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SECOND CIRCUIT REVIEW

Expert Analysis

Refining 'Miranda': Determining Two-Stage Interrogations

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Since the U.S. Supreme Court's decision in *Miranda v. Arizona*,[1] the self-incrimination clause of the Fifth Amendment—and, more specifically, *Miranda* warnings—have captured the public's fascination, and followed a contentious legal course. This month we report on *United States v. Capers*,[2] a path-defining decision issued last month by the U.S. Court of Appeals for the Second Circuit, which has significant implications for the future of *Miranda* warnings jurisprudence. The decision, written by Circuit Judge Peter W. Hall and joined by Circuit Judge Rosemary S. Pooler, clarifies the legal standard and burden of proof for courts to apply when determining whether deliberate two-stage interrogations exist and are in violation of *Miranda*.

Specifically, *Capers* adopts a totality of circumstances test, under which the government has the burden to disprove deliberateness, or demonstrate curative measures, by a preponderance of the evidence. Only two other circuits—the Seventh and Eighth—have issued decisions reaching these questions. The majority opinion is accompanied by a vigorous dissent by late District Judge David G. Trager, sitting by designation.

Background and History

In March 2005, the U.S. Postal Service suspected William Capers, who worked as a mail handler, of stealing money orders from Express Mail envelopes. As a result, in December 2005, postal inspectors conducted a sting operation directed at Mr. Capers. On the day of the sting, inspectors planted $30 in cash and $80 in postal money orders in two separate Express Mail envelopes, respectively. The envelopes were triggered with alarms to signal to the surveilling inspectors if the envelopes were opened. When Mr. Capers found the two envelopes toward the end of the day, he and another postal employee, Juan Lopez, brought them into a delivery trailer outside the view of surveillance. Less than one minute later, the envelope alarm sounded. The inspectors immediately rushed to the trailer and seized both Messrs. Capers and Lopez. The inspectors handcuffed both men, and brought them to the supervisor's office for questioning.

> The Second Circuit's 'Capers' decision has significant implications for the future of 'Miranda' warnings jurisprudence.

Leaving Mr. Lopez to wait in the hall, three inspectors entered the room with Mr. Capers, and Lead Inspector Hoti began questioning Mr. Capers, who remained handcuffed. After less than five minutes of questioning, Mr. Capers admitted that the money orders were in his pocket and that he had taken them from the planted Express envelope. The inspectors then, with Mr. Capers' permission, obtained the money orders from his person. Up to this point, none of the inspectors had given Mr. Capers a *Miranda* warning.

Mr. Capers was then transported to another postal facility, where less than two hours later, Inspector Hoti again questioned him about that day's events, and Mr. Capers again confessed to having taken the money orders from the Express Mail envelope. This time, however, Mr. Hoti informed Mr. Capers of his *Miranda* rights, and Mr. Capers signed a Postal Service Warning and Waiver of Rights form, in advance of questioning.

In March 2006, U.S. Attorney Michael J. Garcia charged Mr. Capers in the U.S. District Court for the Southern District of New York with one count of theft of mail matter by a postal employee, in violation of 18 U.S.C. §1709. Mr. Capers moved to suppress all inculpatory statements that he made the day of the sting operation, both before and after the *Miranda* warnings were given, and any evidence seized from his person. Following an evidentiary hearing, District Judge Lawrence M. McKenna issued a memorandum opinion and order in March 2007, which granted Mr. Capers' motion to suppress as to his inculpatory statements, but denied it as to the seized money orders.

Under *Miranda*, Judge McKenna found that Mr. Capers' unwarned statements would be inadmissible at trial, except for impeachment purposes on cross-examination. As for his post-*Miranda*, or warned statements, Judge McKenna relied on the Supreme Court's decisions in *Oregon v. Elstad* and *Missouri v. Seibert*.[3] Judge McKenna followed the voluntariness standard set forth in *Elstad*, while incorporating *Seibert* factors from the plurality opinion for guidance, and examined the totality of the circumstances to determine whether a defendant's statements were made knowingly and voluntarily.

With regard to the warned statements, Judge McKenna concluded: "The government has not shown that…[the] defendant relinquished his right to remain silent 'voluntarily with a full awareness of the rights being waived and the consequences of doing so.'"[4] The government appealed the order as to the *Miranda* warned statements.

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The Second Circuit Decision

Over three years later, the Second Circuit in *Capers* affirmed the district court's judgment, but on markedly different grounds. Preliminarily, the court acknowledged that it reviews de novo "the constitutionality of a *Miranda* waiver," but reviews "a district court's underlying factual findings for clear error."[5] The court's majority observed that the Supreme Court had twice previously addressed a similar fact pattern, in which a defendant voluntarily made inculpatory statements without receiving the proper *Miranda* warning, then later made inculpatory statements after an appropriate warning.

In *Oregon v. Elstad*, as the *Capers* court explained, the defendant made a self-incriminating statement to two police officers who were at his home investigating a robbery. The officers then transported the defendant to the police station, where they gave him his *Miranda* warnings for the first time, and he provided an oral and written confession. The defendant moved to suppress the later confessions as arising from the earlier, unwarned statement.

The Supreme Court, in an opinion authored by Justice Sandra Day O'Connor, reasoned that "the absence of any coercion or improper tactics" by police undercuts the twin rationales—deterring improper police conduct and assuring trustworthy evidence—for a broader *Miranda* exclusionary rule.[6] In turn, the Supreme Court concluded that the Fourth Amendment's "fruit of the poisonous tree" doctrine did not apply to *Miranda* warnings under the Fifth Amendment.[7] Rather, *Elstad* held that, "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made."[8]

The *Capers* court next addressed *Missouri v. Seibert*, the other Supreme Court opinion that examined a similar fact pattern. The court noted that the critical factual difference in *Siebert* was that, unlike the good-faith effort by police in *Elstad* to follow *Miranda*, the police department in *Siebert* had an official policy to employ a two-stage questioning technique as an interrogation strategy.

The *Siebert* police intentionally withheld *Miranda* warnings when they first interviewed a suspect in order to learn useful information or establish a "breakthrough" or "beachhead," whereby they would have an easier time later when they attempted to obtain a legitimate confession following a *Miranda* warning.[9] Regarding the decision, the *Capers* court recognized that though the Supreme Court agreed that the subsequent confession resulting from the two-stage interrogation technique should be suppressed, no opinion of the court commanded a majority.

The *Capers* court reviewed two of the four opinions from the fractured decision: the plurality and Justice Anthony M. Kennedy's concurrence. The plurality, in an opinion written by Justice David H. Souter, proposed a test asking "whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" under the circumstances of the case.[10]

The plurality identified five factors a court should consider when determining whether the warning could function effectively: (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 interrogations, (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.

> The 'Capers" court concluded: '[A] court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence.'

Under Justice Kennedy's approach, the first question is whether "law enforcement officers used a 'deliberate two-step strategy' in 'a calculated way to undermine the *Miranda* warning."[11] If the answer to that question is negative, then the voluntariness standard under *Elstad* would apply. If the answer is positive, then the second question is whether any curative measures were taken "to ensure that a reasonable person in the suspect's situation [would] understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."[12]

The court underscored two examples of curative measures provided by Justice Kennedy: (1) "a substantial break in time and circumstances between the preparing statement and the *Miranda* warning…[because] it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn"; and (2) "an additional warning that explains the likely inadmissibility of the preparing custodial statement."[13] In *Siebert*, the court noted, Justice Kennedy concluded that the post-warning statements should be excluded, because the police had used a deliberate two-stage interrogation and not taken any curative measures.

Endorsing the Second Circuit's decision in *United States v. Carter*,[14] the *Capers* court rejected the district court's conclusion that Justice Kennedy's concurring opinion in *Siebert* was not the "law of the land."[15] Instead, the *Capers* court agreed with *Carter*, in which the Second Circuit had joined the Third, Fifth, Eighth, Ninth, and Eleventh circuits in adopting Justice Kennedy's concurrence as controlling, and held that "*Seibert* lays out an exception to *Elstad* for cases in which a deliberate, two-step strategy was used by law enforcement to obtain the post warning confession."[16]

Both *Siebert* and *Carter* left the following important questions unresolved: first, what is the proper standard to apply Justice Kennedy's test in *Seibert*—i.e., how could a court determine whether police used a deliberate two-step strategy? Second, what was the proper burden of proof, and which party bears that burden?

Here, the *Capers* court broke new ground. As it did in *Carter*, the court turned to its sister courts for insights. The court found that the Fifth, Ninth, and Eleventh circuits all relied on a totality of the circumstances test to make their determinations. In addition, the court recognized that *Carter* implicitly analyzed the totality of the circumstances, by relying on three objective factors discussed in the *Seibert* plurality. The court also expressed doubt as to the reliability of subjective evidence, quoting Justice Souter's observation that "the intent of the officer will rarely be as candidly admitted as it was" in *Siebert*.[17] Accordingly, the *Capers* court concluded:

> [A] court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence.[18]

Having set forth this standard, the court acknowledged that this standard may not be wholly consistent with Justice Kennedy's original intent, citing his statement from *Seibert* that "a multifactor test that applies to every two-stage interrogation may serve to undermine th[e] clarity [of *Miranda*]."[19]

With regard to the burden of proof, the *Capers* court observed that the Supreme Court consistently has placed the burden on the government to prove the admissibility of a confession in the criminal context. For example, in the related context of voluntariness, the government has the burden to demonstrate that the confession was voluntary.

Although conceding that "the law generally frowns on requiring a party to prove a negative," the *Capers* court—again guided by Supreme Court precedent—emphasized that the evidence of deliberateness, or lack thereof, would lie in the hands of the government.[20]

In addition, the court considered an Eighth Circuit decision, which held that the burden rests with the government to prove deliberateness. Finally, accepting preponderance as the common *Miranda* standard for quantum of proof, the *Capers* court concluded that it is "the government [which] must meet its burden of disproving the deliberate use of a two-step interrogation technique by a preponderance of the evidence."

Next, having defined the governing standard and burden of proof, the court applied its totality of the circumstances test to the facts before it. Unlike the district court, the *Capers* court did not accept Inspector Hoti's ostensible reasons for not initially issuing a *Miranda* warning—namely, because he was concerned (1) about locating the money orders and (2) making a quick determination as to Mr. Lopez's involvement.

The court found that these reasons for failing to provide a *Miranda* warning were not only illegitimate, but under the circumstances also lacked credibility. Similarly, the court concluded that the objective evidence weighed significantly in favor of there being a deliberate two-stage interrogation, highlighting the considerable overlap between the statements elicited in the first and second interrogations, similar settings with the same inspectors and same lead inspector questioning the defendant, and close temporal proximity of the interrogations (only 90 minutes apart). Thus, the court concluded that the district court had committed "clear error" in finding "no evidence" of a deliberate two-stage interrogation, and held that the government had failed to meet its burden of demonstrating that *Capers* had not been subjected to a deliberate two-stage interrogation.

The only remaining question under *Seibert* was whether the government had taken any curative measures. Finding neither a "substantial break in time" nor "an additional warning," the court concluded no curative measures have been taken. Accordingly, the court affirmed the district court's decision to suppress the post-warning inculpatory statements.

Dissent

Judge Trager wrote a spirited dissent, airing a panoply of concerns with the *Capers* majority opinion. First, although the dissent agreed that Justice Kennedy's concurring opinion in *Seibert* was controlling, it charged that the majority misinterpreted and "undermine[d]" that opinion by replacing it with the *Seibert* plurality's "effectiveness" test. The dissent asserted that Justice Kennedy created a "subjective test," applicable only to the "infrequent case" where a two-stage interrogation was "calculated" to circumvent *Miranda*.

Additionally, the dissent pointed out that Justice Kennedy in *Seibert* had rejected the plurality's objective test, which was to be applied in cases of both intentional and unintentional two-stage interrogations, as "cutt[ing] too broadly." Assuming a faithful reading of Justice Kennedy's *Seibert* opinion, the dissent asserted that the case "should be easily resolved based entirely on the district court's factual findings." The dissent also cited Judge McKenna's view, set forth as dicta in footnote 17 of the district court opinion, that "[i]f Justice Kennedy's *Seibert* concurrence represented the law, suppression would be denied."[21]

With regard to the factual findings, the dissent critiqued the majority for giving insufficient weight to Inspector Hoti's testimony. The dissent viewed Inspector Hoti's testimony as "entirely plausible," and argued that the majority was either improperly reviewing Judge McKenna's factual findings de novo, or incorrectly applying the clearly erroneous standard. In this vein, the dissent emphasized that an appellate court is not entitled to overturn a district court's assessment of the credibility of a witness.

The majority responded forcefully to the dissent. The court agreed that appellate courts are "precluded from making credibility determinations," but found that the district court "afforded blind and absolute weight to testimony of the arresting officers and ignored all the other relevant evidence" that it should have con-sidered.

With regard to the interpretation of Justice Kennedy's *Seibert* opinion, the majority explained that the dissent conflates Justice Stephen Breyer's opinion, which focused on the good faith of the officers, with Justice Kennedy's. Instead, the court's "analysis considers subjective evidence adduced at the suppression hearing in the context set forth by Justice Kennedy—as instructive but not automatically dispositive." And, finally, the court noted: "[i]f Justice Kennedy's test is to have any meaning outside of the unique and never-again-to-be-repeated circumstances of *Siebert*, the district court's unidimensional analysis cannot be determinative of the outcome of this case."

Conclusion

Capers clarifies fundamental Second Circuit and Supreme Court precedent, providing critical guidance to district courts that apply *Miranda*. Although the full implications of the decision are unclear, the Second Circuit—with its carefully reasoned and thorough decision in *Capers*—has likely placed itself at the center of future *Miranda* legal discourse.

1. 384 U.S. 436 (1966).

2. No. 07-1830-cr, __F.3d__, 2010 WL 4869768 (2d Cir. Dec. 1, 2010).

3. *Oregon v. Elstad*, 470 U.S. 298 (1985); *Missouri v. Seibert*, 542 U.S. 600 (2004).

4. *United States v. Capers*, No. 06 CR. 266 (LMM), 2007 WL 959300, at *15 (S.D.N.Y. Mar. 29, 2007) (citing *United States v. Gaines*, 295 F.3d 293, 297 (2d Cir. 2002)).

5. *Capers*, 2010 WL 4869768 at *3.

6. *Elstad*, 470 U.S. at 308.

7. Id. at 298.

8. Id. at 309.

9. See *Capers*, 2010 WL 4869768 at *4; see also *Elstad*, 470 U.S. at 328 (Brennan, J., dissenting) (noting that interrogators describe the first admission as the "breakthrough" or "beachhead")

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

11. Id. at *5 (quoting *Seibert*, 542 U.S. at 622).

12. Id. at *5 (quoting *Seibert*, 542 U.S. at 622).

13. Id. at *13 (quoting *Seibert*, 542 U.S. at 622).

14. *United States v. Carter*, 489 F.3d 528 (2d Cir. 2007).

15. Id. at *6.

16. Id. at *5 (quoting *Carter*, 489 F.3d at 535).

17. Id. at *7 (quoting *Seibert*, 542 U.S. at 616 n.6).

18 Id. at *7.

19 Id. at *7 (quoting *Seibert*, 542 U.S. at 622).

20 Id. at *8 (quoting *United States v. Ollie*, 442 F.3d 1135, 1143 (8th Cir. 2006)).

21 Id. (quoting *Capers*, 2007 WL 959300 at *15 n. 17).