibert was questioned in the same location by the same officer who made several references to their prior conversation without informing Seibert that her prior confession was likely inadmissible.\textsuperscript{113} Most importantly, perhaps, was the fact that each time Seibert made statements inconsistent with her earlier confession, the interrogating officer immediately confronted her with that confession in an effort to get her to repeat it.\textsuperscript{114} The interrogating officer knew that the initial confession would not be admissible because of the \textit{Miranda} violation. His use of the unwarned confession against Seibert, immediately after giving her \textit{Miranda} warnings, rendered those warnings ineffective and both confessions involuntary.

At first glance, the plurality, concurring, and dissenting opinions of \textit{Seibert} appear to advocate different tests for evaluating the admissibility of statements made after the administration of mid-interrogation \textit{Miranda} warnings. The plurality opinion seemed to adopt an effectiveness test, under which the statements made after the mid-interrogation \textit{Miranda} warnings would be admissible only if the \textit{Miranda} warnings were found to have effectively advised the suspect of his rights.\textsuperscript{115} As noted above, the inquiry un-

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 2606.
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.} When Seibert returned from her break and the second round of questioning began, Officer Hanrahan asked her what would happen if the boys could not get Donald Rector out of the trailer before it burned. \textit{Id.} Seibert responded that she had not thought about that and always assumed that her son would get Donald out of the trailer. \textit{Id.} This was inconsistent with her earlier statement that she knew Donald was supposed to die in the fire. \textit{Id.} Officer Hanrahan then asked, “Trice, didn’t you tell me that he was supposed to die in his sleep?” \textit{Id.} Seibert then repeated that Donald was, in fact, supposed to die in the fire. \textit{Seibert}, 124 S. Ct. at 2606.
  \item \textsuperscript{115} \textit{Seibert}, 124 S. Ct. at 2610. The Court, in narrowing the issue, held that the pertinent inquiry under these circumstances was whether the warnings effectively advised the suspect of his rights, most notably about his choice to remain silent or to give an admissible statement. \textit{Id.} Further, the Court noted that “in a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the \textit{Miranda} warnings given could reasonably be found effective.” \textit{Id.} at 2610 n.4. If the answer is yes, the Court can analyze the second confession under the traditional voluntariness test. \textit{Id.} at 2610. If the answer is no, then the subsequent confession is not admissible if the first and second interrogations are realistically parts of the same questioning series. \textit{Id.}
der this test can be reduced to a set of factors that are relevant to
the determination of effectiveness, regardless of whether the fail-
ure to administer *Miranda* warnings was intentional.\textsuperscript{116}

In Justice Breyer's concurrence, he wrote that the analysis of
the two-stage interrogation should be governed by a good faith
rule.\textsuperscript{117} Justice Kennedy argued for a similar test, but stated that
in the absence of evidence that the *Miranda* violation was inten-
tional, the admissibility of post-warning statements still should be
governed by *Elstad*.\textsuperscript{118} Finally, the dissenting opinion argued that
any statements made after mid-interrogation warnings should be
governed by the voluntariness standards of the Fifth Amend-
ment.\textsuperscript{119}

In practice, the effectiveness and voluntariness tests will oper-
ate in much the same manner as what will essentially be a total-
ity-of-the-circumstances analysis. The factors under the effective-
ness test are the same factors that would fall under the voluntari-
ness test espoused by the dissenting opinion. The voluntariness
test, which was advocated for in the dissenting opinion and which
Congress attempted to codify in 18 U.S.C. § 3501, would also ac-
count for whether warnings were given, in addition to the timing,
locale, and continuity of personnel elements of the interrogation.
The element of whether warnings were issued is present in the
effectiveness test because its very purpose is to determine the ef-
fectiveness of the warnings in rendering a suspect capable of mak-
ing a voluntary decision. Overlapping of the two tests is inevita-
able.

As for good faith, it will likely not be central to the inquiry often
because in most cases the intent of the interrogating officer will
not be known. When it is known, as in *Seibert*, there is little justi-
fication for including it in the determination of admissibility be-
cause it would only have an effect on the suspect's confession if the
suspect was aware of the intent at the time of the interrogation.\textsuperscript{120}

\textsuperscript{116} *Id.* at 2612. Again, those factors include the completeness of the questions in the
first interrogation, the extent to which the two statements overlap the time difference be-
tween the two rounds of questioning, the location of the two interrogations, whether the
interrogator is the same, and the extent to which the interrogator treats the two interroga-
tions as continual. *Id.*

\textsuperscript{117} *Id.* at 2613 (Breyer, J., concurring). If the failure to give *Miranda* warnings was a
good faith mistake, unlike in *Seibert*, then the statements should be admissible. *Id.*
(Breyer, J., concurring).

\textsuperscript{118} *Id.* at 2616 (Kennedy, J., concurring).

\textsuperscript{119} *Id.* at 2619 (O'Connor, J., dissenting).

\textsuperscript{120} *Seibert*, 124 S. Ct. at 2617-18 (O'Connor, J., dissenting).
The struggle to balance the government's interest in enforcing the laws and the individual protections granted by the Constitution is ongoing. The difficulty inherent in that struggle is that those rights and freedoms provided for in the Constitution are most often invoked to protect a person guilty of breaking the law. But the law also mandates that an "adequate and effective" warning be given to a suspect to apprise them of their rights. Since Miranda was decided, there have been efforts by law enforcement agencies and Congress to circumvent its protections and tip the scale in favor of the government's interests. The Supreme Court has remained steadfast, however, reaffirming Miranda time and again. But with the growing war on terror and some of the congressional actions in connection therewith, the need has perhaps never been greater for a reaffirmation of individual liberties.

Patrice Seibert is guilty. She participated in planning the murder of a seventeen year old, mentally challenged boy. She was tried and convicted by a jury of her peers. Yet the Supreme Court, correctly, invalidated that conviction because the case against her was built upon a confession obtained in violation of her constitutionally protected right against self-incrimination. Had the Court found, under these particular circumstances, that her confession was voluntary in the context of Miranda and the Fifth Amendment, the possibility of further oppression and manipulation of individual freedoms would increase. The government has a legitimate interest in enforcing the laws of this nation, but that end must never justify the means of a constitutional violation.

Mitchell W. Paterline

121. Id. at 2608 (quoting Miranda, 384 U.S. at 467).