

10-2740-cr
United States v. Moore

1
2 **UNITED STATES COURT OF APPEALS**

3
4 **FOR THE SECOND CIRCUIT**

5
6 August Term, 2011

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9 (Argued: November 17, 2011 Decided: February 22, 2012)

10 Docket No. 10-2740-cr

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15 United States,

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17 Appellee,

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19 - v.-

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21 Chauncey Moore,

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23 Defendant-Appellant.

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27 Before: JACOBS, Chief Judge, CABRANES and
28 LIVINGSTON, Circuit Judges.

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30 Chauncey Moore appeals from a judgment entered in the
31 United States District Court for the District of Connecticut
32 (Chatigny, J.) on a plea of possession of a firearm by a
33 felon. The plea was conditioned on the ability to appeal
34 the district court's decision on his motion to suppress.
35 After his arrest, Moore inculpated himself when he was
36 questioned by police before he received Miranda warnings and
37 again later, after he was warned. Moore contends that the

1 subsequent confession must be suppressed because it was
2 obtained through a two-part interrogation technique outlawed
3 as a violation of the Fifth Amendment in Missouri v.
4 Seibert, 542 U.S. 600 (2004).

5 The district court declined to suppress the subsequent
6 confession, and Moore appeals from that ruling. We conclude
7 that the subsequent confession was given voluntarily and
8 without coercion, and was not elicited by the proscribed
9 two-step technique.

10 Moore also contends that the second interview violated
11 his Sixth Amendment right to counsel. We conclude that the
12 confession did not offend the Sixth Amendment because his
13 right to counsel had not yet attached, particularly with
14 regard to the federal offense for which he was prosecuted
15 below.

16 Affirmed.

17 Jeremiah Donovan, Old Saybrook, CT,
18 for Appellant.

19
20 Sandra S. Glover, Assistant United
21 States Attorney (Robert M. Spector,
22 Assistant United States Attorney, on
23 the brief), District of Connecticut,
24 for David B. Fein, United States
25 Attorney, District of Connecticut
26 for Appellee.
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28

1 DENNIS JACOBS, Chief Judge:

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Chauncey Moore appeals from a judgment entered in the United States District Court for the District of Connecticut (Chatigny, J.) on a plea of possession of a firearm by a felon. The plea was conditioned on his appeal of the district court's decision denying (in relevant part) his motion to suppress.

While fleeing arrest on a warrant, Moore tossed a gun away. During an exchange in the police station lockup after his arrest but before he received Miranda warnings, he told a law-enforcement officer where he had tossed the gun. A few hours later he confessed to other officers after the warnings were administered. Moore contends that he confessed because of a two-part interrogation technique outlawed as a violation of the Fifth Amendment in Missouri v. Seibert, 542 U.S. 600 (2004).

The district court suppressed the statement made in lockup -- a ruling from which the Government takes no appeal -- but declined to suppress the confession. Moore takes this appeal from that ruling. We conclude that the confession was given voluntarily, without coercion, and without violation of Seibert.

1 Moore also contends that the second interview violated
2 his Sixth Amendment right to counsel because his right to
3 counsel had attached prior to being questioned. We conclude
4 that the confession did not offend the Sixth Amendment
5 because the right to counsel had not attached, in particular
6 with regard to the federal offense for which he was
7 prosecuted below.

8 Affirmed.
9

10 **BACKGROUND**

11 On the afternoon of September 23, 2002, a Connecticut
12 Superior Court judge issued an arrest warrant for Chauncey
13 Moore on charges that arose from a carjacking and attempted
14 armed robbery in which shots were fired. After 11 p.m. that
15 night, Officer Mark R. Suda spotted Moore walking down the
16 street in Norwalk, and gave chase. After Suda lost sight of
17 him, Moore tossed a handgun onto the roof of a house. Suda
18 searched the path of Moore's flight after giving up the
19 chase, but found nothing.

20 Moore was apprehended the following morning, around
21 6:15 a.m., and placed in the lockup. The arresting officers
22 did not question him and did not administer Miranda
23 warnings.

1 At 8:30 a.m., Detectives Arthur Weisgerber and Michael
2 Murray were sent to the lockup to interview Moore, who was
3 asleep. They tried to awaken him, but Moore told them he
4 did not know why he had been arrested and went back to
5 sleep. The detectives left.

6 Officer William Zavodjancik was in charge of the lockup
7 that day. Generally, arrestees placed in the lockup by 7:00
8 a.m. on a weekday (like Moore) would be processed and taken
9 to the court the same morning. At 9:15 a.m., Zavodjancik
10 took several arrestees to court for arraignment, but Moore
11 was not among them because Zavodjancik lacked the
12 information necessary to "process" him prior to
13 arraignment.¹ The district court concluded "[o]n the record
14 before [it], . . . [that] Officer Zavodjancik engaged in no
15 deliberate wrongdoing as alleged by [Moore]." Moore, 2007
16 WL 708789, at *2. (Moore does not challenge this factual
17 finding.²)

¹ In order to "process" an arrestee, the precinct would, inter alia, "generate a computerized report containing . . . [a] statement of the pending charges." United States v. Moore, No. 3:03-CR-178 (RNC), 2007 WL 708789, *2 (D. Conn. Feb. 20, 2007).

² When Zavodjancik returned to the lockup at about 10:00 a.m., he found a file on his desk containing the information he needed to process Moore. The file had not been there before. Zavodjancik then processed Moore, although he made no attempt to take him to court then or

1 Just after noon, during one of Zavodjancik's routine
2 checks on prisoners in the lockup, Moore asked to speak with
3 a detective. Zavodjancik could not reach anyone in the
4 detectives' bureau, and left a message. During the next
5 check, Moore asked again to speak with a detective;
6 Zavodjancik called again and left another message.

7 Around 2 p.m., Moore asked to use a pay phone and was
8 moved to a cell with a phone. Half an hour later, while
9 still in that cell, Moore spotted a Norwalk narcotics
10 officer he knew (Sergeant Ronald Pine), and called him over.
11 Pine was not involved in Moore's case and did not know that
12 Moore was in the lockup until he heard Moore call his name.
13 All Pine knew about Moore's arrest was that there had been
14 an incident in which shots were fired and that the gun had
15 not yet been recovered.

16 When Moore called to him, Pine came over and asked
17 "What's up?" Moore asked Pine to help him get released on a

later that day. Accordingly, Moore was not arraigned until the next day.

Moore contended below that Zavodjancik purposefully failed to have him arraigned in violation of the directive in the arrest warrant that Moore was to be brought to court "without undue delay." Moore, 2007 WL 708789, at *2 (quotation marks omitted). The district court found "no evidence" that anyone asked Zavodjancik to refrain from taking Moore to court, "nor any evidence" suggesting that Zavodjancik "would engage in such a subterfuge." Id.

1 promise to appear, as Pine had done once before (on a
2 larceny charge). Pine said he could not help because the
3 pending charges involved discharge of a firearm.

4 Pine then asked Moore if he could tell him where the
5 gun was, and Moore said he was reluctant to answer because
6 he did not want to face a federal gun charge. Pine offered
7 to put in a good word for him with the state's attorney.
8 During this brief exchange, Pine saw Agent Ron Campanell of
9 the Federal Bureau of Alcohol, Tobacco, Firearms, and
10 Explosives (who was there on an unrelated matter), and asked
11 him to join them. Pine told Moore that he could talk to
12 Campanell after Moore helped them find the gun.

13 Moore agreed, told them where he had tossed the gun,
14 and drew a map. Map in hand, Pine and Campanell drove to 75
15 South Main Street where, from the rear of the property, they
16 could see the gun on the roof of the house. Detectives
17 Weisgerber and Murray arrived and photographed the scene
18 before retrieving the gun. Pine then informed the
19 detectives that Moore wanted to talk to them.

20 Just after 4:00 p.m. -- about one hour and 35 minutes
21 after Pine and Moore began talking -- the detectives arrived
22 at Moore's cell. Moore told them that he was willing to
23 talk about the pending charges. They moved him to a nearby
24 interview room, where they were joined by Campanell.

1 The detectives told Moore that he was in serious
2 trouble; but before they began asking questions, they handed
3 him an advice of rights and waiver form. By this point,
4 Moore had decided it was in his best interest to cooperate.
5 He read the form aloud, initialed each paragraph, and signed
6 on the bottom.

7 Over the next 45 minutes, the detectives asked him
8 where he got the gun; who else in Norwalk possessed a gun;
9 whether he had information about several cold homicide
10 cases; and what he knew about the carjacking and attempted
11 robbery for which he had been arrested. Moore gave evasive
12 answers to the first two inquiries. He did disclose his
13 role in the carjacking and attempted robbery, but refused to
14 provide a written statement without speaking to counsel.
15 The detectives ended the interview.

16 The following day (September 25, 2002), Moore was
17 arraigned on the state charges. Later, the United States
18 Attorney obtained an indictment against Moore on the federal
19 charge of being a felon in possession of a firearm. See 18
20 U.S.C. § 922(g).

21 In the federal criminal case, Moore moved to suppress
22 his statements to investigators (and the gun) on the grounds

1 that he was not advised of his Miranda warnings and that his
2 questioning violated his Sixth Amendment right to counsel,
3 which he argues attached when the state prosecutor filed an
4 information along with the application for an arrest
5 warrant. The district court suppressed the initial,
6 unwarned statement Moore provided to Pine and Campanell
7 while in the lockup. The district court did not suppress
8 the gun as a fruit of the unwarned statement, however,
9 because the gun was physical evidence obtained from a
10 voluntary statement. Moore, 2007 WL 708789, at *5 n.5
11 (citing United States v. Patane, 542 U.S. 630 (2004)). The
12 district court also denied the motion to suppress the later,
13 warned statement.

14 Moore subsequently entered a conditional guilty plea
15 that permitted him to take this appeal. Moore was sentenced
16 principally to 110 months' incarceration and three years of
17 supervised release.

18 19 **DISCUSSION**

20 When reviewing a district court's decision in the
21 government's favor on a motion to suppress, this Court
22 "examine[s] the record in the light most favorable to the

1 government." United States v. Rommy, 506 F.3d 108, 131 (2d
2 Cir. 2007). We "review a district court's determination
3 regarding the constitutionality of a Miranda waiver de
4 novo," and its factual findings for "clear error." United
5 States v. Carter, 489 F.3d 528, 534 (2d Cir. 2007).

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7 **I.**

8 **A.**

9 The district court suppressed Moore's initial, unwarned
10 statement as obtained in violation of his Fifth Amendment
11 rights under Miranda v. Arizona, 384 U.S. 436 (1966), but
12 did not suppress Moore's post-warning statement. Because
13 the government does not appeal the suppression of Moore's
14 initial statement, the only issue before us is whether the
15 district court erred in not suppressing Moore's subsequent
16 confession, provided after he was Mirandized.

17 Moore argues that police improperly engaged in a
18 deliberate two-step interrogation technique designed to
19 subvert his Fifth Amendment rights by getting him to
20 incriminate himself before being advised of his rights, then
21 reading him his rights and getting him to incriminate
22 himself again while still disarmed by the original

1 incrimination. Under these circumstances, Moore argues,
2 both the initial, unwarned statement and the later, post-
3 warning statement must be suppressed.

4 The Supreme Court has twice considered whether a post-
5 warning inculpatory statement must be suppressed if the
6 defendant was previously interrogated without being warned.
7 First, in Oregon v. Elstad, 470 U.S. 298 (1985), police
8 executed a warrant for the arrest of the 18-year old Elstad
9 on a burglary charge. Id. at 300. At his house, Elstad's
10 mother allowed the police to go upstairs, where they
11 arrested her son. Id. As the police were removing him from
12 the home, they took his mother aside to explain the
13 situation. Id. at 300-01. In that interval, an officer
14 questioned Elstad without advising him of his Miranda
15 rights, and Elstad implicated himself. Id. at 301. Later,
16 at the police station, Elstad was "Mirandized" and
17 interrogated, and gave a complete confession. Id. at 301-
18 02. Elstad argued for suppression of the warned confession
19 on the ground that the initial statement "let the cat out of
20 the bag" and "tainted" his subsequent confession. Id. at
21 303-04 (internal quotation marks omitted).

1 "Though Miranda requires that the unwarned admission
2 must be suppressed," the Supreme Court ruled that "the
3 admissibility of any subsequent statement should turn in
4 these circumstances solely on whether it is knowingly and
5 voluntarily made." Id. at 309. The "subsequent
6 administration of Miranda warnings to a suspect who has
7 given a voluntary but unwarned statement ordinarily should
8 suffice to remove the conditions that precluded admission of
9 the earlier statement," because "the finder of fact may
10 reasonably conclude that the suspect made a rational and
11 intelligent choice whether to waive or invoke his rights."
12 Id. at 314. "[T]here is no warrant for presuming coercive
13 effect where the suspect's initial inculpatory statement,
14 though technically in violation of Miranda, was voluntary."
15 Id. at 318. "The relevant inquiry" is whether "the second
16 [post-warning] statement was . . . voluntarily made." Id.

17 Elstad involved an accidental or mistaken interrogation
18 in violation of Miranda. See Elstad, 470 U.S. at 314
19 (explaining that the police did not use "deliberately
20 coercive or improper tactics" to obtain the initial,
21 unwarned statement). In Missouri v. Seibert, 542 U.S. 600
22 (2004), the Court considered a deliberate effort to

1 circumvent Miranda. In Seibert, the police interrogated a
2 woman suspected of arson. In the first interview, the
3 police intentionally refrained from advise her of her
4 rights, and elicited all the information they needed. They
5 then warned her, and again interrogated her using the first
6 statements against her to obtain a post-warning confession.
7 Id. at 604-06. Five justices found that this tactic
8 violated the suspect's Fifth Amendment rights even with
9 regard to the statement given post-warning.

10 The justices split as to the proper test. The
11 plurality (Souter, Stevens, Ginsburg, and Breyer, JJ.)
12 concluded that the warning administered prior to the second
13 statement was ineffective, id. at 611-12, distinguishing
14 Elstad on that basis. Id. at 615. Five factors were said
15 to be relevant to that inquiry: (1) "the completeness and
16 detail of the questions and answers in the first round of
17 interrogation," (2) "the overlapping content of the two
18 statements," (3) "the timing and setting of the first and
19 second" interrogations, (4) "the continuity of police
20 personnel" doing the questioning, and (5) "the degree to
21 which the interrogator's questions treated the second round
22 as continuous with the first." Id. The warning was deemed

1 ineffective because: the original "questioning was
2 systematic, exhaustive, and managed with psychological
3 skill"; there "was little, if anything, of incriminating
4 potential left unsaid"; the two interrogations took place
5 "only 15 or 20 minutes" apart, "in the same place," and with
6 "the same officer"; nothing was said to dispel the
7 impression that the first statement could be used against
8 the suspect; and it reasonably appeared to the suspect that
9 "the further questioning was a mere continuation of the
10 earlier questions and responses." Id. at 616.

11 Justice Kennedy's concurrence disagreed with the
12 plurality's reasoning. In Justice Kennedy's view, the real
13 difference between Elstad and Seibert was that Seibert
14 involved a "deliberate, two-step strategy, predicated upon
15 violating Miranda." Id. at 621 (Kennedy, J., concurring).
16 It was decisive for Justice Kennedy that the two-step
17 process was arranged by the police deliberately as a
18 "calculated way to undermine the Miranda warning" --
19 something that is only likely to occur "in the infrequent
20 case." Id. at 622. So, in Justice Kennedy's view, if there
21 is a deliberate two-step, the "postwarning statements that
22 are related to the substance of prewarning statements must

1 be excluded unless curative measures are taken before the
2 postwarning statement is made." Id. Such "curative
3 measures" are those "designed to ensure that a reasonable
4 person in the suspect's situation would understand the
5 import and effect of the Miranda warning and of the Miranda
6 waiver." Id. Such curative measures could include "a
7 substantial break in time and circumstances between the
8 prewarning statement and the Miranda warning" or "an
9 additional warning that explains the likely inadmissibility
10 of the prewarning custodial statement." Id.

11 This Court first addressed the issue of a two-step
12 interrogation in United States v. Carter, where we
13 implicitly found controlling Justice Kennedy's concurrence
14 in Seibert and "join[ed] our sister circuits in holding that
15 Seibert lays out an exception to Elstad for cases in which a
16 deliberate, two-step strategy was used by law enforcement to
17 obtain the postwarning confession." United States v.
18 Carter, 489 F.3d 528, 536 (2d Cir. 2007). In Carter,
19 officers executing a search warrant smelled crack cocaine
20 and discovered a bag containing crack and powder cocaine as
21 well as a brown substance they believed to be heroin. The
22 suspect (Bearam), unwarned, said that the substance was "bad

1 co[caine]." Id. at 533. Bearam was interrogated again
2 after being Mirandized, and admitted that he sold drugs and
3 had received the bag of drugs discovered by the authorities.
4 Id.

5 The facts in Carter did not amount to a proscribed two-
6 step strategy because (1) "there was almost no overlap
7 between th[e] statement and the full confession [Bearam]
8 gave after he received the warnings," (2) over an hour had
9 passed between the two statements, (3) the investigators
10 were not the same in the first and second interviews, (4)
11 the investigators in the second interview did not know about
12 Bearam's original statement, and (5), unlike in Seibert
13 where "the second round of interrogation was essentially a
14 cross-examination using information gained during the first
15 round of interrogation," in Carter the "postwarning
16 questioning was not a continuation of the prewarning
17 questioning." Id. Finally, having found no deliberate two-
18 step we applied the principle of Justice Kennedy's Seibert
19 concurrence and concluded that Bearam waived his rights: his
20 initial, prewarning statement was "voluntary"; the
21 questioning "not coercive"; and the later, post-warning
22 statement was, therefore, admissible. Id. at 537.

1 We considered this issue again in United States v.
2 Capers, 627 F.3d 470 (2d Cir. 2010). Capers was caught in a
3 sting operation stealing money from Express Mail envelopes.
4 Id. at 472-73. After Capers and another man (Lopez) were
5 arrested and separated, Capers was questioned by a postal
6 inspector without being warned, and incriminated himself.
7 Id. After Capers was transported to another facility and
8 advised of his rights, he was again interviewed by the same
9 postal inspector, and again incriminated himself. Id. at
10 473. We affirmed the suppression of both sets of
11 statements. Id. at 474, 485.

12 In affirming the suppression, we decided several
13 questions left open by Seibert and Carter, that will bear
14 upon our analysis here. First, we made explicit what was
15 implicit in Carter: Justice Kennedy's concurrence in Seibert
16 is controlling. Capers, 627 at 476. Second, although
17 Justice Kennedy wrote of a deliberate two-step scheme, his
18 concurrence did not explain how a court is to determine
19 whether such a strategy has been employed. So, "we join[ed]
20 our sister circuits in concluding that a court should review
21 the totality of the objective and subjective evidence
22 surrounding the interrogations in order to determine

1 deliberateness" Id. at 479. Third, we held that
2 the prosecution bears the burden of disproving by a
3 preponderance of the evidence that the government employed a
4 deliberate two-step strategy to deprive the defendant of the
5 protections afforded by the Fifth Amendment. Id. at 479-80.

6 Finally, we advised a somewhat closer scrutiny of an
7 investigator's testimony of subjective intent when the
8 proffered rationale is not a "legitimate" reason to delay or
9 where it "inherently lacks credibility" in view of the
10 "totality of the circumstances." Capers, 627 F.3d at 484
11 n.5. Such scrutiny is not ordinarily required when the
12 reason for delay is legitimate, such as officer or community
13 safety or when delay is a product of a "rookie mistake,"
14 miscommunication, or "a momentary lapse in judgment." Id.
15 Moreover, if it is found, after weighing the investigator's
16 credibility, that the investigator's intent was not
17 "calculated . . . to undermine Miranda," delay will not
18 require exclusion of the later, warned statement even if the
19 court finds that the delay was for an illegitimate reason
20 and even in the absence of curative measures. Id. at 482.

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B.

These authorities can be applied using a straightforward analysis. First, was the initial statement, though voluntary, obtained in violation of the defendant's Miranda rights? If not, there is no need to go further. See United States v. Courtney, 463 F.3d 333, 336 (5th Cir. 2006). If the initial statement was obtained in violation of the defendant's Miranda rights, has the government demonstrated by a preponderance of the evidence, and in light of the totality of the objective and subjective evidence, that it did *not* engage in a deliberate two-step process calculated to undermine the defendant's Miranda rights? If so, the defendant's post-warning statement is admissible so long as it, too, was voluntary; if not, the post-warning statement must be suppressed unless curative measures (designed to ensure that a reasonable person in the defendant's position would understand the import and effect of the Miranda warnings and waiver) were taken before the defendant's post-warning statement.

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C.

The district court concluded that Moore's initial statement was obtained in violation of his Miranda rights. The government does not appeal that decision; so we proceed on that assumption.

In considering whether the government has demonstrated that it did not engage in a deliberate two-step process designed to thwart Moore's Miranda rights, we "review the totality of the objective and subjective evidence surrounding the interrogations," Capers, 627 F.3d at 479, guided by -- but not limited to -- the factors identified by the plurality in Seibert, see Capers, 627 F.3d at 483-84 (applying plurality's factors); see also Seibert, 542 U.S. at 615 (identifying factors). Although the five Seibert factors were developed by the plurality to gauge whether the later Miranda warnings "could be effective enough to accomplish their object," Seibert, 542 U.S. at 515, they likewise will often serve as helpful indicia for whether an alleged two-step interrogation was intended to circumvent Miranda, see, e.g., Capers, 627 F.3d at 483-84; Carter, 489 F.3d at 536. We therefore use the plurality's five factors not to weigh the effectiveness of the later Miranda

1 warnings, but to shed light on the detectives' intent.³

2 A review of the evidence leads us to conclude that the
3 government did not engage in a deliberate two-step strategy
4 to deprive Moore of his Miranda rights. There is no
5 subjective evidence of intent here -- no testimony, for
6 example, by any officer of an intent to use a two-step
7 technique, nor any evidence that such intent was reflected
8 in a police report. See, e.g., Capers, 627 F.3d at 479
9 (categorizing the interrogating officer's testimony as
10 subjective evidence); cf. Ryan Iron Works, Inc. v. NLRB, 257
11 F.3d 1, 9 (1st Cir. 2001) (observing that subjective
12 criteria includes a party's "own characterization of [its]
13 motive") (internal quotation marks omitted). Nor is there
14 any objective evidence that such a technique was used.
15 Moore, 2007 WL 708789, at *2 (finding "no evidence" that the
16 government intentionally delayed bringing Moore to court or
17 engaged in any such subterfuge or deliberate wrongdoing in
18 order to obtain a confession).

³ The five Seibert factors consulted in this particular case "are by no means the only factors to be considered. . . . [Instead,] a court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness." See Capers, 627 F.3d at 479. Subjective evidence of the investigators' intent, if credible, will of course be persuasive, and often decisive.

1 Moreover, a discarded gun obviously poses public safety
2 considerations. True, the district court ruled that the
3 public safety exception⁴ did not, as a matter of law, excuse
4 the failure to give Miranda warnings at the initial
5 interview, see Moore, 2007 WL 708789, at *5 -- a ruling we
6 do not consider, much less adopt, inasmuch as it was
7 unchallenged by the government on appeal. Nevertheless,
8 undoubted public safety considerations plausibly account for
9 the conduct of the police in a way that militates against
10 finding that the first interview was a premeditated attempt
11 to evade Miranda. See generally Capers, 627 F.3d at 481;
12 id. at 492-94 (Trager, J., dissenting); cf. United States v.
13 Hernandez-Hernandez, 384 F.3d 562, 566 (8th Cir. 2004)
14 (finding that the failure of the officer to read the
15 defendant "his rights does not seem to have been 'an
16 intentional withholding that was part of a larger nefarious
17 plot.'" (quoting Reinert v. Larkins, 379 F.3d 76, 91 (3d
18 Cir. 2004))).⁵

⁴ See, e.g., New York v. Quarles, 467 U.S. 649, 659 (1984).

⁵ The District Court's holding rested on a lack of exigent circumstances, not on any adverse credibility finding regarding the testimony of Sergeant Pine. Moore, 2007 WL 708789, at *2-3, *5; see Capers, 627 F.3d at 481, 484 n.5. Although Pine's stated public safety rationale was

1 The objective evidence -- including the narrowness of
2 overlap between the subjects of the two interrogations, the
3 participation of different officers, and the elapse of 90
4 minutes between the interrogations -- decidedly points
5 against concluding that the government engaged in a
6 deliberate two-step process designed to undermine Moore's
7 Fifth Amendment rights.

8 1. Thoroughness of the first interrogation. The first
9 factor considers "the completeness and detail of the
10 questions and answers in the first round of interrogation."
11 Seibert, 542 U.S. at 615. As opposed to Seibert -- where
12 the initial "questioning was systematic, exhaustive, . . .
13 managed with psychological skill," and left "little, if
14 anything, of incriminating potential . . . unsaid," id. at
15 616 -- here the initial questioning was brief and spare.
16 Sergeant Pine's questioning of Moore in the lockup was
17 limited to the location of the gun because, as the

insufficient to render Moore's first statement admissible
under the public safety exception to Miranda, it was
sufficient, "in light of the totality of the circumstances,"
Capers, 627 F.3d at 484 n.5, to show that Pine did not
intend to circumvent Miranda with this unwarned questioning.
Under Capers, therefore -- even in the absence of one of the
recognized "legitimate" reasons for delaying Miranda
warnings, id. -- Pine's rationale does not bar admission of
the second warned, statement, regardless of whether curative
measures were undertaken.

1 government argued, Pine was worried about the danger to the
2 public of someone finding a (potentially loaded) weapon.
3 Pine asked no questions about Moore's involvement in the
4 attempted robbery or carjacking, about who else was involved
5 in either of those incidents, or about how Moore obtained
6 the gun. Pine's sole and limited focus was finding the gun.
7 See United States v. Verdugo, 617 F.3d 565, 575 (1st Cir.
8 2010) (finding it significant that the defendant "was asked
9 only a limited number of questions before he was read his
10 Miranda rights").

11 2. Overlap. The second factor -- "the overlapping
12 content of the two statements," Seibert, 542 U.S. at 615 --
13 also favors the government. See United States v. Stewart,
14 536 F.3d 714, 722 (7th Cir. 2008) ("[T]he lack of overlap
15 between the warned and unwarned statements is evidence that
16 the interrogator did not deliberately use a two-step
17 strategy designed to circumvent Miranda."). Whereas the
18 initial questioning focused exclusively on the location of
19 the gun, the second questioning was broad and systematic: it
20 focused on the attempted robbery and carjacking, where Moore
21 got the gun, who else in town had guns, and whether Moore
22 had any information about cold homicide cases. The two

1 rounds of questioning did not appreciably overlap. See
2 Carter, 489 F.3d at 536 (finding "almost no overlap" between
3 the initial questioning involving the contents of a baggie
4 found during the search and the defendant's later full
5 confession); see also United States v. Jackson, 608 F.3d
6 100, 104 (1st Cir. 2010) (finding significant that the
7 initial questioning was "aimed primarily at securing the
8 weapon").

9 3. Timing and setting. The circumstances of the
10 interrogations likewise favor the government. Although both
11 rounds of questioning took place within the police station,
12 the first began when Moore initiated a conversation with
13 Pine after he saw Pine walking through the station and
14 called him over to speak with him. Moore did so because he
15 knew Pine, who had previously helped Moore get released on a
16 promise to appear, and wanted to ask Pine to help him again.
17 Although (as the district court found) Pine turned the
18 discussion to the whereabouts of the gun, Moore, 2007 WL
19 708789, at *3, Pine was not involved in the investigation of
20 Moore, id. at *2, and Pine did not know that Moore was in
21 the lockup before Moore beckoned to him. Id. In
22 combination, these facts suggest that, although Pine

1 questioned Moore about the location of the gun and the
2 district court suppressed Moore's response, Pine did not
3 initiate this questioning as part of a two-step
4 interrogation.⁶

5 4. Continuity of personnel. There was little
6 "continuity of police personnel" involved in the two
7 interviews. See Seibert, 542 U.S. at 615. In Seibert, the
8 same officer did the questioning both times. Id. at 605,
9 616. Similarly, the lead postal investigator who set up the
10 sting operation in Capers did the questioning before and
11 then again after the defendant had been advised of his
12 rights. 627 F.3d at 473, 483. Here, Moore was questioned
13 first by Pine and later by Detectives Weisgerber and Murray.
14 The detectives were not present at the initial questioning;
15 and Pine was not present when the detectives asked the
16 questions. Although Pine called over Agent Campanell during
17 his brief interaction with Moore, and Campanell was also
18 present at Moore's interrogation by the detectives,
19 Campanell had little, if any, role in questioning Moore.

⁶ Both interviews took place in the police station; but the environment was significantly different. Moore's encounter with Pine, which began as a voluntary conversation after Moore initiated contact, was not "inquisitorial," Capers, 627 F.3d at 483, while the second interview was routine and systematic.

1 5. Continuity of the questioning. Approximately 90
2 minutes elapsed between Pine's encounter with Moore and the
3 detectives' interrogation of him. In that interval, the
4 officers left the station to retrieve the gun. The 90-
5 minute interval was enough time for Moore to have reasonably
6 believed that the second interrogation was not merely a
7 continuation of the first.

8 In Capers, a 90-minute break between questioning was
9 insufficient. 627 F.3d at 484. But there, both encounters
10 were inquisitorial and conducted by the same inspector, who
11 was leading the investigation and had planned the sting
12 operation. See id. at 483-84. Moreover, in Capers, "the
13 latter session was 'essentially a cross-examination using
14 information gained during the first round of
15 interrogation.'" Id. at 484 (quoting Carter, 489 F.3d at
16 536). Here, the second interview was not treated as a
17 continuation of the first, see Seibert, 542 U.S. at 615, nor
18 did the investigators use the information obtained from
19 Pine's questioning to cross-examine Moore or compel him to
20 answer due to the weight of an earlier admission, id. at 621
21 (Kennedy, J., concurring).

1 Moore had a 90-minute break between the two encounters,
2 which differed in every material respect. The break in
3 momentum allowed Moore to appreciate that he retained the
4 right to remain silent. See Seibert, 542 U.S. at 616-17;
5 see also United States v. McConer, 530 F.3d 484, 498 (6th
6 Cir. 2008) (describing a reasonable suspect's belief that he
7 or she retained a choice to remain silent as "the factor
8 primarily relied upon by the Seibert plurality").

9 Based on the totality of the record here, the
10 government has met its burden of demonstrating that it did
11 not engage in a deliberate two-step process to undermine
12 Moore's Fifth Amendment rights. Therefore, this case is
13 controlled by Elstad, not Seibert.

14 Under Elstad, the dispositive inquiry is whether the
15 statements were provided voluntarily and free of coercion.
16 470 U.S. at 318. Moore does not contend -- nor could he --
17 that his initial statement to Pine was coerced or otherwise
18 involuntary.⁷

⁷ This is so even though we "presume the privilege against compulsory self-incrimination ha[d] not been intelligently exercised" by Moore when he spoke to Pine because Moore had not been advised of his rights. Elstad, 470 U.S. at 310.

1 Nor can there be doubt that Moore's later statement was
2 voluntary. The circumstances of his questioning "contain no
3 traces of the 'brutality, [p]sychological duress, threats,
4 [or] unduly prolonged interrogation' that courts have
5 previously found when they have concluded that statements
6 were involuntarily made." Verdugo, 617 F.3d at 575 (quoting
7 Jackson, 608 F.3d at 102-03) (alterations in original).

8 Moore was advised of his rights before the later
9 interrogation, and he agreed (orally and in writing) to
10 waive them. There is no dispute that he was fully advised
11 of his rights and that he knowingly and voluntarily waived
12 them. See Elstad, 470 U.S. at 314-15; Carter, 489 F.3d at
13 536-37. Moore's willingness to talk with the police even
14 after he was informed of his rights is itself "highly
15 probative." Elstad, 470 U.S. at 318. Based on these facts,
16 it is clear Moore knowingly and intelligently waived his
17 right to remain silent. Because "[a] subsequent
18 administration of Miranda warnings . . . ordinarily should
19 suffice to remove the conditions that precluded admission of
20 the earlier [unwarned] statement," id. at 314, and Moore's
21 statements to the authorities were voluntary, the district
22 court properly denied Moore's suppression motion as to
23 Moore's post-warning statement to the detectives.

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II.

Moore's second argument for suppression -- that his post-arrest questioning violated his Sixth Amendment right to counsel -- fares no better. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The district court concluded that Moore's Sixth Amendment right had not yet attached because the state prosecution had not been initiated, and (independently) that the Sixth Amendment did not attach to the federal gun possession charge because the Sixth Amendment is offense specific and the gun-possession prosecution had not yet been initiated. We agree on both scores.

A.

The Sixth Amendment is concerned with the assistance of counsel in "criminal prosecutions." U.S. Const. amend. VI. Accordingly, the right to counsel does not attach until the prosecution is initiated. If, as true at the time of Moore's questioning here, no formal charging instrument has yet been filed, the right to counsel generally attaches "at

1 the first appearance [by the accused] before a judicial
2 officer at which a defendant is told of the formal
3 accusation against him and restrictions are imposed on his
4 liberty." Rothgery v. Gillespie Cnty., 554 U.S. 191, 194
5 (2008) (citing Michigan v. Jackson, 475 U.S. 625, 629 n.3
6 (1986), and Brewer v. Williams, 430 U.S. 387, 398-99
7 (1977)). Absent a formal charge, arrest on a warrant, even
8 one issued pursuant to a criminal complaint sworn out by
9 prosecutors, is insufficient prior to the initial appearance
10 before a judicial officer. See United States v. Duvall, 537
11 F.2d 15, 21-22 (2d Cir. 1976) (Friendly, J.). It is only at
12 that point that "the government has committed itself to
13 prosecute" that "the adverse positions of government and
14 defendant have solidified" and the accused "finds himself
15 faced with the prosecutorial forces of organized society,
16 and immersed in the intricacies of substantive and
17 procedural criminal law." Rothgery, 554 U.S. at 198
18 (internal quotation marks omitted).

19 Moore was questioned before he was arraigned. He had
20 been arrested the day after a state prosecutor presented an
21 application for an arrest warrant (with attached criminal
22 information) to a superior court judge. Once Moore was

1 arrested, he remained in lockup where he had the
2 conversation with Pine and then was moved to an
3 interrogation room (after the gun was located) and
4 questioned by the detectives and Agent Campanell. Moore was
5 then arraigned the following day.

6 Moore argues that the line of cases fixing the
7 attachment of the Sixth Amendment at arraignment are
8 inapplicable here because the police unnecessarily delayed
9 bringing him to court. But, as the district court found as
10 fact, there was no attempt by the police to intentionally
11 keep Moore from being arraigned. Moore, 2007 WL 708789, at
12 *2 (finding "no evidence" that anyone asked Officer
13 Zavodjancik to refrain from taking Moore to court "nor any
14 evidence" suggesting that Zavodjancik "would engage in such
15 a subterfuge."). This finding is reviewed for clear error,
16 Carter, 489 F.3d at 534, and Moore has failed to show error.

17 Moore also argues that the Sixth Amendment attached
18 even before his arrest because the assistant state's
19 attorney obtained the arrest warrant by presenting the
20 superior court judge with an information and an application
21 for an arrest warrant. But the Connecticut Supreme Court,
22 in State v. Pierre, 890 A.2d 474 (Conn. 2006), held that an

1 information attached to an application for an arrest warrant
2 does not represent a commitment to prosecute, id. at 506-
3 508; rather, that commitment is made only when the state --
4 following the defendant's arrest -- files the information
5 and arrest warrant with the court *at the defendant's*
6 *arraignment*, id. at 508.

7 Moore attempts to distinguish Pierre by drawing a
8 distinction between the "signing" of the information by
9 prosecutors in Pierre, and the "filing" of that information
10 with the court. But Pierre expressly stated that (as here)
11 the arrest warrant application approved by the superior
12 court included an attached information signed by a state's
13 attorney. 890 A.2d at 504. Pierre held that "it was not
14 until the entire arrest warrant, with the attached signed
15 information, was filed with the court *at arraignment* that
16 the document became an information within [S]ixth
17 [A]mendment jurisprudence, thus triggering the defendant's
18 constitutional right to counsel." Id. (emphasis added).
19 Like the sworn complaint in Duvall and the information in
20 Pierre, the information in this case initially "function[ed]
21 . . . as a basis for an application for an arrest warrant,"
22 Duvall, 537 F.2d at 22 (internal quotation marks omitted) --

1 "a prelude to a criminal prosecution . . . rather than the
2 initiation of an adversarial judicial proceeding in its own
3 right," Pierre, 890 A.2d at 508.

4 The precedents of this Court cited by Moore are not to
5 the contrary. In United States v. Mills, 412 F.3d 325, 328
6 (2d Cir. 2005), we *assumed* that the right to counsel
7 attached before a defendant's first appearance before a
8 judicial officer because, "[f]or the purposes of th[at]
9 appeal, the government d[id] not challenge the District
10 Court's determination that the police officers violated
11 Mills's right to counsel as to the state charges" by
12 interrogating him after he was charged but prior to his
13 arraignment. Accord id. at 326.⁸

14 In United States v. Worjloh, 546 F.3d 104, 108 (2d Cir.
15 2008) (per curiam), the defendant also relied on Mills, and
16 we made clear that such reliance was misplaced because Mills
17 proceeded based on the government's concession.

18 Accordingly, Moore's Sixth Amendment right to counsel
19 had not attached before he was interrogated, and the

⁸ The district court's ruling was based on Connecticut precedents on this issue as they existed in 2004, prior to the state Supreme Court's decision in Pierre. See United States v. Mills, No. 03-32, 2004 WL 57282, at *2 (D. Conn. Jan. 8, 2004).

1 district court correctly denied his motion to suppress on
2 that basis.

3

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B.

5 Independently, Moore's argument fails because even if
6 his right to counsel had attached to the state charges, it
7 had not attached to the federal charge for which he pleaded
8 guilty below.

9 "[T]he Sixth Amendment right is 'offense specific,'"
10 meaning that even when the right to counsel attaches for one
11 offense, that does not mean that the defendant has a right
12 to counsel for all ongoing criminal investigations. Texas
13 v. Cobb, 532 U.S. 162, 164 (2001) (quoting McNeil v.
14 Wisconsin, 501 U.S. 171 (1991)). "[T]he definition of an
15 'offense,'" however, "is not necessarily limited to the four
16 corners of a charging instrument." Id. at 173. Instead,
17 "'where the same act or transaction constitutes a violation
18 of two distinct statutory provisions, the test to be applied
19 to determine whether there are two offenses or only one, is
20 whether each provision requires proof of a fact which the
21 other does not.'" Id. (quoting Blockburger v. United

1 States, 284 U.S. 299, 304 (1932)).⁹

2 Moore was charged with (and pleaded guilty to) the
3 federal crime of being a felon in possession of a firearm.
4 The elements of such an offense are (1) that the defendant
5 is a felon, (2) who possesses a firearm or ammunition, (3)
6 which has been shipped or transported in interstate
7 commerce. 18 U.S.C. § 922(g). Moore was charged with
8 various state crimes including (1) two counts of attempt to
9 commit felony murder; (2) two counts of criminal use of a
10 firearm; (3) two counts of attempt to commit first degree
11 robbery; (4) two counts of conspiracy to commit first degree
12 robbery; (5) first degree reckless endangerment; (6) robbery
13 involving an occupied motor vehicle; and (7) third degree
14 assault. The only one of those offenses that even arguably
15 overlaps with the federal charge is criminal use of a
16 firearm under Conn. Gen. Stat. § 53a-216(a). The elements
17 of that crime are (1) commission of a felony, (2) in which
18 the defendant uses or threatens to use a firearm. Id. The

⁹ Blockburger defined the term "offense" for the purposes of the Fifth Amendment's protection against double jeopardy. Cobb applied Blockburger's definition in the right-to-counsel context under the Sixth Amendment. Cobb, 532 U.S. at 173 ("We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel.").

1 federal charge has the added element that the defendant must
2 be a felon, and one element of the state offense (that is
3 missing from the federal statute) is that the defendant must
4 use or threaten to use the firearm in the commission of a
5 felony. Accordingly, under Blockburger, they are separate
6 offenses.

7 Moore argues the offenses are the same because Moore
8 received an increased sentence because he "used or possessed
9 a[] firearm . . . in connection with another felony offense
10" U.S.S.G. § 2K2.1(b)(6).

11 According to Moore's brief, when the Guidelines are "an
12 integral component of the federal charge . . . , the state
13 statute can be seen as a lesser included offense of the
14 federal statute[] since it requires proof that the defendant
15 had used a firearm in committing a felony" Moore
16 does not explain, nor is it readily apparent, why the
17 Guidelines should be considered an integral component of a
18 federal offense. Moreover, any such argument is refuted by
19 the offense-specific, Sixth Amendment jurisprudence, which
20 determines whether two offenses overlap based on the
21 *elements* of the offenses and whether there are any *elements*
22 present in one of the offenses but not the other. See Cobb,

1 532 U.S. at 173; see also Blockburger, 284 U.S. at 304.
2 Sentencing enhancements are separate from the offense and
3 related conduct, which is why a defendant can receive an
4 enhancement as to one offense based on particular conduct
5 and then be prosecuted separately based on that same
6 conduct. See Witte v. United States, 515 U.S. 389, 399-404
7 (1995); United States v. Grisanti, 116 F.3d 984, 987-88 (2d
8 Cir. 1997).

9 Because the Sixth Amendment is offense specific and the
10 state and federal offenses charged against Moore are
11 distinct offenses under the Sixth Amendment, Moore's Sixth
12 Amendment right to counsel was not violated by his post-
13 arrest questioning. The district court therefore did not
14 err in denying Moore's motion to suppress for the alleged
15 violation of his Sixth Amendment right to counsel.

16
17 **CONCLUSION**

18 We have carefully considered all of Moore's remaining
19 arguments and find them to be without merit. Accordingly,
20 the judgment of the district court is affirmed.