STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP2100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS ALFONSO COLEMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND
AN ORDER DENYING A MOTION
TO SUPRESS EVIDENCE ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. Coleman asserts that a publishable issue exists concerning the proper test for determining when suppression is required in cases like his. But, even if such a publishable issue exists, it need not be addressed to resolve Coleman's case.

STATEMENT OF THE CASE

As Respondent, the State exercises its option not to present a full statement of the case, Wis. Stat. Rule 809.19(3)(a)2., and provides facts as necessary in the Argument section.

ARGUMENT

On appeal, Coleman argues that the trial court erred in admitting statements from his two custodial interviews. He maintains that his statements from the first interview should have been suppressed because he was interrogated within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980), without being advised of his *Miranda*[1] rights. (Coleman's Br. 14-21.)

He next argues that his statements in the second interview conducted later that day, in which *Miranda* warnings were read, should also have been suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004). (Coleman's Br. 21-25.) Presenting *Seibert* as the controlling authority here, Coleman urges this Court to adopt the objective test

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

advanced by a plurality of the *Seibert* Court for determining the admissibility of statements made in a *Mirandized* interview conducted following an un-*Mirandized* interview, and to reject the subjective test favored by Justice Kennedy in his concurrence in *Seibert*. (Coleman's Br. 25-28.) Finally, he argues that, under either test, his statements in the second interview should have been suppressed, and asks this Court to vacate his conviction—without addressing what impact, if any, the trial court's alleged errors had on the outcome. (Coleman's Br. 28-33.)

The State agrees with Coleman that he was interrogated within the meaning of *Innis* during the un-*Mirandized* first interview, and therefore his statements therein should have been suppressed.

But regardless this error, and regardless any alleged error in admitting Coleman's statements from his second, *Mirandized* interview, the denial of suppression of these statements was plainly harmless beyond a reasonable doubt. As developed below, what was presented to the jury from the interviews came in through the interviewing detective's brief testimony. (93:39-60, A-App. 181-202.) Critically, the detective testified that, in the interviews, Coleman consistently *denied* possessing the gun (93:57-58, A-App. 199-200)—and the only crimes Coleman was ultimately found guilty of stemmed from his possession of the gun (34; 35, A-App. 101, 103).

Finally, even if the absence of harm from the court's alleged errors were somehow not dispositive, Coleman would not be entitled to relief for the reasons developed below.

I. The trial court's error in denying suppression of the statements from the first interview, and any alleged error in denying suppression of statements from the second interview, were harmless.

A. Background.

In June 2011, the State charged Julius Alfonso Coleman with conspiracy to commit armed robbery, felon in possession of a firearm, and two counts of bail jumping for committing these crimes while on bond. (2:1-6.) In the criminal complaint, the State alleged that, in a series of phone conversations recorded in May and June 2011 with an informant, Coleman agreed to rob a drug dealer named Poncho. (2:2-4.) Poncho was fictitious, a target created by the informant to give Coleman someone to rob. (89:122.) Coleman told the informant that he owned several guns, and described how he might use them in the robbery. (2:3.)

On June 9, 2011, Coleman drove two associates in his car to meet the informant, who was parked in a vehicle. (2:4.) The informant saw Coleman holding a gun after he got out of the car. (2:4.) Coleman and his associates got in the informant's vehicle, and drove to a parking lot to a location predetermined by the informant's police handlers. (2:4.) The informant then stepped out of the vehicle to "check on Poncho," and officers arrested Coleman and his associates. (2:4; 89:114-15.)

The next day, Detective Robin Schumacher interviewed Coleman for a little over an hour at the Wauwatosa Police Station. (18:1, 19, A-App. 162, 180.) During this first interview, Coleman admitted that he had had the conversations with the informant, and that he had taken steps to carry out the planned robbery. (18:6, A-App. 167; 113-11:43:35—"You guys got me. Got my phone

conversation.") (113-12:09:33—stating "I'm guilty about that. I'm going to plead guilty," in response to the detective stating that he showed up at the scene, and that his associates would likely give statements consistent with Coleman's recorded conversations with the informant). At another point, he appeared to admit that he agreed to commit a robbery, but said that it had been the informant's idea. (18:13, A-App. 174.) Coleman repeatedly denied possessing the gun. (18:10-11, 13-15, 19, A-App. 171-72, 174-76, 180.)

The interview ended abruptly when Coleman rushed out of the room, stating: "Bring me back to my room! Man! I don't want to talk!" (18:19, A-App. 180; 113-13:12:24:00.)

About an hour later, Coleman asked to talk with the detective again, and Colman met with her and Detective John Milotzky[2] in the interview room. (93:48, 57, A-App. 190-99.) Detective Schumacher read Coleman the *Miranda* warnings, and Coleman expressly agreed to answer questions. (113-13:27:53.)

As Coleman notes, he then gave a rambling statement to the detectives that was interrupted sporadically by questions from the detectives. Coleman made some inculpatory statements regarding the conspiracy to commit armed robbery charge, *see* Coleman's Br. 9, but once again denied bringing the gun, and gave consent to provide a DNA sample to use in testing the gun. (113-13:39:15, 13:41:00.)

Before trial, Coleman moved to suppress his statements made in the two interviews, citing *Seibert*. (13:1-

[2] Detective Milotzky testified at trial, but was not asked questions about Coleman's statements in the interview. (91:75-94.)

5.) At an evidentiary hearing on the motion, Detective Schumacher indicated that she had not been trained to conduct a two-interview interrogation in which a confession is obtained during the first, un-*Mirandized* interview, and then repeated during a *Mirandized* second interview. (81:4, A-App. 113.)

At a decision conference two weeks later, the court denied the suppression motion, allowing the State to use Coleman's statements in both interviews. (82:4, A-App. 165.)

But, at trial, the State elected not to play the recordings of the custodial interviews or to present transcripts of the interviews. Rather, the little that was presented from Coleman's interviews came in through Detective Schumacher's testimony, as discussed in the next section. (93:39-60, A-App. 181-202.)

The State's case relied heavily on the recordings of Coleman's conversations with the informant, and the informant's testimony. (89:72-176.) In addition to providing lengthy testimony relevant to the robbery charge, the informant testified that Coleman discussed having guns, and using them during the robbery. (89:93-94.) The informant also said he saw Coleman retrieve a gun from the engine compartment of his car. (89:109-110.) The State also presented testimony from Officer David Cefalu, the informant's handler who, with Detective Schumacher, witnessed Coleman retrieve something from under the hood of his car while conducting surveillance. (91:127; 93:44-45, A-App. 186-87.) Sergeant David Moldenhauer testified that a gun was found in the vehicle at the scene, and identified it at trial. (93:24-25.)

The jury found Coleman guilty of felon in possession of a firearm and bail jumping for committing the gun crime

while on bond, but deadlocked on the conspiracy to commit armed robbery and the bail jumping charge associated with committing that offense. (34; 35, A-App. 101-103; 95:12-13.)

Coleman appealed his conviction, and appointed counsel Susan Marie Roth filed a no-merit report and sought to withdraw as appellate counsel. (R-App. 101.) In a February 4, 2015 order, this Court rejected the no-merit report and converted the case to a merits appeal. (R-App. 102.) This Court determined that there was arguable merit to a claim that Coleman's statements in the two interviews should have been suppressed. (R-App. 105) This Court indicated there was arguable merit to a claim that the statements from the first interview should have been suppressed because it was an un-*Mirandized* custodial interrogation. (R-App. 105.) Likewise, in this Court's view, there was arguable merit to a claim that the *Mirandized* second interview should have also been suppressed, citing *Seibert*. (R-App. 105.) The order did not address whether any error in denying suppression was harmless. (R-App. 101-106.)

B. The trial court erred in denying suppression of Coleman's statements made during the un-*Mirandized* first interview.

Police must read *Miranda* warnings to any suspect who is in custody and subject to interrogation if the suspect's statements are to be admissible in court. *See State v. Mitchell*, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992). Interrogation includes conduct or words of the officer that are the "functional equivalent" of interrogation. *Innis*, 446 U.S. at 300-01 (1980). The test for determining whether an interrogation occurred is "whether an objective observer could foresee that the officer's conduct or words would elicit

an incriminating response." *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988).

At the decision conference on Coleman's motion to suppress the interview statements, the circuit court denied the motion upon declaring that "there was nothing that would indicate there was an interrogation at the time of the interview." (82:4, A-App. 107.)

Coleman argues that the trial court erred in determining that he was not subject to interrogation in the first interview. The State agrees with Coleman. Though the interview included much discussion about Coleman becoming an informant, and the assistance he would need to provide police to receive consideration in this case (*see esp.* 18:2-9, A-App. 163-170), the detective also made statements—for example, asserting that Coleman was not being fully truthful and urging him to tell the whole truth (18:8, 16-19, A-App. 169 177-180)—that would reasonably elicit an incriminating response. At one point, the detective directly asked Coleman if there were additional guns in the impounded car when discussing whether the car would be returned. (18:8, A-App. 169.)

Accordingly, the trial court should have suppressed Coleman's statements made in the un-*Mirandized* first interview.

C. Despite this error, and despite any alleged error in admitting statements from the *Mirandized* second interview, Coleman is not entitled to relief because the error and alleged error were harmless beyond a reasonable doubt.

Coleman next maintains that his statements from the second *Mirandized* interview should have been suppressed as an illegal extension of the unwarned first interview (Coleman's Br. 21-33.) While asserting this alleged error entitles him to reversal of his conviction, Coleman does not explain how the error affected the verdict, even though an order denying a motion to suppress is plainly subject to harmless error review. *See State v. Moore*, 2015 WI 54, ¶ 92, 363 Wis. 2d 376, 864 N.W.2d 827.

The Wisconsin Supreme Court addressed the standard for determining harmless error as follows:

> The court has formulated the test for harmless or prejudicial error in a variety of ways. The United States Supreme Court set forth a test for harmless error in *Chapman v. California*, 386 U.S. 18 (1967), *reh'g denied*, 386 U.S. 987 (1967). Under *Chapman*, the error is harmless if the beneficiary of the error proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."
>
> "In recent years, the United States Supreme Court and this court, while adhering to the *Chapman* test, have also articulated alternative wording. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 2-3 (1999); *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485; *State v. Harvey*, 2002 WI 93, ¶ 48, n.14, 254 Wis. 2d 442, 647 N.W.2d 189." The *Neder/Harvey* test for harmless error asks whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."

State v. Anderson, 2006 WI 77, ¶¶ 114-15, 291 Wis. 2d 673, 717 N.W.2d 74 (footnotes omitted), *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶¶ 26-29, 349 Wis. 2d 327, 833 N.W.2d 126.

Under the standard above, the trial record demonstrates that the trial court's error and alleged error in denying suppression of Coleman's statements in the first and second interviews were plainly harmless.

As noted, the jury was not shown the video recording of the interviews, or provided transcripts of the interviews at trial. (*See* 93:39-60, A-App. 181-202.) The limited portions of Coleman's statements that were presented to the jury came in through Detective Schumacher's trial testimony, which totaled five pages on direct examination. (93:47-51, A-App. 189-193.) And most of Coleman's inculpatory statements conveyed in that testimony concerned the conspiracy to commit the robbery (*see* 93:49-51, A-App. 191-93), the charge (along with the bail jumping charge associated with the robbery) on which the jury deadlocked.

As for evidence pertinent to the crimes for which the jury did find Coleman guilty—felon in possession of a firearm and bail jumping for committing the gun crime while on bond—the detective testified on cross examination that, throughout the interview, Coleman *denied* possessing the gun. (93:57-58, A-App. 199-200). And while the detective also testified that Coleman admitted telling the informant on the phone that he was bringing a gun to the robbery (93:50, A-App. 192), this testimony was cumulative. That is because the recordings of Coleman's phone conversations with the

informant had already been played for the jury,[3] including one in which Coleman said he had several guns, and that he would "merk"—the informant testified this meant "kill"—Poncho if Poncho saw Coleman during the robbery (89:93-94).

The detective also testified that Coleman admitted in the second interview that there was a gun in the car, but he would not say who brought it. (93:50, A-App. 192.) The inculpatory value of this statement is also limited because the jury was already presented evidence that the police had recovered a gun from the vehicle at the scene. (93:24-25.)

On the whole, the detective's testimony about Coleman's statements pertaining to the gun charges was arguably more helpful than harmful to Coleman. Coleman did not testify at trial, and the testimony about his interview statements put his denials about having possessed the gun squarely before the jury. At any rate, proof of Coleman's possession of the firearm was established not by the testimony about the interviews, but by the following evidence: (1) the informant's testimony that he saw Coleman raise the hood of his car and pull a gun from the engine compartment and put it into his waistband (89:109-110); (2) testimony of Detective Schumacher, and identical testimony by Officer Cefalu, that they saw Coleman pull something out from under the hood of his car (91:127; 93:44-45, A-App. 186-87); (3) Coleman's recorded conversations with the informant

[3] The Milwaukee County Circuit Court did not include the CD with these recordings, or any other trial exhibits, in the record on appeal, and Coleman did not seek to add the exhibits to the record. Nonetheless, because the informant appears to have restated in his testimony the content of the recording excerpts played for the jury (*see* 89:78-108), the absence of the recordings from the record should not affect this court's review.

about the having several guns, and his willingness to use the guns in the robbery, and the informant's testimony about this as well; and (4) the recovery of the gun from the van at the scene (93:24-25).

For these reasons, this Court should conclude the trial court's error and alleged error in denying suppression of statements from the first and second interviews were harmless beyond a reasonable doubt, and affirm the judgment of conviction.

II. Even if the absence of harm resulting from the court's error and alleged error were somehow not dispositive, Coleman would not be entitled to relief because the trial court properly admitted his statements in the second, *Mirandized* interview.

Because the error and alleged error in denying suppression of the first and second interviews were harmless beyond a reasonable doubt, this Court need not address the merits of Coleman's claim. *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis.2d 300, 786 N.W.2d 15 ("[A]n appellate court should decide cases on the narrowest possible grounds.") (citation omitted).

Nonetheless, for the sake of completeness, the State addresses the merits, and submits that this case is controlled by *Oregon v. Elstad*, 470 U.S. 298 (1985), not the plurality opinion in *Seibert*.[4]

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[4] Coleman does not argue that denial of suppression of the un-*Mirandized* first statement only entitles him to reversal of his conviction. By not making this argument, Coleman appears to concede that the court's error in denying suppression of statements from the first interview was harmless. The State agrees. Detective Schumacher's testimony on direct examination

(footnote continued)

After *Seibert* was decided, the Seventh Circuit Court of Appeals in *United States v. Stewart*, 388 F.3d 1079, 1086-1092 (7th Cir. 2004), addressed a claim that a successive *Mirandized* statement should be suppressed under the test recommended by the four-justice plurality in *Seibert*. Therein, the Seventh Circuit concluded that the Supreme Court's prior opinion in *Elstad* (discussed below) remained controlling as to cases in which "the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings." *Stewart*, 388 F.3d at 1090.

The *Stewart* Court began its analysis by discussing the plurality opinion in *Seibert*:

> A plurality of the Court held that *Miranda* warnings given mid-interrogation, after a suspect has already confessed, are generally ineffective as to any subsequent, postwarning incriminating statements. *Seibert*, 542 U.S. at ___, 124 S. Ct. at 2605. The plurality held that the police interrogation technique known as "question first" did not serve *Miranda*'s purpose of informing suspects about their constitutional rights: "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Seibert*, 542 U.S. at ___, 124 S. Ct. at 2610. When police question first and warn later, the threshold inquiry, according to the plurality, is "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* The plurality was skeptical: "[I]t is likely that if the

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specific to the first interview was less than one page, and did not reveal any inculpatory statements made therein. (93:47-48, A-App. 189-90.) And, where the detective did not distinguish between statements made in the first and second interviews, overlaps between Coleman's statements in the two interviews rendered admission of the first statement harmless.

> interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. This is because a suspect who had just admitted guilt "would hardly think he had a genuine right to remain silent." *Id.* at 2611.

Stewart, 388 F.3d at 1087.

The court then addressed the Supreme Court's decision in *Elstad* at length, and the *Seibert* plurality's grounds for distinguishing *Elstad*:

> The plurality distinguished *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985), essentially limiting it to its facts. *Id.* at 2611-12. *Elstad* addressed the admissibility of a *Mirandized* station-house confession that was preceded by an earlier, unwarned inculpatory remark by the defendant at the scene of his arrest. The defendant in *Elstad* was arrested at his home in connection with a recent neighborhood burglary. As police were executing the arrest warrant, and while still in the defendant's living room, one of the officers explained to the defendant that he was suspected of being involved in burglarizing his neighbor's home. *Elstad*, 470 U.S. at 301, 105 S. Ct. 1285. The defendant told the officer, "Yes, I was there." Id. He had not yet received Miranda warnings. Later, at the sheriff's headquarters, the defendant was fully *Mirandized*, waived his rights, and gave an incriminating statement. *Id.*
>
> The Supreme Court held in *Elstad* that the failure to administer Miranda warnings prior to the defendant's initial inculpatory statement did not require suppression of his subsequent *Mirandized* confession. *Elstad*, 470 U.S. at 300, 105 S. Ct. 1285.
>
> . . . .

The [*Elstad*] Court also refused to attribute constitutional significance to the "psychological effects" of a voluntary unwarned admission, reiterating that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." Id. at 310-11, 105 S. Ct. 1285. . . . ."[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" as to the second statement. *Id.* at 314, 105 S. Ct. 1285. Where the initial unwarned statement was voluntary, the admissibility of the second statement depends only on whether it, too, was voluntary, and obtained in compliance with *Miranda*. *Id.* at 318, 105 S. Ct. 1285. Thus, "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." *Id.*

. . . [T]he plurality distinguished the police conduct at issue in *Elstad* from the deliberate use of a question-first interrogation strategy: "Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, 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." *Id.* at 2612. The plurality characterized the facts in *Seibert* as presenting "the opposite extreme . . . which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. *Id.* The plurality distilled from these extremes a list of factors that may inform a court's judgment on whether mid-interrogation *Miranda* warnings are effective in individual cases:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on

> whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: 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. Applying these factors to the case before the Court, the plurality concluded that the delayed *Miranda* warnings were ineffective and the statements made after they were delivered were inadmissible. Id. at 2613.

Stewart, 388 F.3d at 1087-89.

The court then turned to Justice Kennedy's concurrence in *Seibert*:

> Justice Kennedy [] concurred, but took a different approach to the analysis of *Mirandized* confessions that follow unwarned incriminating statements. Justice Kennedy viewed the plurality's test for admissibility as too broad, calling for a multifactor objective inquiry into the "effectiveness" of midstream *Miranda* warnings in all cases involving two-stage interrogations. Seibert, 542 U.S. at ___, 124 S. Ct. at 2614 (Kennedy, J., concurring). He rejected the general proposition that a *Miranda* violation in connection with one statement necessarily threatens the admissibility of other statements taken in full compliance with *Miranda*: "[I]t would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning." Id. at 2615.
>
> Justice Kennedy narrowed the focus to the deliberate circumvention of *Miranda*. "The *Miranda* warning was withheld [from Seibert] to obscure both

> the practical and legal significance of the admonition when finally given." *Id.* He favored the following rule: "When an interrogator uses this deliberate, two-step strategy, predicated upon violating Miranda during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." *Id.* The sufficiency of the curative measures would depend upon their capacity to "ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning." *Id.* at 2616. Justice Kennedy suggested that "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." *Id.* He added that providing the suspect with an explanation of the likely inadmissibility of the unwarned statement "may be sufficient" as a curative measure. *Id.*
>
> Justice Kennedy made it clear, however, that he would apply this test "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." *Id.* That is, "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* On the facts before the Court, he concluded that the question-first tactic represented an "intentional misrepresentation of the protection that Miranda offers and does not serve any legitimate objectives that might otherwise justify its use." *Id.* at 2615. Because no curative steps were taken, Justice Kennedy joined the plurality in concluding that the defendant's postwarning statement was inadmissible. *Id.* at 2615-16.

Stewart, 388 F. 3d at 1089-90.

Having analyzed the *Seibert* plurality opinion, *Elstad*, and Justice Kennedy's concurring opinion in *Seibert*, the

Seventh Circuit concluded that *Elstad* provided the correct test for analyzing motions to suppress a *Mirandized* statement made after an un-*Mirandized* statement where police did not engage in a deliberate strategy to undermine the effectiveness of the *Miranda* warnings:

> What emerges from the split opinions in *Seibert* is this: at least as to deliberate two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* 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. According to the plurality, the multifactor test—timing and location of interrogations, continuity of police personnel, overlapping content of statements, etc.—measures the "effectiveness" of midstream *Miranda* warnings and applies in all cases involving sequential unwarned and warned admissions. In Justice Kennedy's view, however, an inquiry into change in time and circumstances between the prewarning and postwarning statements—what he called "curative steps"—is necessary only in cases involving the deliberate use of a two-step interrogation strategy calculated to evade the requirements of *Miranda*. Justice Kennedy thus provided a fifth vote to depart from *Elstad*, but only where the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured. Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*.

Stewart, 388 F. 3d at 1090.

The State submits that the Seventh Circuit correctly concluded that the approach favored by the *Seibert* plurality did not supplant *Elstad* for circumstances like the present case in which the detective did not engage in an intentional strategy to skirt *Miranda*. Applying this test, Coleman's

statements in the second interview would be admissible because *Miranda* warnings were given, and, here, Coleman expressly stated that he understood his rights and expressly agreed to answer questions. (113-13:27:53.)

Further, the facts of this case argue against application of the *Seibert* plurality test, and, generally, against suppression under any applicable test.

Critically, Coleman, not the detective, initiated the second interview. Of course, because the detective did not set up both interviews, it cannot be shown that she intentionally used a two-interview technique to obtain Coleman's statements.[5] This fact plainly distinguishes this case from *Seibert*, where police initated both interviews and deliberately sought to undermine the effectiveness of the suspect's *Miranda* waiver. *See generally Seibert*, 542 U.S. 600.

The State submits that the *Seibert* plurality test is a poor fit, when, as here, the defendant initiates the second interview. As noted, that test looks, in part, to "the timing and setting of the first and the second [interviews], [and] the continuity of police personnel" to determine whether

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[5] The detective also likely could not have reinitiated contact with Coleman only one hour after Coleman ended the first interview without running afoul of *Michigan v. Mosely*, 423 U.S. 96, 104 (1975). Coleman invoked his right to silence by storming out of the interview room and declaring, "Bring me back to my room! Man! I don't want to talk!" (18:19, A-App. 180; 113-13:12:24:00.) Under *Mosely*, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Mosely*, 423 U.S. at 104. *Mosely* suggests that the detective would have had to wait at least two hours to reapproach Coleman. *Id.* at 106.

suppression of the second statement is appropriate. *Id.* at 615. But here, Coleman asked to make a second statement to the interviewing detective, and thus the timing, location and personnel were essentially dictated by him. Where a suspect makes such a request, the State should not be expected to *decline* the opportunity to obtain a statement just to ensure its compliance with a test (*Seibert*) that plainly assumes that both interviews are police initiated.

Finally, even if the *Seibert* plurality test were applied, suppression of the statements in the second interview would be inappropriate because the detectives' questions therein—such as they were—did not "treat[] the second round as continuous with the first." *Seibert*, 542 U.S. at 615. As noted, Coleman was not questioned in the second interview so much as he gave a lengthy statement. (113-13:28:35-13:41:00.)

Thus, even if it were necessary to address the merits of Coleman's claim, the trial court's decision denying suppression of the second interview would be upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm Coleman's judgment of conviction.

Dated this 15th day of July, 2016, in Madison, Wisconsin.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,992 words.

Dated this 15th day of July, 2016.

_____
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of June, 2016.

_____
JACOB J. WITTWER
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2013AP2100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS ALFONSO COLEMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND
AN ORDER DENYING A MOTION
TO SUPRESS EVIDENCE ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY A. WAGNER, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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SUPPLEMENTAL APPENDIX TO BRIEF OF
PLAINTIFF-RESPONDENT STATE OF WISCONSIN

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of July, 2016.

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JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 15th day of July, 2016.

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JACOB J. WITTWER
Assistant Attorney General