No. 20 -

---

---

IN THE

**SUPREME COURT OF THE UNITED STATES**

---

MOHAMAD JAMAL KHWEIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

Respondent.

---

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

---

# PETITION FOR WRIT OF CERTIORARI

---

John M. Beal
*Counsel of Record*
53 West Jackson Blvd., Suite 1615
Chicago, Illinois 60604
(312) 408-2766
Johnmbeal@att.net

## QUESTION PRESENTED

Did the intentional utilization by the F.B.I. of a two step interrogation process, without taking remedial measures as required by *Missouri v. Seibert,* 542 U.S. 600 (2004), violate Petitioner's rights under the Fifth Amendment to the United States Constitution?

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES



STATUTES

## OPINIONS BELOW

This petition seeks the review of the opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Khweis*, reprinted in Appendix One and published at 971 F.3d 453 (4th Cir., 2020). That opinion affirmed the ruling of the District Court which denied Petitioner's motion to suppress defendant's statements in *United States v. Khweis*, reprinted in Appendix Two and published at 2017 WL 2385355 (E.D. Va., 2017).

## JURISDICTION

The Fourth Circuit opinion sought to be reviewed was entered on August 11, 2020, and the order of the Fourth Circuit denying the petition for rehearing of that opinion was rendered on September 9, 2020.

Jurisdiction to review the decision of the Court of Appeals is conferred by 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

No person… shall be compelled in any criminal case to be a witness against himself.

## STATEMENT OF THE CASE

Mohammed Khweis was a 26 year old young man from Virginia in 2015 who traveled to Turkey and then into Syria and Iraq. He spent approximately three months there with the Islamic State of Iraq and the Levant ("ISIL"), a foreign terrorist organization. He attended religious instruction and cared for wounded ISIL soldiers, including cooking for them. At that point he decided to escape. On March 14, 2016, Khweis surreptitiously left the ISIL controlled Iraqi town of Tal Afar, initially by taking a taxi and then by walking into Kurdish military territory. He surrendered to Kurdish military personnel.

Following his surrender Mr. Khweis was taken to a Kurdish Counter-Terrorism Directorate (CTD) detention center in Erbil, Iraq. The Federal Bureau of Investigation (FBI) was given access to him to interrogate him. At the detention center, the FBI Assistant Legal Attache' for Iraq, Michael Connelly, interviewed Khweis. Agent Connelly intentionally did not give *Miranda* warnings to Mr. Khwies to facilitate gathering intelligence about ISIL. *See Miranda v. Arizona*, 384 U.S. 436, 467-473 (1966). Ten days after Connelly's interviews concluded, a different team of FBI agents interviewed Khweis for purposes of a potential United States criminal prosecution. This second team advised Khweis of his *Miranda* rights before each interview. Khweis waived his rights and made inculpatory statements that the Government later introduced at his trial.

Agent Connelly interviewed Khweis on March 15 (twice), 17, 18, 19, 20, 23, 26, and 31 and April 7 and 10. The interviews were conducted at the detention center and were attended by a Kurdish CTD official, a State Department official, and occasionally Department of Defense officials. Agent Connelly did not advise Khweis of his *Miranda* rights before any of the interviews.

In an FBI internal email on March 26, Connelly wrote that "[t]his was time very well spent because the extensive time we took getting him comfortable with telling the truth will make it far easier for subsequent interviews here and in the U.S." On April 7, Connelly reported that "[Khweis] would not stop talking in an attempt to fill in gaps he previously created. He is going to be very easy to deal with from a clean team perspective." Finally, on April 8, Connelly stated to other intelligence agents via email that "[Khweis] is lined up perfectly for the clean team." Connelly's interviews ended on April 10, and neither he nor any other government official involved in the initial interviews contacted Khweis after that date.

Ten days later, on April 20, a second team of interviewers met with Khweis for the purpose of a potential United States prosecution. This team consisted of FBI Special Agents Victoria Martinez and Brian Czekela, along with a Kurdish official who had not attended the previous interviews. Martinez and Czekela were walled off from the intelligence team. This interview was

conducted in a different conference room in the same CTD detention center. The agents advised Khweis of his *Miranda* rights orally and in writing before the interview. The advice-of-rights form, which the agents reviewed with Khweis, also stated in part:

> You have the right to remain silent. We understand that you may have already spoken to others. We do not know what, if anything, they said to you, or you said to them. Likewise, we are not interested in any of the statements you may have made to them previously. You are starting anew. You do not need to speak with us today just because you have spoken with others in the past.

In addition to apprising Khweis of his right to counsel, the agents advised him that his family had retained counsel for him in the United States. Khweis waived his *Miranda* rights orally and in writing. Martinez and Czekela interviewed Khweis again on April 21 and 23. Before each interview, they advised Khweis of the *Miranda* rights, reminded him that his family had retained counsel on his behalf, and reiterated that he was under no obligation to speak to them simply because he had made statements in the past. Khweis again waived his rights orally and in writing before each interview.

There is nothing in the record indicating that Khweis himself communicated in any way with the lawyer his parents had retained until after he returned to the United States.

The Government filed a sealed complaint against Khweis on May 11, 2016, and he was transferred from Kurdish to United States custody on June 8. During his flight to the United States, Khweis initiated conversation with

Agent Martinez and another FBI agent on board. The agents apprised Khweis of his *Miranda* rights, which he waived. During the conversation, Khweis made a number of inculpatory statements.

Following Mr. Khweis' return to the United States, he was charged in the Eastern District of Virginia with conspiring to provide material support or resources to ISIL in violation of 18 U.S.C. §2339B, providing material support or resources to ISIL in violation of 18 U.S.C. §2339B, and possessing, using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A). He was convicted of all three counts by a jury. Mr. Khweis was sentenced to 180 months incarceration on Counts One and Two and a consecutive sentence of 60 months on Count Three. Mr. Khweis appealed his case to the United States Court of Appeals for the Fourth Circuit. The panel affirmed the convictions for both violations of §2339B, but reversed the §924(c) conviction with the concurrence of the Government, based upon *United States v. Davis*, 139 S.Ct. 2319 (2019). Judge Henry Floyd dissented from the affirmance on Counts One and Two.

At the sentencing hearing, District Judge Liam O'Grady stated, "You didn't harm anybody, you didn't kill anybody, you left of your own volition…I believe you left because you became disillusioned with the caliphate, that you were not committed to follow through and be a fighter. You ultimately provided information to the FBI which was valuable."

## REASONS FOR GRANTING THE WRIT

The majority opinion and the dissent both state that Justice Anthony Kennedy's concurring opinion in *Missouri v. Seibert*, 542 U.S. 600, 621-622 (2004) is the controlling law in this case. And in the dissent Judge Floyd states, "By and large, I do not take issue with the majority's summary of the relevant factual and procedural history." 971 F.3d at 465. With the facts essentially undisputed, this case presents the legal issue of whether the majority opinion follows *Seibert*, or, in reality, seeks to nullify Justice Kennedy's opinion in *Seibert* and to restore *Oregon v. Elstad*, 470 U.S. 298 (1985) as the controlling law for two-step interrogations in order to provide the Government with a road map for conducting interrogations in terrorism cases without giving *Miranda* warnings while not, at the same time, jeopardizing the use of the answers obtained in a subsequent criminal trial.

The majority opinion quotes *Siebert*, stating that, in a case in which a "deliberate two-step strategy has been used, postwarning statements that are related to the substance of the prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."

The opinion continues:

> The district court here determined that the Government did not employ a deliberate two-step strategy designed to undermine *Miranda*, J.A. 2287-2288, a conclusion Khweis disputes on appeal. We need not address this question, however, because, even assuming the FBI used a deliberate strategy, we conclude that they instituted sufficient curative measures "designed to ensure that a reasonable person in [Khweis's] situation

> would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in judgment).

Judge Floyd, on the other hand, concluded that "the FBI deliberately employed a two-step interrogation process in this case. That is not to say that the FBI was *wrong* to employ this process, but just to say that, having chosen to do so, it needed to cure the inherent coercion." He then concluded that "[b]ecause I do not believe that the FBI cured the coercion that a reasonable person would feel under the circumstances…I would hold that Khweis's Mirandized statements to Agent Martinez and Agent Czekala should have been suppressed."

District Court Judge O'Grady found that "Connelly testified that because his access to Defendant might be limited, he made the decision with his supervisors to interrogate Defendant for intelligence purposes without providing him *Miranda* warnings. Connelly acknowledged that this approach might jeopardize any future United States criminal prosecution, but Connelly believed that Defendant could provide valuable intelligence about ISIS facilitation networks, organizational structure, and fighters." Thus, there was an apprehension that if the *Miranda* warnings were given, Mr. Khweis might not give any statement. There was also a recognition that as a result of not giving the *Miranda* warnings, any statements might not be admissible in a subsequent criminal trial. Agent Connelly testified "that it was not an

acceptable risk to me, to Mirandize him in order to preserve what could be a confession for a future case." In deciding whether to conduct his questioning of Khweis without Miranda warnings, Agent Connelly consulted with FBI Headquarters, including the FBI General Counsel, and with Agent Connelly's supervisor in Baghdad.

The Second Circuit has noted what could constitute non-deliberate failures to *Mirandize:* "There will be many occasions where the totality of the circumstances surrounding the two interrogations leads to the conclusion that a two-step interrogation was the product of a 'rookie mistake,' resulted from poor communication among investigating officers, or occurred when an experienced officer suffered a momentary lapse in judgment." *United States v. Capers*, 627 F.3d 470, 484, Footnote 5 (2nd Cir. 2010). This is consistent with the Fourth Circuit's opinion in *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005), where an officer asked a defendant only two or three questions before remembering to give the *Miranda* warnings. *Capers* also holds that the burden rests on the prosecution to disprove deliberateness, albeit by a preponderance of the evidence. It notes that the Eighth Circuit agrees. *Capers,* 627 F.3d at 479. This all supports Judge Floyd's conclusion that not giving the *Miranda* warning was understandable, but also deliberate and intentional.

**Curative Measures.** This case largely comes down to the question of whether adequate "curative measures" were taken, or whether the majority has

so eviscerated *Seibert* that it has given the government a road map for how to use the two step interrogation technique with impunity and thereby has *sub silento* nullified Seibert.

Judge Floyd concluded that the curative measures were not sufficient. He noted that Justice Kennedy did not limit the curative measures that could be employed, but gave two examples. They are "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning," and an additional warning that explains the likely inadmissibility of the prewarning custodial statements. It is undisputed that the latter was not given. The majority opinion states that a majority of the Court in *Elstad* rejected such a warning and that in this case it would have been "imprecise, or even misleading." Judge Floyd responded by citing two cases in which defendants were told about the likely inadmissibility of of first round statements. He further noted that "*Seibert* was decided after *Elstad*, and Justice Kennedy's opinion in *Seibert* controls our analysis in this case."

With respect to "a substantial break in time and circumstances," the majority opinion finds sufficient curative measures based upon: (1) the fact that the "*Mirandized* interviews here began ten days after the unwarned interviews had ended - a period longer than any break during the series of unwarned interviews," (2) that "the warned interviews were held in a different room than the unwarned interviews," and (3) that "entirely different American

and Kurdish personnel attended the *Mirandized* interviews."

Those findings ignore the undisputed facts that the last two *non-Mirandized* interviews were seven days apart, hardly a "substantial" difference from a ten day break, as well as the fact that Agent Connelly told Mr. Khweis after the last unwarned interview that "I'll be back," creating the impression of continuity between the two sets of interviews. As to location, both sets of interviews were held in conference rooms in the same detention center, and no difference in the size or appearance of the rooms is in the record. As for differentiation of personnel, one FBI agent, who asked the questions, was replaced by two FBI agents who asked the questions. And, finally, as for the questions themselves, when Agent Connelly reported that "[Khweis] is lined up perfectly for the clean team," he was acknowledging that Mr. Khweis was asked essentially the same questions by Agent Connelly in his last interviews as he was expected to be asked, and was asked, by the new agents. He then proceeded to give the new agents the same narrative depiction of his activities with ISIL.

Thus, the majority's conclusion that Miranda had been complied with rests on, first, a factually unsupported assertion that there had been a break in time and circumstances that a reasonable person in the defendant's situation would have understood, and, second, on the rejection of Justice's Kennedy's other curative measure, namely, an additional warning that explains the likely

inadmissibility of the prewarning custodial statement. And, finally, the majority points to nothing else that demonstrates compliance with *Miranda*..

Therefore, the majority opinion has the consequence of undercutting the requirements established by *Seibert* that were designed to provide adequate assurances that the true requirements of Miranda are adhered to in two-step interrogations. What the government is seeking to do is to restore *Elstad* as the governing law and to nullify Justice Kennedy's opinion in *Seibert.* That is the import of the majority opinion.

**CONCLUSION**

This Court should grant certiorari in order to establish under what circumstances the Government may intentionally interrogate persons without providing *Miranda* warnings, obtain statements, repeat the interrogation with *Miranda* warnings, obtain nearly identical answers, and then secure the admission of those answers in a subsequent criminal trial. The question of whether the process used in this case comports with the Fifth Amendment presents an issue of exceptional importance, particularly where members of

the Fourth Circuit panel that heard the case came to diametrically opposed views as to the correct answer.

Respectfully submitted,

_____/s/_____
John M. Beal
Counsel of Record for the Defendant
and Member of the Bar of the Supreme Court

John M. Beal
Attorney at Law
53 West Jackson Blvd., Suite 1615
Chicago IL 60604
(312) 408-2766
johnmbeal@att.net

Dated: February 4, 2021