No. 21-5795

IN THE SUPREME COURT OF THE UNITED STATES

ETHAN GUILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's statements describing how he assembled an improvised explosive device and placed it under his ex-girlfriend's bed, given after he received Miranda warnings, were rendered inadmissible by an earlier unwarned admission that he had made the device.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A51) is reported at 995 F.3d 1095. The opinion of the district court (Pet. App. B1-B40) is unreported but is available at 2018 WL 2075457.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for

rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on September 23, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted on one count of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d), and one count of attempting to destroy a building by fire or explosive, in violation of 18 U.S.C. 844(i). Judgment 1-2. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A51.

1. In May 2017, law enforcement responded to an emergency call from a young woman -- "MC" -- who had found an improvised explosive device under her bed. Pet. App. A3. The device was a pressure cooker that had been filled with black powder, homemade napalm, nuts, bolts, and screws, and sealed with white duct tape. Ibid. It contained a fuse connected to an electric soldering iron that was plugged into a timer, which was, in turn, plugged into the wall. Ibid. The device was designed so that the timer would turn on the soldering iron; the soldering iron would heat up and ignite the fuse; and the fuse would cause an explosion. Ibid.

Fortunately, the design failed and the device never detonated. Ibid.

During an interview with a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) special agent, MC identified petitioner as someone who might want to harm her. Pet. App. A3. She explained that she and petitioner had previously dated for about six months. Ibid. MC told the agent that after the two broke up, petitioner continued to communicate with her against her wishes. Id. at A3-A4. And she explained that her school had eventually provided her with an escort to stop petitioner's harassment. Id. at A4.

Law enforcement agents went to petitioner's home and were met at the door by petitioner and his older brother. Pet. App. A4. After a brief discussion in the doorway, the brothers agreed that the officers could come into the home. Id. at A4-A5. Following a protective sweep of the home, the officers began to interview the brothers -- petitioner at the kitchen table, his brother in the hallway. Id. at A5.

Petitioner's father arrived at the house 18 minutes later and joined the conversation. Pet. App. A5. Petitioner's father informed the agents that he had recently purchased a pressure cooker for petitioner, but he could not find it. Ibid. Petitioner claimed that he had taken the pressure cooker to his mother's house. Ibid. But petitioner's mother stated in a telephone call

that she did not know where the pressure cooker was. Ibid. Petitioner's father additionally informed the agents that he owned a soldering iron, but he could not find that, either. Ibid.

Petitioner's father consented to a search of the home. Pet. App. A5. Agents did not locate the missing pressure cooker or soldering iron. Ibid. But they did discover a table on the back porch with burn marks and a piece of fuse burnt onto it. Ibid. They also found a backpack in petitioner's bedroom containing white duct tape matching the tape on the pressure-cooker bomb, black duct tape, latex gloves, scissors, super glue, and zip ties. Id. at A5-A6.

While the search was occurring, agents continued to speak with petitioner at his kitchen table for about 50 minutes. Pet. App. A6. Petitioner denied making the pressure-cooker bomb. Ibid. When the search ended, one agent summarized the evidence collected during the search, informed petitioner that the evidence pointed to him, and asked again whether petitioner had created the explosive device. Ibid. Petitioner took a deep breath and stated, "Yes, I made it." Ibid. The agent immediately advised petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Pet. App. A6.

Petitioner acknowledged that he understood his rights to decline to speak with the agents and to request a lawyer. Pet. App. A6. But petitioner waived those rights and continued to

respond to the agents' questions for 20-40 minutes. Id. at A6, B4. During that discussion, petitioner explained how he had constructed the pressure-cooker bomb and planted it under MC's bed. Ibid. He admitted that he wanted MC dead and did not care whether anyone else was hurt by the explosion. Ibid. And he led the agents into his bedroom and showed them the items that he had used to build the device, including the white duct tape, gloves, and super glue stored in his backpack. Ibid. Although petitioner declined to answer whether he "planned to make another device to kill MC," he never asked the agents to stop questioning him or requested a lawyer. Id. at A6.

2. A federal grand jury in the District of New Mexico charged petitioner with one count of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d), and one count of attempting to destroy a building by fire or explosive, in violation of 18 U.S.C. 844(i). Pet. App. A6. Petitioner filed a motion to suppress the statements that he had made to the agents, arguing (inter alia) that the agents violated his Fifth Amendment rights by questioning him without first providing Miranda warnings. Id. at A7. The district court granted petitioner's motion in part and denied it in part. Id. at B1-B40.

The district court granted petitioner's motion with respect to his initial incriminating statement, made after the agents presented him with the evidence connecting him to the explosive

device and before the agents issued Miranda warnings. Pet. App. B24-B30. The court concluded that, although "[t]he fact-specific analysis is a close one," that initial statement was a product of custodial interrogation in which Miranda warnings were required. Id. at B26. The court reasoned that, "although [petitioner] was not in custody for purposes of Miranda during [the] initial questioning," that "status changed when the agent continued to press [petitioner] despite his repeated denials[ ] and then confronted him with the information and evidence that had been collected during the search." Id. at B30.

The district court denied petitioner's motion, however, as to his incriminating statements made after receiving Miranda warnings. Pet. App. B34-B36. Looking to the plurality decision from this Court's decision in Missouri v. Seibert, 542 U.S. 600 (2004), the district court reasoned that where an incriminating statement is made before the delivery of Miranda warnings, the admissibility of post-warning statements turns on "whether it would be reasonable to find that * * * in the[ ] circumstances the warnings could function 'effectively' as Miranda requires." Pet. App. B21 (quoting Seibert, 542 U.S. at 611-612). The court observed that the Seibert plurality had identified five factors that bear on whether such mid-stream Miranda warnings 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 the second, (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." Ibid. (citing Seibert, 542 U.S. at 615). And the court determined that petitioner's post-warning statement was admissible under that standard.

The district court found that the first two factors favored admission. As to the first, the court explained that the pre-warning questions at petitioner's kitchen table "were not the kind of 'systematic' or 'exhaustive' interrogation that would thwart the purpose of a subsequent Miranda warning." Pet. App. B34 (quoting Seibert, 542 U.S. at 616). As to the second, the court observed that "[t]he information that [petitioner] provided after he received the warning" -- explaining how he had made the bomb and the components he had used -- was meaningfully different from his brief pre-warning admission that he had made it. Id. at B35. And while the court took the view that the third and fourth factors weighed against admission because both questioning rounds occurred in the same location and involved the same agents, ibid., it found that the fifth factor also supported admission because "the second interrogation focused on a different subject," id. at B36. In total, balancing the factors, the court determined that "the Miranda warning that was issued to [petitioner] functioned

effectively and therefore allows the admission of the post-warning statements." Ibid.

Petitioner subsequently entered a guilty plea to both counts, but reserved the right to appeal the district court's denial of his motion to suppress. Pet. App. A8.

3. The court of appeals affirmed. Pet. App. A1-A51. The court agreed with the district court that, while petitioner was not in custody before the agents "confronted him with the information and evidence discovered during the search," the "situation evolved" at that point because "a reasonable person in [petitioner's] position would not have felt free to leave or otherwise end the interview." Id. at A23-A24. The court of appeals thus concluded that the district court had "properly suppressed [petitioner's] unwarned admission." Id. at A25. The court of appeals also agreed with the district court, however, that petitioner's post-warning statements were admissible. Id. at A51.

Rather than rely on the Seibert plurality opinion, the court of appeals applied "Justice Kennedy's concurrence" as "the binding opinion from Seibert." Pet. App. A30. The court of appeals did so after analyzing Seibert under the rule this Court articulated in Marks v. United States, 430 U.S. 188 (1977), that in a case where no opinion garners support from a majority of the Court, "the holding of the Court may be viewed as that position taken by

those Members who concurred in the judgment on the narrowest grounds." Pet. App. A31 (quoting 430 U.S. at 193) (brackets omitted)). The court of appeals reasoned that the Seibert plurality's five-factor approach "replaces the central voluntariness standard" for the admissibility of post-Miranda warning statements "with an objective inquiry into whether midstream Miranda warnings were effective" in "all cases involving sequential unwarned and warned statements." Id. at A33-A34. The court further reasoned that Justice Kennedy's concurrence, by contrast, would apply a similar inquiry into the effectiveness of the warnings "only in cases involving the deliberate use of a two-step interrogation technique calculated to circumvent Miranda." Id. at A34. The court thus found that "[t]he cases governed by Justice Kennedy's approach" in Seibert "form a logical subset of the cases governed by the plurality's approach," ibid., and that his opinion accordingly reflects "the narrowest grounds for the Court's judgment" and "provides the controlling standard for assessing the admissibility of incriminating statements given subsequent to midstream Miranda warnings." Id. at A35.

The court of appeals then determined that, in this case, "the agents did not use a two-step interrogation technique in a calculated way to undermine the Miranda warning." Pet. App. A46 (citation and internal quotation marks omitted). The court found no "subjective evidence" that the agents intentionally withheld

Miranda warnings to deprive petitioner of his rights. Id. at A46-A47. To the contrary, the court observed that the lead investigator "testified that he did not believe [petitioner] was in custody until his initial confession" and that "as soon as [he] believed [petitioner] was in custody," the agent "immediately provided Miranda warnings." Id. at A47. The court also found no "objective indicia that the agents set out to intentionally circumvent or undermine the protections the Miranda warnings provide." Id. at A48. The court observed that the agents "did not withhold Miranda warnings, solicit a full confession, and lead [petitioner] back through his confession again." Ibid. It further observed that the agents also did not "use [petitioner's] initial admission to cross-examine or pressure him to answer their questions during the postwarning interrogation." Id. at A49. "For these reasons," the court found that "the government ha[d] met its burden of showing the agents did not engage in a deliberate two-step interrogation strategy to frustrate Miranda." Ibid.

The court of appeals explained that, in the absence of such intentional evasion, "[s]o long as [petitioner] knowingly and voluntarily waived his Miranda rights and made both his prewarning and postwarning statements voluntarily, his postwarning statements are admissible." Pet. App. A49. And the court found that petitioner's post-warning statements were admissible under that standard. The court noted that petitioner was not a minor, knew

how to build a sophisticated explosive device and a computer, and initially asked agents for a warrant when they first appeared at his home. Id. at A50. The court also observed that petitioner "was not subjected to any physical punishments or threats; the interview was not unduly prolonged; and the agents' questioning, though accusatory at one point, was done in a conversational tone and never rose to the level of coercion." Ibid. "Based on those * * * considerations," the court determined that petitioner "voluntarily, knowingly, and intelligently waived his Miranda rights," ibid., and that "the voluntary statements he made after he received the Miranda warnings and waived his right to remain silent were properly admitted," id. at A51.

ARGUMENT

Relying on the plurality opinion in Missouri v. Seibert, 542 U.S. 600 (2004), petitioner contends (Pet. 8-24) that the statements he made after receiving and voluntarily waiving his rights under Miranda v. Arizona, 384 U.S. 436 (1966), should have been suppressed as the fruits of his initial pre-Miranda admission. The lower courts, however, correctly determined that petitioner's post-Miranda statements were admissible. Law enforcement did not deliberately attempt to circumvent Miranda, and no evidence indicated that the warnings were ineffective or that petitioner's statements were involuntary. And while some disagreement exists among the courts of appeals concerning the appropriate inquiry for

reviewing such a claim, this case does not present a suitable vehicle for resolving that disagreement because petitioner's post-Miranda statements would be deemed admissible under the law of any circuit. This Court has repeatedly denied review of the question presented, see, e.g., Wass v. Idaho, 138 S. Ct. 2706 (2018) (No. 17-425); Hill v. United States, 559 U.S. 1106 (2010) (No. 09-740); see also Pet. 17 n.5. The same result is warranted here.

1. In Oregon v. Elstad, 470 U.S. 298 (1985), this Court addressed the admissibility of a warned statement given by a suspect after the police had already obtained an unwarned statement from him in violation of Miranda. This Court held that a "subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Id. at 314. The Court explained that a defendant's incriminating statements before the Miranda warnings do not, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," in themselves result in such a degree of psychological coercion that any subsequent administration of the warnings will be ineffective. Id. at 309, 313. The Court therefore concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement," an unwarned admission

does not give rise to any presumption that subsequent, warned statements were involuntary. Id. at 314.

In Seibert, the Court considered a police protocol for custodial interrogation under which the police would deliberately delay giving Miranda warnings until after custodial interrogation had produced a confession, and then would lead the suspect to cover the same ground in a warned statement. 542 U.S. at 604 (plurality opinion). A plurality of the Court concluded that post-Miranda statements made in the context of successive unwarned and warned questioning are admissible only when "it would be reasonable to find that in th[e] circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The plurality identified several facts present in the case that indicated that the Miranda warnings could not have functioned effectively: (1) the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill"; (2) the warned questioning promptly followed the unwarned questioning; (3) the warned questioning took place in the same location as the unwarned questioning; (4) the same officer conducted both interrogations; and (5) the officer did nothing to dispel the defendant's probable misimpression that the warned interrogation was merely a continuation of the unwarned interrogation and that her unwarned inculpatory statements could be used against her. Id. at 616. The plurality reasoned that, in light of those factors, the Miranda

warnings in that case were ineffective, because "[i]t would have been reasonable [for the defendant] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." Id. at 616-617.

Concurring in the judgment, Justice Kennedy provided the fifth vote for holding the post-warning statements to be inadmissible. Justice Kennedy stated that the plurality's objective test "cuts too broadly" because it would apply to both intentional and unintentional two-stage interrogations. Seibert, 542 U.S. at 621-622 (concurring in the judgment). Instead, Justice Kennedy favored "a narrower test applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning." Id. at 622. In Justice Kennedy's view, in the absence of a "deliberate two-step strategy," the admissibility of post-warning statements should be governed by Elstad. Ibid. And Justice Kennedy took the view that if a "deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." Ibid.

2. Petitioner contends (Pet. 8-18) that federal and state courts are "deeply divided over whether the Seibert plurality opinion or Justice Kennedy's concurrence" controls whether post-

warning statements are admissible when the defendant made prior unwarned statements, Pet. 8 (capitalization altered), and he urges the Court to grant review to clarify the holding of Seibert. But petitioner overstates both the level of disagreement in the lower courts and the practical implications of that disagreement. No further review is warranted.

Nearly every circuit to have decided the issue, including the court of appeals below, has determined that Justice Kennedy's concurring opinion represents the holding of Seibert under Marks v. United States, 430 U.S. 188 (1977). See United States v. Carter, 489 F.3d 528, 535-536 (2d Cir. 2007), cert. denied, 552 U.S. 1144 (2008); United States v. Kiam, 432 F.3d 524, 532-533 (3d Cir.), cert. denied, 546 U.S. 1223 (2006); United States v. Mashburn, 406 F.3d 303, 308-309 (4th Cir. 2005); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Briones, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005); United States v. Williams, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007). Only the Sixth Circuit has taken the view that Seibert failed to produce a binding holding under Marks, and accordingly adopted the Seibert

plurality opinion as its controlling circuit law. See United States v. Ray, 803 F.3d 244, 270-272 (2015).[1]

Petitioner also cites (Pet. 13) four state supreme court decisions that apply the test adopted by the Seibert plurality in evaluating a defendant's Miranda claim, but none of those decisions considered whether the Seibert plurality opinion or Justice Kennedy's concurrence represents the controlling holding of this Court under Marks before applying the plurality's approach. See State v. Juranek, 844 N.W.2d 791, 803-804 (Neb. 2014); Kelly v. State, 997 N.E.2d 1045, 1054-1055 (Ind. 2013); State v. Navy, 688 S.E.2d 838, 842 (S.C.), cert. denied, 562 U.S. 834 (2010); State v. Farris, 849 N.E.2d 985, 994 (Ohio 2006), cert. denied, 549 U.S. 1252 (2007). But see State v. Pye, 653 S.E.2d 450, 453 n.6 (Ga. 2007) (concluding that the Seibert plurality's approach governs).

It may be the case that the analysis in this context is not as straightforward as in some other contexts where multiple opinions combine to produce this Court's disposition. In Marks,

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[1] In United States v. Rogers, 659 F.3d 74 (2011), the First Circuit -- in an opinion by Justice Souter, who also authored the Seibert plurality opinion -- identified Justice Kennedy's Seibert opinion as "controlling," id. at 79, but subsequent panels have not viewed Rogers as definitively resolving the question. See, e.g., United States v. Faust, 853 F.3d 39, 48 n.6 (1st Cir. 2017). The Seventh and D.C. Circuits have declined to decide the issue. See United States v. Straker, 800 F.3d 570, 617 (D.C. Cir. 2015) (per curiam), cert. denied, 577 U.S. 1147 (2016); United States v. Heron, 564 F.3d 879, 884-885 (7th Cir. 2009).

this Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (citation omitted). See, e.g., Williams, 435 F.3d at 1157-1158; Mashburn, 406 F.3d at 308-309. In most circumstances, Justice Kennedy's Seibert opinion does provide a narrower ground for decision than the plurality opinion for determining the admissibility of post-warning statements that follow similar unwarned statements, because his rule of exclusion applies only when "the two-step interrogation technique was used in a calculated way to undermine the Miranda warning," Seibert, 542 U.S. at 622, whereas the plurality's rule would require an objective inquiry into the effectiveness of the warnings in all cases involving two successive interrogations, id. at 611.

In cases in which an impermissible intent is actually present, however, Justice Kennedy's opinion arguably may provide a broader ground for exclusion, as Justice Kennedy would have excluded a second related statement "unless curative measures are taken before the postwarning statement is made," Seibert, 542 U.S. at 622, whereas the plurality would have permitted the introduction of the second statement even in the absence of curative measures, so long as the Miranda warnings "could function 'effectively' as

Miranda requires," id. at 611-612. Nevertheless, it is difficult to identify actual litigated fact patterns in which the police harbor a subjective intent to undermine Miranda, as Justice Kennedy would have required, and where the second warned statement would be admissible under the plurality's "effective warnings" approach but not Justice Kennedy's "curative measures" approach. Any uncertainty about the application of Marks in this context accordingly does not warrant this Court's intervention. That is particularly true because it is rare that courts have found an impermissible intent under Justice Kennedy's opinion in the first place, and in the absence of such a finding, Elstad remains the controlling authority.

Petitioner also briefly suggests (Pet. 18) that this case would present an opportunity for this Court to provide "guidance on application of the Marks rule." But as petitioner recognizes (Pet. 13), when the Court has chosen to review a dispute about the application of Marks to a fractured decision, it has generally proceeded to revisit the underlying question at issue in that decision rather than "pursu[ing] the Marks inquiry to the utmost logical possibility." Nichols v. United States, 511 U.S. 738, 746 (1994); see Hughes v. United States, 138 S. Ct. 1765, 1772 (2018); Grutter v. Bollinger, 539 U.S. 306, 325 (2003); cf. Ramos v. Louisiana, 140 S. Ct. 1390, 1403-1404 (2020) (plurality opinion) (noting the parties' agreement that Apodaca v. Oregon, 406 U.S.

404 (1972), "yielded no controlling opinion" because "Justice Powell's opinion * * * relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after Apodaca has rejected"). Petitioner provides no sound reason why the Court should grant the petition for a writ of certiorari solely to address Marks without allowing this Court to itself address the underlying Miranda issue, and no reason to believe that further review in this case would provide any further guidance on the Marks inquiry.

3. In any event, even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to do so, because -- as in most, if not all, real-word cases -- petitioner's post-warning statements were admissible under both Justice Kennedy's approach in Seibert and the Seibert plurality's approach. Indeed, the district court found petitioner's statements admissible under the plurality approach, while the court of appeals found them admissible under Justice Kennedy's approach.

Petitioner does not claim that the evidence in this case shows any deliberate attempt to employ a two-step interrogation process to undermine the Miranda warnings, as would be required for suppression under Justice Kennedy's Seibert opinion. The evidence instead demonstrates that the agents reasonably believed that petitioner was not in custody during the questioning in his own

home -- and therefore no Miranda warnings were required -- at least until after petitioner made his first incriminating statement. See Pet. App. A46-A47; see also id. at A21-A25 (considering when petitioner became subject to custodial interrogation); id. at B26 (expressly finding the question to be "a close one"). The evidence further shows that, as soon as the lead investigator believed that the situation had evolved into a custodial interrogation, he immediately provided petitioner with Miranda warnings before pursuing any further questioning. See id. at A47; see also id. at B35 (finding that the agent "immediately advised [petitioner] of his Miranda rights when he made the initial self-incriminating statement that he had created the device"). The court of appeals thus correctly determined that the agents had no intent to engage in a two-step interrogation strategy calculated to frustrate Miranda. Id. at 49a. And petitioner has not sought this Court's review of that factbound holding. See Pet. i; see also Pet. 21 (arguing that the court of appeals' reliance on Justice Kennedy's approach "was decisive to the outcome").

Petitioner's statements were also admissible under the Seibert plurality's approach, as the district court correctly found. See Pet. App. B34-B36.[2] Unlike in Seibert, the agents'

[2] Contrary to petitioner's suggestion (Pet. 19), the court of appeals' decision to recognize Justice Kennedy's opinion as the controlling holding in Seibert does not reflect an implicit recognition that his post-warning confession would have been

questioning of petitioner before his first incriminating statement was not "systematic" or "exhaustive." 542 U.S. at 616. Even accepting the lower courts' determination of when the custodial interrogation began, that interrogation lasted not 50 minutes (cf. Pet. 20), but only a few moments before Miranda warnings were given, during which time the agents asked petitioner only whether he had made the explosive device. Pet. App. B34. The brevity of the one question during the short unwarned interrogation "reduced the likelihood" that the Miranda warnings were not effective when given. United States v. Carrizales-Toledo, 454 F.3d 1142, 1152 (10th Cir.), cert. denied, 549 U.S. 1065 (2006).

Relatedly, although petitioner admitted before receiving Miranda warnings that he made the explosive device, see Pet. App. A6, petitioner's detailed account during the subsequent round of questioning -- explaining the details of how he had created the explosive device and planted it under MC's bed -- dispels any suggestion that his post-warning statements were motivated by a

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inadmissible under the plurality's approach. Nothing in the court of appeals' decision suggests that it reached any conclusion on how the Seibert plurality's approach would apply to this case, let alone disagreed with the district court on that issue. Instead, the court of appeals' adoption of Justice Kennedy's approach was simply an effort to faithfully follow this Court's binding precedent and to provide guidance to litigants and courts in the Tenth Circuit facing such claims. See Pet. App. A30 ("Vertical stare decisis is absolute and requires us, as middle-management circuit judges, to follow Supreme Court precedent in every case."); see id. at B22 n.8 (district court highlighting the absence of "further guidance from the Tenth Circuit").

perception that he had already let the "cat out of the bag." Seibert, 542 U.S. at 615 (plurality opinion) (citation omitted); see id. at 616 (relying on the fact that "little, if anything, of incriminating potential [was] left unsaid" in the initial, unwarned questioning). Here, "[t]he differing content of [petitioner's] first and second [statements] * * * suggests that the initial interrogation did not undermine the Miranda warnings." Carrizales-Toledo, 454 F.3d at 1152; see Pet. App. B35 ("The information that [petitioner] provided after he received the warning was different from his pre-warning admission."). Petitioner's post-warning decision to decline to answer at least one of the agents' questions likewise illustrates the warnings' effectiveness. See Pet. App. A6.

Finally, nothing in the evidence indicates that, at any point after the agents provided Miranda warnings, the agents referred back to petitioner's initial answer, suggested that petitioner could not "refuse to repeat at the second stage what had been said before," or "treated the second round as continuous with the first." Seibert, 542 U.S. at 615, 617. Rather, as the district court observed, "[w]hile the information elicited in the second round of questioning technically arose from [petitioner's] initial admission that he made the [explosive device], the second interrogation focused on a different subject: the details of how

the device was built and the reasons [petitioner] had for building it." Pet. App. B36.

Accordingly, as the district court explained, the agents' post-warning questioning of petitioner in this case was "not conducted in a way that could aggravate any uncertainty on [petitioner's] part about a right to stop talking about matters previously discussed." Pet. App. B36. Petitioner "was advised of his Miranda rights immediately after he admitted to making the device, and before any further information or details were solicited or made." Ibid. Every indication suggests that "the Miranda warning that was issued to [petitioner] functioned effectively and therefore allows the admission of the post-warning statements." Ibid. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2021