10-2740

To Be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2740

UNITED STATES OF AMERICA,

Appellee,

-vs-

CHAUNCEY MOORE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on July 1, 2010. Joint Appendix ("JA") 17. On July 8, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA17, 73. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

I. Did the police deliberately employ a two-step interrogation technique to undermine the *Miranda* warnings given in a second interview with the police when the defendant himself initiated the first, unwarned conversation with an officer who was not involved in investigating his conduct and when the second interview was conducted by different officers and covered different topics?

II. (A) When Moore made post-arrest statements to law enforcement, had his Sixth Amendment right to counsel attached with respect to the state charges when the State had not yet filed an information at his arraignment?

(B) Even if his right to counsel had attached on the state charges, does the Sixth Amendment require suppression of his statements in a trial on a federal offense that is not the "same offense" within the meaning of *Blockburger v. United States*?

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Preliminary Statement

The defendant, Chauncey Moore, appeals to challenge the denial of his motion to suppress the post-arrest statements he made to police. Moore was arrested in September 2002 on state charges, and was indicted nine months later by a federal grand jury for unlawful possession of a firearm by a convicted felon. In his federal case, he moved to suppress the post-arrest statements he

made to the local police (and the gun found based on those statements) arguing that his statements were obtained in violation of his Fifth Amendment and Sixth Amendment rights, but the district court denied his motion in relevant part.

As set forth below, the district court properly denied the defendant's motion to suppress. Even though Moore spoke to police twice (the first time prior to receiving *Miranda* warnings), the officers did not deliberately employ a two-step interrogation procedure to undermine the *Miranda* warnings given to Moore during his second interview and thus there was no Fifth Amendment violation. Moreover, the Sixth Amendment does not require suppression of the statements because his right to counsel had not attached at the time of the statements. And even if it had attached with respect to the state charges, it had not attached on the separate and distinct federal charge at issue in this federal case.

The district court's judgment should be affirmed.

Statement of the Case

On September 24, 2002, the defendant was arrested in Norwalk, Connecticut on state charges. JA43-44. On June 18, 2003, a federal grand jury indicted the defendant on one count of unlawful possession of a firearm by a convicted felon. JA4.

The defendant filed a motion to suppress his post-arrest statements on September 19, 2003. JA5. The district court

held hearings on the defendant's motion, JA6, and on February 20, 2007, the district court (Robert N. Chatigny, J.) entered an order granting in part and denying in part the defendant's motion, JA8, 42-59.

On March 13, 2007, the defendant pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), but reserved his right to appeal the district court's order denying his motion to suppress. JA8, 60-69.

On June 30, 2010, the district court sentenced the defendant to 110 months' imprisonment, to be followed by 3 years' supervised release. JA17, 70. Judgment entered July 1, 2010. JA17. The defendant filed a timely notice of appeal on July 8, 2010. JA17-18, 73.

The defendant is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal[1]

A. The Norwalk police arrest Moore.

On September 22, 2002, in Norwalk, Connecticut, Moore was involved in an attempted armed robbery and subsequent car-jacking in which shots were fired. JA43, 69. The next day, an assistant state's attorney "presented an information and application for an arrest warrant to a judge of the Connecticut Superior Court" charging the defendant with attempted felony murder, criminal use of a firearm, attempted first-degree robbery, conspiracy to commit first-degree robbery, first-degree reckless endangerment, robbery involving an occupied motor vehicle, and third-degree assault. JA42-43. A Connecticut Superior Court judge signed the arrest warrant that day. JA43.

Later that night, after the arrest warrant issued, Norwalk Police Officer Mark Suda saw Moore on South Main Street in Norwalk. JA43. Officer Suda chased Moore on foot, but lost sight of him. JA43. During the chase, Moore threw a gun onto the roof of the building at 75 South Main Street, a high-crime area of Norwalk. JA43. Officer Suda did not see Moore throw the gun, but after he lost Moore, he searched the path Moore had traveled and found nothing. JA43.

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[1] The facts are taken from the district court's findings of facts.

The next morning, an informant's tip led to Moore's arrest at approximately 6:15 a.m. JA43. At the time of his arrest, Moore was not given any *Miranda* warnings, nor was he questioned. JA44. The arresting officers took Moore to police headquarters and placed him in a cell before 7:00 a.m. JA44. An officer signed the arrest warrant return, although he did not realize that, by so doing, he was attesting to having read the charges in the warrant to Moore, which he had not done. JA44.

B. Moore is held in the lock-up but is not arraigned.

At approximately 8:30 a.m., two Norwalk detectives (Detectives Arthur Weisgerber[2] and Michael Murray) were assigned to interview Moore about the charges on which he had been arrested. JA44. The detectives went to Moore's cell, but found him to be sleeping. JA44. They woke him up and tried to get him to talk, but he told them that he did not know why he had been arrested and went back to sleep. JA44. The detectives left without disturbing Moore any further. JA44.

At approximately 9:15 a.m., Officer William Zavodjancik, the officer in charge of the lockup during the day, took several arrestees to court for arraignment. JA44. Moore was not taken to court, however, because Officer Zavodjancik lacked the information he needed to process

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[2] The district court's opinion contains a misspelling of Detective Weisgerber's name. *See* JA149. The correct spelling is used in this brief.

Moore before taking him to court. JA44. Officer Zavodjancik could have used information from Moore's arrest warrant to process him and take him to court, but Zavodjancik did not know about the warrant at that time. JA45 & n.2.

When Officer Zavodjancik returned to the lockup from court at approximately 10:00 a.m., he found the information he needed to process Moore on his desk. JA45. Accordingly, he processed Moore, but did not take him to court for arraignment that day. JA45. As a consequence, Moore was not arraigned until the next day, September 25, 2002. JA45.

C. Moore repeatedly asks to speak with detectives and reveals the location of the gun.

Shortly after noon on September 24, when Officer Zavodjancik checked on Moore in his cell, Moore asked to speak with a detective. JA45. Officer Zavodjancik relayed this request to the detective bureau. JA46. When Officer Zavodjancik checked on Moore again approximately 30 minutes later, Moore repeated his request to speak with a detective. JA45-46. Officer Zavodjancik explained that he had already left a message for the detective bureau and that he would leave another message. JA46. As promised, Officer Zavodjancik called and left another message with the detective bureau about Moore's request. JA46.

At approximately 2:00 p.m., Moore asked to use a pay phone. JA46. Officer Zavodjancik moved Moore to a booking cage that contained a pay phone and left him

there. JA46. Moore placed one or more telephone calls. JA46.

A short time later, while still in the booking cage, Moore saw Sergeant Ronald Pine, a narcotics supervisor who had been with the Norwalk Police for twenty-five years, walking nearby. JA46. Moore, who knew Sergeant Pine from encounters during previous arrests, called out to Sergeant Pine by name. JA46. Sergeant Pine knew that Moore had been arrested in connection with an incident in which shots were fired and also knew that the gun used in the incident had not been recovered. JA46. He had not been involved in the case, however, and had not even known that Moore was in the lockup until he heard Moore call his name. JA46.

Sergeant Pine approached Moore and said, "What's up?" Moore asked for Sergeant Pine's assistance in getting released on a "promise to appear." JA46. (On a previous occasion, Sergeant Pine had assisted Moore in getting released on a promise to appear in exchange for information about a homicide. JA47.) Sergeant Pine told Moore that there was no way he could get released on a promise to appear because the charges pending against him involved an incident in which shots were fired. JA47.

Minutes into this conversation, Sergeant Pine asked Moore to tell him where the gun was.[3] In response, Moore

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[3] Sergeant Pine's written report of this encounter records that he asked this question in response to Moore's disclosure (continued...)

said he was reluctant to reveal the location of the gun. JA48. Sergeant Pine told him that, in return for information on the location of the gun, he would urge the state prosecutor to give him credit for this information. JA48. Moore responded by stating that he did not want to face a federal gun charge. JA48.

During this conversation, Sergeant Pine saw Special Agent Chad Campanell of the Bureau of Alcohol, Tobacco and Firearms.[4] Agent Campanell was working on a federal/state firearms offense initiative with the Norwalk Police. JA48. Sergeant Pine asked Agent Campanell to join the conversation and introduced him to Moore. JA48. Sergeant Pine told Moore that he would have a chance to talk with Agent Campanell after the police recovered the gun, but that they had to recover the gun first. JA48.

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[3] (...continued)
that he had discarded the gun in a public place and was concerned that it created a public danger. JA47. The district court declined to rely on this report, choosing instead to rely on Sergeant Pine's testimony at the hearing that he could not recall how the subject of the gun came up. JA47. Accordingly, the district court concluded that "there is no evidence that the defendant volunteered any information about the gun before Pine asked if the defendant could tell him where the gun was." JA47-48.

[4] The district court opinion mistakenly identifies Agent Campanell as "Ron." *See* JA213 (Agent Campanell's testimony).

With this introduction, Moore told Sergeant Pine and Agent Campanell that he had thrown the gun onto the roof of a restaurant in Norwalk. JA48. With Sergeant Pine's help, Moore drew a map identifying the gun's location. JA48. Based on this map, Sergeant Pine understood the gun to have been thrown onto the roof of a house at 75 South Main Street. JA48. Sergeant Pine told Moore that detectives would want to talk with him later about the pending charges, and he urged Moore to cooperate. JA48.

Using the map provided by Moore, Sergeant Pine and Agent Campanell drove to 75 South Main Street and saw the gun on the roof of the house. JA48-49. Detectives Weisgerber and Murray were called to take possession of the gun. JA49. When they retrieved the gun from the roof of the house, they found that it was loaded. JA49. Sergeant Pine told Detective Weisgerber that Moore wanted to speak with detectives. JA49.

D. Moore speaks with detectives again.

After they retrieved the gun, Detectives Weisgerber and Murray returned to police headquarters. JA49. They arrived at Moore's cell in the lockup at approximately 4:05 p.m. that same day, at which time Moore indicated his willingness to discuss the pending charges. JA49. Moore was moved to an interview room, where they were joined by Agent Campanell. JA49.

By the time Moore met with the officers in the interview room, he knew that the charges against him included attempted murder, and he had decided that it

would be in his best interest to cooperate. JA49. The officers relayed this precise message to him in the interview room: they explained that he was in serious trouble and that it would be in his interest to cooperate. JA49. The officers handed Moore an advice of rights and waiver form, which Moore read aloud, initialed, and signed at approximately 4:15 p.m. JA49.

After signing the advice of rights form, Moore spoke with the detectives for approximately 45 minutes. JA49. Moore told the detectives he bought the gun on the street in Norwalk for $25. JA49-50. He provided general information, with very few specifics, about other people who had guns in Norwalk and about cold case homicides in Norwalk. JA50. Turning to the events of September 22, 2002, he stated that when he fired his gun he did not intend to kill anyone. JA50. Moore refused to provide a written statement about the pending charges, however, without first speaking with a lawyer. JA50. As soon as Moore requested an attorney, the detectives ended the interview and returned Moore to his cell in the lockup. JA50.

The next day, on September 25, 2002, Moore was arraigned on the pending state charges. JA50.

E. Moore is indicted on a federal gun charge and moves to suppress his post-arrest statements and the gun.

On June 18, 2003, a federal grand jury indicted Moore on one count of unlawful possession of a firearm by a

convicted felon. JA4. Moore moved to suppress his post-arrest statements, as well as the gun itself, arguing that the statements (and ultimately the gun) were obtained in violation of his rights under the Fifth and Sixth Amendments to the Constitution.

After holding two evidentiary hearings and reviewing multiple rounds of briefing, the district court issued an order granting in part and denying in part Moore's motion to suppress. JA42-59. Beginning with Moore's claims under the Fifth Amendment, the court granted Moore's motion to suppress the unwarned statements to Sergeant Pine concerning the location of the gun, finding the record insufficient to support the public safety exception to the *Miranda* rule. JA51-52. This ruling, which is not at issue in this appeal, did not require suppression of the gun. *See* JA52 n.5 (citing *United States v. Patane*, 542 U.S. 630 (2004)).

The court denied Moore's motion to suppress his subsequent statements to the detectives, finding that the *Miranda* warnings given at the beginning of the second interview effectively informed the defendant of his right to counsel and right to remain silent. JA53-55. Furthermore, the court found that Moore's waiver of his rights and subsequent statements were voluntary. JA54-55.

Turning to Moore's Sixth Amendment claims, the court found that when Moore spoke to the police, his Sixth Amendment right to counsel had not attached because he had only been arrested on what amounted to a complaint. JA56. Alternatively, even if his right to counsel had

attached on the state charges, the court found that it had not attached with respect to the federal charge at issue because the federal and state charges were different under the *Blockburger* test. JA56-57.

F. Moore pleads guilty and is sentenced on the federal charge.

After denial of his motion to suppress, Moore pleaded guilty to being a felon in possession of a firearm, while preserving his right to appeal the denial of his suppression motion. JA8, 60-69.

On June 30, 2010, the district court sentenced Moore to 110 months' imprisonment, to be followed by 3 years' supervised release. JA17, 70. This appeal followed.

Summary of Argument

I. The police did not deliberately employ a two-step interrogation procedure to undermine Moore's *Miranda* rights. Moore – not the police – initiated the first, unwarned conversation by calling out to an officer that he knew, but who was personally unfamiliar with the investigation. The officer testified that he inadvertently failed to give *Miranda* warnings because he was concerned about public safety and the need to get a gun off the streets. That officer was not involved in the second, post-*Miranda* police conversation with Moore, and there was very little overlap in topics covered as well. Accordingly, there is no basis for concluding that the

police manipulated the interrogation process to circumvent *Miranda*.

II. The Sixth Amendment does not require suppression of Moore's post-arrest statements in this federal prosecution. *First*, Moore's right to counsel on the state charges had not attached at the time of his post-arrest statements because the state prosecutor had not yet filed an information at Moore's arraignment on the state charges. In a case with virtually identical facts, the Connecticut Supreme Court held that although the state had signed an information and submitted it to a state court judge in conjunction with an application for an arrest warrant, this action did not commence the prosecution for Sixth Amendment purposes. In other words, the signing of an information in connection with an arrest warrant does not commence judicial proceedings in Connecticut, just as the filing of a complaint in support of a federal arrest warrant does not commence judicial proceedings in the federal system. It is only when the information is *filed* at the time of arraignment that the state has shifted from investigation to prosecution by committing itself to prosecution and the defendant faces the prosecutorial force of the government. Therefore, because the state had not yet filed an information at Moore's arraignment, his Sixth Amendment right to counsel had not attached at the time of his post-arrest statements to the police.

Second, even if Moore's right to counsel had attached on the state charges, the Sixth Amendment does not require suppression of his post-arrest statements in this separate federal prosecution for a different offense. The

Sixth Amendment is offense specific, and thus only requires the suppression of statements elicited from a defendant outside the presence of counsel with respect to the charges for which the right to counsel has attached. Here, as conceded by defense counsel, a comparison of the elements of the federal and state charges reveals that the two offenses were different offenses. The fact that the elements of the state offense could be considered in setting the defendant's federal sentencing guidelines range is irrelevant under *Blockburger v. United States*.

Argument

I. The police did not violate Moore's Fifth Amendment rights by questioning him in violation of *Miranda*.

A. Governing law and standard of review

1. The Fifth Amendment and the admissibility of unwarned statements

The Fifth Amendment to the Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend. V. To protect this right, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that the government may not use any custodial statements made by a suspect unless the police first inform him of his Fifth Amendment rights.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court addressed whether a defendant's pre-*Miranda*

statements in response to police interrogation rendered inadmissible a subsequent post-*Miranda* confession. In *Elstad*, police officers went to the teenage suspect's house to arrest him for burglary. *Id.* at 300. While one officer spoke with the suspect's mother, another officer remained with the suspect in the living room. *Id.* at 300-301. The officer who remained with the suspect said he "felt" the suspect was involved in a burglary, and the suspect admitted he was "there." *Id.* at 301. Approximately one hour later, at the police station, the defendant waived his *Miranda* rights and gave a statement. *Id.*

Elstad argued that the *Mirandized* confession was inadmissible on at least two grounds – first, that the warned confession was the "tainted fruit" of the *Miranda* violation and, second, that the psychological effect of having "let the cat out of the bag" created a lingering compulsion that rendered subsequent statements involuntary. *Id.* at 303-04, 310-11. The Supreme Court rejected both arguments. First, the Court adhered to prior decisions and declined to extend the "fruits" doctrine – which applies to constitutional violations – to a failure to administer *Miranda* warnings, which is not, in and of itself, a constitutional violation. *Id.* at 305-309. A broader rule, the Court reasoned, would not serve "the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Id.* at 308. The Court held, therefore, that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" with respect to subsequent statements that the

suspect makes after receiving *Miranda* warnings. *Id.* at 314. Rather, "the admissibility of any subsequent statement should turn in these circumstances solely on whether it [was] knowingly and voluntarily made." *Id.* at 309.

Next, the Court rejected the argument that the psychological impact of having "let the cat out of the bag" compromised the voluntariness of an informed waiver. *Id.* at 311-12. Such a view would "effectively immunize[] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver," and this immunity would "come[] at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.* at 312. "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. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court revisited *Elstad*, but this time in the context of a deliberate two-step interrogation technique that was designed to undermine the *Miranda* warnings. In *Seibert*, prior to administering *Miranda* warnings, the officers conducted a 30- to 40-minute interrogation, which the Court described as "systematic, exhaustive, and managed with psychological skill." *Id.* at 604-05, 616. Fifteen to twenty

minutes after Seibert made unwarned, highly inculpatory statements, police read her the *Miranda* warnings, after which she repeated her statements. *Id.* at 605. During the post-*Miranda* questioning, the police officers repeatedly confronted Seibert with her earlier statements. *Id.* at 605, 616. The officer who conducted the interrogation testified explicitly that he made a "conscious decision" to withhold *Miranda* warnings based upon a technique he had been taught, which was to question first, then give warnings, and repeat questioning until he obtained the answers previously provided. *Id.* at 605-06.

Five Justices agreed that the statements were inadmissible, but the Court did not issue a majority opinion. The plurality condemned the "question-first" tactic, the use of which, in the plurality's view, was likely to "'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* at 613-14 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point . . . ." *Id.* at 613 (plurality opinion) (footnote omitted).

The plurality thus decided that the "threshold issue [in circumstances] when interrogators question first and warn later is . . . whether it would be reasonable to find that . . .

the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-12. In other words, the question is "[c]ould the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture." *Id.* at 612. The plurality proposed a multi-factor test to determine "whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Id.* at 615. If a court determined that the warnings were effective, it could then consider whether the waiver and statements were voluntary. *Id.* at 612 n.4.

Having thus identified the threshold issue, the plurality concluded that the *Miranda* warnings given to Seibert were ineffective. In the circumstances, "[i]t would have been reasonable to regard the two sessions as parts 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 616-17.[5]

Justice Kennedy wrote a separate opinion concurring in the judgment only. *See id.* at 618-22. Reviewing the Court's precedents, Justice Kennedy explained that "the scope of the *Miranda* suppression remedy" depends on balancing the legitimate interests served by admitting evidence and "whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concerns and objectives." *Id.* at 619. In Justice Kennedy's

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[5] Having found that the warnings were ineffective, the plurality did not evaluate the voluntariness of the confession. *See id.* at 617 n.8.

view, *Elstad* "reflect[ed]" this "balanced and pragmatic approach to enforcement of the *Miranda* warning" because there are various reasons an investigator might delay *Miranda* warnings. *Id.* at 620. As he explained:

> An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection.

Id. "In light of these realities," he reasoned, "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." *Id.*

In Justice Kennedy's view, however, the "two-step questioning technique" employed against Seibert "distort[ed] the meaning of *Miranda* and further[ed] no legitimate countervailing interest." *Id.* at 621. Accordingly, he agreed with the plurality that Seibert's post-warning statements were improperly admitted at trial. Nevertheless, he disagreed with the plurality's test for such cases, which he characterized as one that "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations." *Id.* Justice Kennedy explained that, in his view, "this test cuts too

broadly. *Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity." *Id.* at 622. Instead, Justice Kennedy wrote that he "would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* Summarizing his test, Justice Kennedy explained that "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* If such a deliberate strategy was 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." *Id.*; *see also id.* (providing examples of adequate "curative measures").

In *United States v. Carter*, 489 F.3d 528 (2d Cir. 2007), this Court considered both *Elstad* and *Seibert*. In that decision, issued after the district court's decision in this case, this Court held that *Seibert* did not overrule *Elstad*, but rather that Justice Kennedy's concurrence in *Seibert* established an "exception to *Elstad* for cases in which a deliberate, two-step strategy was used by law enforcement to obtain the postwarning confession." *Carter*, 489 F.3d at 535. In other words, absent a deliberate intent to engage in a two-step interrogation for the purpose of circumventing *Miranda*, the admissibility of a post-*Miranda* statement continues to turn solely upon voluntariness standards, and not upon an inquiry into the effectiveness of the *Miranda* warnings.

When evaluating whether law enforcement engaged in a deliberate two-step strategy for the purpose of circumventing *Miranda*, the government bears the burden of disproving deliberateness by a preponderance of the evidence. *United States v. Capers*, 627 F.3d 470, 479, 480 (2d Cir. 2010). In making this evaluation, "the court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness." *Id.* at 479.

2. The standard of review

"On review of a motion to suppress evidence, [this Court] examine[s] the record in the light most favorable to the government[.]" *United States v. Rommy*, 506 F.3d 108, 131 (2d Cir. 2007). The district court's factual findings on a motion to suppress are reviewed for clear error, and its determination on the constitutionality of a *Miranda* waiver *de novo*. *Carter*, 489 F.3d at 534.

B. Discussion

Because the district court denied Moore's suppression motion without the benefit of this Court's decision in *Carter*, it made no express findings on whether the police deliberately employed a two-step interrogation procedure to circumvent *Miranda*. Nevertheless, the findings made by the district court are more than sufficient to sustain a conclusion that the police *did not* deliberately employ a two-step interrogation procedure to circumvent *Miranda* and that Moore's *Miranda* waiver and statements during the second interrogation were knowing and voluntary.

The totality of the circumstances demonstrate that the police did not deliberately employ a two-step interrogation procedure to undermine Moore's *Miranda* rights. The evidence shows that Moore, and not the police, initiated a conversation with an officer he knew from previous encounters but who was not involved in the investigation into Moore's conduct. Moreover, the two separate conversations were conducted by different officers, with very little overlap in topics. In short, the police did not deliberately employ tactics to undermine Moore's *Miranda* rights.

First, although the police spoke with Moore in two separate conversations, they did not initiate the first, unwarned conversation. Rather, Moore himself initiated the first conversation after repeatedly demonstrating his interest in talking to the police. As the district court expressly found, after Moore was placed in the lockup, he *twice* asked to speak with detectives, but had not yet been given that opportunity. JA45-46. While he was waiting in the booking cage, Moore saw Sergeant Pine walking nearby and called out to him. JA46. When Sergeant Pine approached, Moore began the conversation by asking for Sergeant Pine's help in getting out of jail. JA46-47. Moore's decision to initiate contact with the police for the express purpose of getting help to get out of jail undermines any suggestion that the *police* deliberately staged the first interrogation to undermine Moore's rights. *Contrast Seibert*, 542 U.S. at 604-605 (police initiated the first, unwarned conversation); *Capers*, 627 F.3d at 472-73 (same).

Second, the officer who Moore invited into the first conversation, Sergeant Pine, was not the officer assigned to investigate Moore's conduct and had very little information about Moore's case. JA46. Indeed, as the district court found, beyond knowing about the bare facts of the incident, Sergeant Pine had no involvement in the case and did not even know that Moore was in the lockup until Moore called out to him from the booking cage. JA46. The evidence showed that Moore initiated contact with Sergeant Pine because Sergeant Pine had helped him in the past and he was hoping that the officer would be able to help him again. JA46-47. The fact that Moore's initial conversation was with an officer unrelated to, and unfamiliar with, the investigation, and who had no plans to interrogate Moore, undermines any suggestion that the police deliberately designed the first unwarned conversation to circumvent Moore's *Miranda* rights. *Contrast Capers*, 627 F.3d at 472-73, 481 (interrogation by officer involved in investigation who had time to prepare for interrogation).

Third, Sergeant Pine's testimony reveals that his purpose in talking with Moore was not to undermine Moore's *Miranda* rights, but rather to locate the as-yet-unrecovered gun. Sergeant Pine testified that he did not know Moore was in the lockup until Moore called out to him and only spoke to Moore because Moore asked for his help. JA180, 186, 190-91. *See also* JA46 (district court finding). He testified that he did not advise Moore of his *Miranda* rights because he was not thinking about *Miranda* and was not thinking about the investigation. JA186. His only concern at the time he spoke with Moore

was in learning the location of the gun to get it off the street. JA186. In other words, Sergeant Pine's conversation with Moore was geared around a concern for public safety, and was not intended to trap Moore or to elicit a confession for use against him on the pending state charges. JA186.

The other facts found by the district court support the conclusion that Sergeant Pine did not deliberately withhold *Miranda* warnings to obtain a confession. *Moore* initiated the conversation with Sergeant Pine, an officer he knew from previous encounters but who was unfamiliar with the investigation. JA46. Indeed, Sergeant Pine did not even know that Moore was in the lockup until Moore called out to him as he walked by. JA46. Thus, from Sergeant Pine's perspective, this conversation came "out of the blue." *Capers*, 627 F.3d at 481. Finally, once the conversation began, it focused exclusively on pinpointing the location of the gun. JA46-48.

Although Moore now contends that Sergeant Pine acted deliberately in not advising Moore of his *Miranda* rights because he must have known that Moore had not been arraigned, Defendant's Br. at 24, there is nothing in the district court's findings, or the record itself, to support this claim. The district court found that Moore called out to Sergeant Pine at approximately 2:30 p.m. JA46. At that time, Sergeant Pine knew that Moore had been arrested, but he had no other information about the case. JA46. In fact, he did not even know that Moore was in the lockup until Moore called out to him. JA46. There is no record

evidence – much less a finding – that Sergeant Pine knew that Moore had not been arraigned.

In short, Sergeant Pine's testimony suggests that, far from being part of a deliberate strategy designed to circumvent *Miranda*, his failure to read Moore his rights was merely an inadvertent mistake. After all, Sergeant Pine candidly stated that he was just not thinking about *Miranda*. JA186. *See Capers*, 627 F.3d at 484 n.5 (holding that where failure to give *Miranda* warnings resulted from mistake or inadvertence, there is no basis to infer that a deliberate two-step interrogation technique was being used); *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005) (suggesting that "inadvertent" omission of *Miranda* warnings should not result in automatic evaluation under *Seibert*). His focus, rather, was on public safety and getting a weapon off the streets. JA186.

To be sure, the district court rejected the government's argument that Moore's statements to Sergeant Pine were admissible under the "public safety" exception to *Miranda*, JA51-52, but this *post hoc* legal conclusion that the facts did not warrant a public safety exception to *Miranda* does not undermine Sergeant Pine's consistent testimony that public safety was his concern and goal when he interviewed Moore.[6] JA186. Sergeant Pine's

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[6] The district court's holding that Sergeant Pine's questioning of Moore was not legally justified under the public safety exception does not, by itself, preclude admissibility of Moore's subsequent, post-*Miranda* statement. The *Seibert* (continued...)

testimony disproves deliberateness because it makes clear that he was subjectively motivated by a desire to protect the public safety rather than by a desire to circumvent *Miranda*. At most, the district court's legal conclusion demonstrates that Sergeant Pine *mistakenly* thought public safety warranted an exception to *Miranda*. But an honest officer mistake about the applicability of the public safety exception[7] does not automatically transform that conversation into a deliberate attempt to circumvent *Miranda*. It is precisely this kind of mistake – about a difficult question of law – that the Supreme Court in *Elstad* held "should not breed the same irremediable

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[6] (...continued)
deliberateness inquiry *presumes a Miranda* violation in the first round of questioning. In other words, if *Seibert* applies, then by definition there was no legally justifiable basis to forego *Miranda* in the first interview. By contrast, if there was a legitimate reason to withhold *Miranda* warnings in a first interview – for example, if the public safety exception to *Miranda* applied – then there is no need to engage in the deliberateness inquiry at all. *See, e.g.*, *United States v. Courtney*, 463 F.3d 333, 337 (5th Cir. 2006) (holding that *Miranda* was not required for the defendant's initial questioning because he was not in custody and therefore the district court had erred in applying *Seibert*); *United States v. Kiam*, 432 F.3d 524, 531 (3d Cir. 2006) (holding that *Miranda* was not required in connection with questioning the defendant at the border and therefore that the defendant's post-*Miranda* statements were admissible without regard for deliberateness).

[7] The district court's findings provide no reason to question Sergeant Pine's credibility.

consequences as police infringement of the Fifth Amendment itself." 470 U.S. at 309. Just as law enforcement officers "are ill-equipped to pinch-hit for counsel [in] construing the murky and difficult questions of when 'custody' begins," they are ill-equipped to pinch-it for counsel in construing the murky and difficult question of whether the public safety exception applies. *Id.* at 316.

On this point, this Court's decision in *Capers* provides a useful contrast. In *Capers*, an officer testified that he *deliberately* withheld *Miranda* warnings from a suspect to protect evidence that might be lost in a large mail distribution facility and to allow a quick decision on whether to detain a second suspect. 627 F.3d at 480. This Court noted that neither explanation was a legitimate reason for delaying *Miranda* warnings, *id.*, and, more significantly, that these proffered reasons lacked credibility when considered in light of the other evidence before the court, *id.* at 481-83. Here, by contrast, Sergeant Pine's testimony established that he made an inadvertent mistake in his concern for protecting public safety, thus bringing this case potentially within the public safety exception to *Miranda*. *See id.* at 481 (noting that public safety is "only legitimate reason" for delayed *Miranda* warnings). Moreover, as set forth above, in contrast to *Capers*, the objective evidence supports Sergeant Pine's testimony about his motivations. While in *Capers*, the officers had time to prepare and plan for the interrogation of the suspect, here, by contrast, the conversation between Sergeant Pine and Moore took place "out of the blue," *id.*

at 481, thus undercutting any suggestion of deliberate action by Sergeant Pine.

Fourth, unlike in *Seibert* or *Capers*, there was very little overlap, in personnel or in topics covered, between the two conversations. The first conversation was led by Sergeant Pine, with Agent Campanell joining mid-way through the conversation. JA46-48. Agent Campanell was not in Norwalk to work Moore's case, and was not there to participate in the investigation of Moore's conduct, but just happened to be nearby while Sergeant Pine was talking with Moore. JA48, 184 (testimony of Sergeant Pine), 216-18 (testimony of Agent Campanell). The second conversation was led by Detectives Weisgerber and Murray, and they were joined by Agent Campanell. JA49. Agent Campanell was present for at least part of both sessions, but as the district expressly found, he asked no questions during the first session, and few, if any, during the second. JA54. In other words, he was not leading, or even taking a prominent role, in either conversation. *Contrast Seibert*, 542 U.S. at 604-605 (both interrogations led by same officer); *Capers*, 627 F.3d at 472-73 (same).

Moreover, unlike the tactic described in *Seibert* where the police covered the same ground in both the pre-*Miranda* and post-*Miranda* interrogations, *see Seibert*, 542 U.S. at 604-605, the conversations here focused on distinctly separate topics. The first conversation with Moore focused exclusively on identifying the precise location of the gun that Moore had thrown while being chased the night before. JA47-48. In the second, post-*Miranda* conversation, the detectives did not re-hash this

topic, but instead discussed a variety of other topics, including where Moore obtained the gun, other people with weapons in Norwalk, cold case homicides in Norwalk, and finally, the events of September 22, 2002. JA49-50. Because there was little to no overlap in personnel and topics, there is nothing to suggest that the police deliberately employed a two-step interrogation strategy to circumvent Moore's *Miranda* rights.

Notably, faced with similar – or even more troubling – circumstances, other courts have easily rejected arguments for suppression under Justice Kennedy's test. *See, e.g.*, *United States v. Jackson*, 608 F.3d 100, 104 (1st Cir.) (holding that a two-stage interrogation passed muster under Justice Kennedy's test where, at the first stage, "the police doubtless were hoping to discover the whereabouts" of a firearm "as swiftly as possible . . . without . . . formal warnings that might chill . . . cooperation"), *cert. denied*, 131 S. Ct. 435 (2010); *United States v. Nunez-Sanchez*, 478 F.3d 663, 668-69 (5th Cir. 2007) (rejecting suppression where the defendant was asked both pre- and post-*Miranda* about his immigration status on the ground that there was "no evidence of a deliberate attempt to employ a two-step strategy"); *United States v. Kiam*, 432 F.3d 524, 532-33 (3d Cir. 2006) (similar); *United States v. Hernandez-Hernandez*, 384 F.3d 562, 566-67 (8th Cir. 2004) (similar).

In arguing to the contrary for suppression, Moore relies heavily on this Court's decision in *Capers*. Capers was a postal service employee who was suspected of stealing cash and money orders from the mail. 627 F.3d at 472.

Postal inspectors set up a sting operation to catch him in the act. They planted two envelopes with cash and money orders and placed a device in one of the envelopes that would trigger an alarm when it was opened. *Id.* Capers and another postal employee, Juan Lopez, took the envelopes into a trailer, and the alarm went off. *Id.*

Postal inspectors handcuffed Capers and, without advising him of his *Miranda* rights, questioned him about the envelopes. *Id.* at 472-73. Inspector Hoti, who led the questioning, asked about the contents of the envelopes, and Capers indicated that he had taken the money orders from the envelopes and that they were in his pocket. *Id.* at 473. Inspector Hoti testified that he did not advise Capers of his *Miranda* rights because he was concerned about tracking down the money from one of the envelopes and because he needed to decide whether Lopez was involved so he could decide whether to release him. *Id.* at 473, 480. Approximately 1 ½ hours later, Inspector Hoti questioned Capers again, but this time after advising Capers of his *Miranda* rights. *Id.* at 473. Although Hoti did not specifically ask Capers about his earlier statements, he did question him about the events of that night. *Id.*

Capers moved to suppress his statements, and this Court affirmed the suppression of all of his statements. Most significantly, this Court concluded that Inspector Hoti deliberately chose to withhold *Miranda* warnings in an attempt to circumvent *Miranda*. This Court rejected the reasons Hoti gave for this decision – to protect evanescent evidence and to decide whether to release another suspect – as illegitimate and lacking credibility. In short, this Court

found that Hoti's expressed reasons were mere pre-text for a deliberate two-step strategy to deprive Capers of his *Miranda* rights. *Id.* at 480-82. This Court also noted that there was considerable overlap between the two interrogations, both in terms of the identity of the interrogating officers and in terms of the statements made by Capers. Indeed, this Court noted that the second session, as in *Seibert*, "was 'essentially a cross-examination using information gained during the first round of interrogation.'" *Id.* at 484 (quoting *Carter*, 489 F.3d at 536).

On all relevant points, *Capers* is distinguishable. *First*, in *Capers*, Inspector Hoti had time to plan and prepare for his initial conversation with Capers after the sting, planning that presumably would include consideration of the need to advise him of his *Miranda* rights. By contrast, Sergeant Pine was not involved in the investigation into Moore's conduct and was invited into the conversation by Moore himself. *Second*, Sergeant Pine testified that he inadvertently failed to give *Miranda* warnings because he was concerned about public safety. Thus, unlike Inspector Hoti in *Capers*, Sergeant Pine offered a facially legitimate reason for his failure, and there was no testimony or evidence to suggest that his actions were anything other than an inadvertent mistake. *See also supra* at 23-27. *Finally*, unlike in *Capers* where the same inspector conducted both interrogations, here, Sergeant Pine conducted the first interrogation but was not involved in the second interrogation at all. Agent Campanell participated in both conversations but was a minor player in both settings. JA54. Moreover, there was very little

overlap in the topics covered during the two sessions. JA46-48, 49-50, 54. In sum, although *Capers* involved the suppression of post-*Miranda* statements, it does not help Moore.

Because the police did not deliberately employ a two-step interrogation procedure to undermine Moore's *Miranda* rights, the Supreme Court's *Elstad* standard, with its focus on voluntariness, controls. *See Carter*, 489 F.3d at 536. Moore does not argue that his statements were involuntary, and thus he has waived any argument on that point. *See McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005) (arguments not presented in appellant's opening brief are waived). In any event, he would be hard-pressed to make such an argument. Here, the district court found that Moore's *Miranda* waiver and subsequent statements were voluntary. JA54-55. Moreover, the record reflects that Moore's pre-warning statements were voluntary as well. There is no suggestion that the first statement was coerced; indeed, Moore himself initiated the conversation. Accordingly, on this record, Moore's statements, both before and after the *Miranda* warnings, were voluntary.

II. The Sixth Amendment does not require suppression of Moore's post-arrest statements because his right to counsel had not attached on the state charges, much less on the uncharged and legally distinct federal offense.

A. Governing law and standard of review

1. The Sixth Amendment right to counsel

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., Amend. VI. This guarantee entitles a criminal defendant to a lawyer for "critical" stages of the criminal prosecution. *United States v. Wade*, 388 U.S. 218, 224 (1967). As the Supreme Court has repeatedly noted, "'the core purpose of the [Sixth Amendment] counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)).

A criminal defendant is only entitled to a lawyer, *i.e.*, the Sixth Amendment right to a lawyer "attaches," at the *commencement* of a criminal prosecution. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198 (2008). The Supreme Court has repeatedly explained that a criminal prosecution commences at "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or

arraignment." *Id.* (internal quotations omitted)); *see also Fellers v. United States*, 540 U.S. 519, 523 (2004) (same); *Rommy*, 506 F.3d at 135 ("The right [to counsel] attaches at the initiation of adversary judicial proceedings, such as arraignment or the filing of an indictment . . . .") (quotation omitted)). It is at this point – the "initiation of adversary judicial criminal proceedings" – that "'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery*, 554 U.S. at 198 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

In *Rothgery*, the Supreme Court reaffirmed the long-standing rule that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." 554 U.S. at 194 (citing *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) and *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986)). There, the County argued that under Texas law, the right to counsel *did not* attach at the initial proceeding before a judge because a prosecutor was not aware of, or involved in, that proceeding. Without a prosecutor, the County reasoned, there was nobody who could commit the state to prosecution of the offense. *Id.* at 198-99.

The Supreme Court rejected this proposed extension of its standard to require participation of a prosecutor. The

Court noted that the County's proposed standard was inconsistent with its precedent, and also, significantly, inconsistent with the overwhelming majority practice of the states. *Id.* at 199-205. Specifically, the Court noted that, at that time, the Federal Government, and 43 states – including Connecticut – "take the first step toward appointing counsel 'before, at, or just after initial appearance.'" *Id.* at 204 (quoting Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae*). Further, the Court held that even if State law required the involvement of a prosecutor to commit the State to prosecution of an offense, this "allocation[] of power among state officials" did not control the *federal* question of whether the County had committed to prosecute a defendant. *Id.* at 207. And "under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty." *Id.* After rejecting the County's remaining arguments, the Court concluded by summarizing the repeated teachings of its Sixth Amendment cases: "[a]ttachment occurs when the government has used the judicial machinery to signal a commitment to prosecute . . . ." *Id.* at 211.

In deciding whether the right to counsel may attach *before* an initial court appearance, courts have focused their attention on whether the government has used the "judicial machinery" to initiate criminal prosecution, and in so doing, have regularly rejected attempts to extend the right to counsel to a time earlier than this appearance.

Thus, in *United States v. Gouveia*, 467 U.S. 180 (1984), the Supreme Court held that the right to counsel had not attached for prison inmates who were suspected of murder and placed in administrative detention during the pre-indictment investigation into the murders. Similarly, in *United States v. Duvall*, 537 F.2d 15, 22 (2d Cir. 1976) (Friendly, J.), this Court held that the Sixth Amendment right to counsel does not attach upon an arrest on a complaint. This holding is consistent with the holding of every other federal circuit to consider the question. *See United States v. Boskic*, 545 F.3d 69, 83 (1st Cir. 2008) (collecting cases); *Gouveia*, 467 U.S. at 190 ("[W]e have never held that the right to counsel attaches at the time of arrest."). *See also Neighbour v. Covert*, 68 F.3d 1508, 1511 (2d Cir. 1995) (per curiam) (no right to counsel at pre-arrest police questioning);*United States v. Holmes*, 44 F.3d 1150, 1159-60 (2d Cir. 1995) (during investigation of unindicted target, no Sixth Amendment right to counsel).

Because the Sixth Amendment right to counsel arises upon the initiation of adversary judicial proceedings, the Supreme Court has recognized that the right is "offense specific." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). The right "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced . . . ." *Id.*

In *McNeil*, the Court concluded that the police did not violate the Sixth Amendment right to counsel of a defendant McNeil who was already charged, incarcerated, and represented by counsel for an armed robbery in one town in Wisconsin, when they questioned McNeil about

factually unrelated offenses involving a murder, attempted murder, and burglary in another town in Wisconsin. *Id.* at 176.

The Supreme re-affirmed that the Sixth Amendment right to counsel is offense specific in *Texas v. Cobb*, 532 U.S. 162 (2001). The defendant in *Cobb* burglarized his neighbor's home, murdered two of the occupants after he was discovered, and then buried their bodies in the woods. He was charged and initially confessed to the burglary but denied knowledge about the missing people. When the police later acquired additional evidence linking Cobb to the murders, the police conducted non-custodial questioning of Cobb again, and this time he confessed to the murders. Cobb was convicted for capital murder, and he challenged on appeal the admissibility of his murder confession, claiming that the confession was obtained in violation of his Sixth Amendment right to counsel because he was represented by counsel for the burglary charge, and the murders were factually related to the burglary. *Id.* at 164-66.

The Supreme Court rejected this argument. The Court concluded that the right to counsel is "offense specific," and there is no "exception for crimes that are 'factually related' to a charged offense." *Id.* at 168. "[I]t is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses." *Id.* at 171-72.

The *Cobb* Court further explained the meaning of an "offense" for Sixth Amendment purposes, equating it with the meaning of the term as used for purposes of the Double Jeopardy Clause of the Fifth Amendment. "We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Id.* at 173.

Drawing a further parallel between the Sixth Amendment and Double Jeopardy analysis, the Court noted that "we could just as easily describe the Sixth Amendment as 'prosecution specific,' insofar as it prevents discussion [between the police and a defendant] of charged offenses as well as offenses that, under *Blockburger [v. United States*, 284 U.S. 299 (1932)], could not be the subject of a later prosecution." *Id.* at 173 & n.3. "And, indeed, the text of the Sixth Amendment confines its scope to 'all criminal *prosecutions*.'" *Id.* (emphasis in original).

2. The standard of review

The standard of review is set forth in Part I.A.2., *supra*.

B. Discussion

Moore argues that his post-arrest statements to the police, along with the gun, must be suppressed because his statements were made in violation of his Sixth Amendment right to counsel. As the district court properly found, this argument fails for two reasons. *First*, when Moore made statements to the police, his Sixth

Amendment right to counsel had not attached on *any* charges because the State had not filed an information at his arraignment. *Second*, even if his right to counsel had attached on the state charges, the Sixth Amendment does not require suppression of statements because the federal charge is not the "same offense" as any state charge within the meaning of *Blockburger v. United States*.

1. Moore's right to counsel on the state charges had not attached at the time of his statements to the police because the State had not yet filed an information at his arraignment.

When Moore spoke to the police on September 24, 2002, his right to counsel on the state charges had not attached. In short, the State had not yet "used the judicial machinery to signal a commitment to prosecute." *Rothgery*, 554 U.S. at 211.

Connecticut follows the majority rule that the Sixth Amendment right to counsel attaches at "the first formal proceeding." *Rothgery*, 554 U.S. at 203; *see also id.* at 204 & n.14 (identifying Connecticut as a jurisdiction that appoints counsel "before, at or just after initial appearance," and citing Conn. Gen. Stat. § 54-1b, Conn. Super. Ct. Crim. Rules §§ 37-1, 37-3, and 37-6, and *State v. Pierre*, 890 A.2d 474, 507 (Conn. 2006)). In other words, as relevant here, the right to counsel attaches in a Connecticut criminal case with the charging of a defendant through the filing of an information at the time of arraignment. *Pierre*, 890 A.2d at 507.

The Connecticut Supreme Court's decision in *State v. Pierre* is based on facts directly analogous to the facts here. In that case, the Connecticut Supreme Court described Connecticut practice and procedure and then proceeded to address the precise question at issue here, namely "whether the signing of an information in conjunction with obtaining an arrest warrant constitutes the commencement of adversarial judicial proceedings within the meaning of the sixth amendment." *Pierre*, 890 A.2d at 507.[8]

In *Pierre*, after discovery of a dead body, the police investigation eventually focused on the defendant, Gregory Pierre. *Id.* at 504. On May 13, 1999, an assistant state's attorney reviewed and signed an arrest warrant application for Pierre, with an attached information. A state court judge signed the warrant that same day. *Id.* One month later, on June 14, 1999, the defendant was arrested in New York on the Connecticut warrant. *Id.* After his arrest, while in police custody, he provided an eleven-page written statement to the police about the victim's murder, and made additional oral statements to the police. *Id.* He

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[8] Although this Court looks to state law for an understanding of state procedure, *see, e.g.*, *Moore v. Illinois*, 434 U.S. 220, 228-29 (1977); *Meadows v. Kuhlmann*, 812 F.2d 72, 77 (2d Cir. 1987), the "constitutional significance" of a particular procedure is a matter of federal law, *Rothgery*, 554 U.S. at 199 n.9. *See also id.* at 207 ("[W]hat counts as a commitment to prosecute is an issue of federal law unaffected by allocations of power among state officials under a State's law . . . .").

was arraigned in Connecticut on June 25, 1999, "at which point the arrest warrant with the attached signed information also was filed with the court." *Id.* at 505.

Pierre moved to suppress his post-arrest written and oral statements to the police, arguing that his Sixth Amendment right to counsel attached when the State signed the information on May 13, 1999, one month before his arrest. *Id.* at 504, 505. The trial court denied Pierre's motions, holding that an arrest pursuant to a warrant is not the commencement of formal legal proceedings. *Id.*

The Connecticut Supreme Court affirmed. That court held that the *signing* of the information did not trigger prosecution. "Rather, it is the state's decision to move forward with the prosecution of the crimes charged in the information document, by arraigning the suspect and filing the information with the court, that signifies the state's commitment to prosecute as well as the initiation of the adversary judicial proceedings that trigger a defendant's right to counsel under the sixth amendment." *Id.* at 507. As the court noted, "the arrest warrant and information are prepared largely without the defendant's knowledge and it is not until the defendant is formally charged in open court at arraignment that he enters a plea, is faced with an adversarial judicial process, and the prosecution begins." *Id.*

Further, the court reviewed the Connecticut rules and procedures governing warrants and informations and concluded that "the signing of an information does not necessarily represent a commitment by the state to

prosecute the defendant. Instead, it may be more accurately considered a prelude to a criminal prosecution, subject to amendment or cancellation as necessary, rather than the initiation of an adversarial judicial proceeding in its own right." *Id.* at 508. Thus, the court concluded that "the defendant's constitutional right to counsel did not attach upon the signing of the information, but when the information was acted upon by the state and filed at the defendant's arraignment." *Id.* The court noted that "[i]t is at this point in the process that the 'prosecutorial forces of organized society' aligned against the defendant and the defendant actually found himself 'immersed in the intricacies of substantive and procedural criminal law,' thus warranting protection under the sixth amendment." *Id.* (quoting *Kirby*, 406 U.S. at 689).

This holding is fully consistent with cases interpreting when the Sixth Amendment right to counsel attaches in an analogous federal context. Specifically, the procedure described by the *Pierre* court – the submission of an information to a judge in support of an arrest warrant – is directly analogous to the filing of a complaint in support of an arrest warrant in federal court, an event that this Court – and every federal appeals court to consider it – has held does not trigger attachment of the Sixth Amendment right to counsel. *See Duvall*, 537 F.2d at 22; *Boskic*, 545 F.3d at 83 (collecting cases).

In the federal system, a complaint functions principally as the basis for an application for an arrest warrant, a process that "does not involve the appearance of the defendant before a judicial officer." *Boskic*, 545 F.3d at

83. Moreover, because the complaint functions merely as a precursor to an arrest warrant, it "does not move the case from the investigative phase to the point at which the defendant 'finds himself faced with the prosecutorial forces of organized society.'" *Id.* (quoting *Kirby*, 406 U.S. at 689). Similarly, the signed information submitted to the judge in *Pierre* did not require the defendant to appear before a judicial officer. At that time, it functioned merely as a precursor to the arrest warrant. *See Pierre*, 890 A.2d at 508 (describing information submitted with arrest warrant as "a prelude to a criminal prosecution"). In light of the similarities between the signed information in *Pierre* and the filed complaint in *Duvall*, it is hardly surprising that both courts found that the Sixth Amendment right to counsel had not attached at that juncture.

The facts of this case are analogous to the facts in *Pierre*. Here, as in *Pierre*, a state prosecutor signed an information and submitted it to a state court judge in support of an arrest warrant. *See Pierre*, 890 A.2d at 504; JA42-43. After Moore was arrested, as in *Pierre*, he made incriminating statements to the police. *Pierre*, 890 A.2d at 504-505; JA44-50. And after those statements, as in *Pierre*, Moore was arraigned. *Pierre*, 890 A.2d at 505; JA50, 56. Accordingly, as in *Pierre*, Moore's Sixth Amendment right to counsel did not attach until the information was filed in court at his arraignment. *Pierre*, 890 A.2d at 507.

Moore agrees that *Pierre* controls, but contends that it supports *his* argument because, according to Moore, in this

case, unlike in *Pierre*, the information was *filed* with the application for the arrest warrant.[9] Thus, according to Moore, under the authority of *Pierre*, his right to counsel attached before his arrest at the *filing* of the information with *the signing of the arrest warrant*.

Moore's argument fails because the record does not show that the information was *filed* before his arrest. Indeed, the district court found that the information was merely "presented" to a state court judge with the arrest warrant application on September 23. JA42-43. *Compare Pierre*, 890 A.2d at 504 ("[T]he Connecticut state police submitted an arrest warrant application with an attached information for the defendant, which was reviewed and signed by both an assistant state's attorney and a judge of the Superior Court."). And although the district court did not expressly state that the information was filed at the time of arraignment, that was the clear implication of its holding, in reliance on *Pierre*, that the defendant's right to counsel did not attach until the "information [was] filed with the court at the time of the defendant's arraignment." JA56 (describing *Pierre*).

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[9] There is no question, as Moore notes, that the government had originally assumed that Moore's right to counsel on the state charges attached with the submission of the information in support of the arrest warrant application, but as the district court acknowledged, the government re-considered its position after *Pierre*. *See also Pierre*, 890 A.2d at 506 n.15 & 507 (noting that question was open until *Pierre* decision itself and that that court's past decisions could be read as offering "inconsistent guidance in this area").

Moore points to no evidence in the record in support of his claim that the information was filed before his arrest, much less any evidence demonstrating that the district court's finding to the contrary was clearly erroneous. Accordingly, Moore's argument based on *Pierre* fails.

Moore raises two other arguments in support of his attachment claim, neither of which is persuasive. *First*, he argues that a Connecticut "information" shares several characteristics with a federal indictment, and thus an information should be treated like the return of an indictment for Sixth Amendment purposes. The fact that a Connecticut information shares certain characteristics with a federal indictment is hardly surprising because Connecticut does not have a grand jury system so all criminal prosecutions proceed by way of information. As the *Pierre* court explained, however, the information serves different purposes at different times. When submitted in support of an arrest warrant, it is merely an investigatory tool; it is not until the information is *filed* at the time of arraignment that a defendant faces an "adversarial judicial process[] and the prosecution begins." *Pierre*, 890 A.2d at 507. It is only at that time, in other words, that the state has used "the judicial machinery to signal a commitment to prosecute." *Rothgery*, 554 U.S. at 211.

Second, Moore suggests that the facts here are analogous to the relevant facts in *United States v. Mills*, 412 F.3d 325 (2d Cir. 2005), in which this Court affirmed the suppression of statements made after an information had been "issued," but before the defendant was arraigned.

Id. at 328. Of course, this Court's decision did not resolve the "attachment" issue because, on appeal, the government did not contest the district court's conclusion that the right to counsel had attached on the state charges. *Id.* at 328; *see also Pierre*, 890 A.2d at 508 n.16 (noting this Court's decision in *Mills* but finding the issue still open in light of the government's concession in that case). And the district court's decision in *Mills* was hardly a model of clarity on the topic. Indeed, it is difficult to understand the precise sequence of events from the district court's interchangeable use of the terms "filed," "issued," and "signed," and thus it is also difficult to discern at what point the court determined the right to counsel had attached. *See Pierre*, 890 A.2d at 508-509 (describing *Mills* opinion). In any event, to the extent the *Mills* district court held that the right to counsel attached with the mere signing of an information, that holding was expressly rejected by *Pierre*. *See id.* at 509.

In sum, when Moore spoke to the police after his arrest, his Sixth Amendment right to counsel had not attached. Although a state court judge had issued an arrest warrant based in part on a signed information, the State had not yet filed an information at Moore's arraignment and thus had not used "the judicial machinery to signal a commitment to prosecute" Moore. *Rothgery*, 554 U.S. at 211.

2. Even if Moore had a Sixth Amendment right to counsel on his state charges, he had no such right on the separate, uncharged federal offense.

Even if Moore's statements were made after attachment of his right to counsel on the state charges, the Sixth Amendment does not require suppression of those statements, and the gun found based on those statements, in a prosecution on the separate federal charge, for which his right to counsel had *not* attached.

Moore's right to counsel had not attached on the federal charge at issue here because at the time of his statements, there was no federal charge pending. Indeed, Moore was not indicted on the federal charge until nine months after his statements to the police. It is of no consequence that there were allegedly pending state charges concerning the same factual subject matter at the time Moore was interviewed by the police. That is because, as the Supreme Court has repeatedly held, the Sixth Amendment right to counsel is offense specific. *Cobb*, 532 U.S. at 168. In other words, the Sixth Amendment only precludes the use of statements made outside the presence of counsel with respect to offenses as to which the right has attached, including offenses that would be considered the same offense under the familiar *Blockburger* test. *Id.* at 173 & n.3.

Here, the district court found – and defense counsel acknowledges, *see* Defendant's Br. at 40-41 – that the state and federal charges were not the same under

Blockburger. JA57. That conclusion is indisputably correct. In federal court, Moore was charged with violating 18 U.S.C. § 922(g), which requires proof that the defendant had a prior felony conviction. This element was not an element of any of the state charges. The closest analogous state charge was for criminal use of a firearm under Conn. Gen. Stat. § 53a-216. That statute requires proof that the defendant use, or threaten to use, a firearm in the commission of a felony, an element not required by the federal statute.[10] In short, because the charges are different, Moore's right to counsel did not attach on his federal offense until his indictment in 2003, nine months after his statements to the police. Thus, the Sixth Amendment does not require suppression of Moore's post-arrest statements in a trial on the federal charge.

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[10] The government also notes that under the *Blockburger* test, "two identical offenses are *not* the 'same offense' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 89, 92 (1985). The government acknowledges that *Mills* rejected the application of the dual sovereignty doctrine in the right to counsel context and that that decision is controlling on the Court at this time. *See Mills*, 412 F.3d at 330. The government respectfully suggests that *Mills* was wrongly decided, however, and raises the issue now to preserve it for later review. *See, e.g.*, *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002) (holding that a Sixth Amendment violation in a state case does not bar use of the defendant's statements in a subsequent, related federal case); *United States v. Coker*, 433 F.3d 39, 44-45 (1st Cir. 2005) (same).

Moore attempts to get around this conclusion by focusing his attention on the sentencing guidelines. According to Moore, because the guidelines are "an integral component of the federal charge," and because his guidelines range was increased by four levels based on his use of a firearm in connection with a felony offense, *see* U.S.S.G. § 2K2.1(b)(6), the state charge should be considered a lesser included offense of the federal charge. Defendant's Br. at 41-42.

This argument is fundamentally flawed. The defendant cites no authority for this novel interpretation of the *Blockburger* test, and for good reason. The *Blockburger* test focuses on a comparison of the *elements* of the relevant offenses, not on the factors that may be considered by a judge at sentencing. *Blockburger*, 284 U.S. at 304.

Moreover, Moore's argument reflects a fundamental misunderstanding of the role of the sentencing guidelines in federal sentencing. Moore claims that "in order for [him] to be subjected to the punishment that was imposed upon him in federal court, the government was required to prove (or, in this case, the defense was required to admit), that Mr. Moore . . . had possessed the firearm in connection with another felony offense." Defendant's Br. at 41. But this is not true. Based on the offense for which the defendant was convicted, and under the facts as admitted by the defendant at his plea colloquy, he was

subject to a sentence of up to ten years.[11] To be sure, the government had to prove by a preponderance of the evidence (or the defendant had to admit) that he had used the firearm in connection with another felony offense to increase his guidelines offense level by four levels, but the guidelines range was only one factor among the § 3553(a) factors at issue in sentencing. And using those factors, the district court could have imposed the same sentence – or indeed, any substantively reasonable sentence within the statutory sentencing range – even if the government did not prove that he had used a firearm in connection with a felony offense.[12]

The other significant problem with the defendant's argument is that it effectively eliminates the Supreme Court's holding that the Sixth Amendment is offense specific. Moore argues that any factor that could effect the

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[11] When Moore pleaded guilty, the parties assumed that he would qualify for the enhanced penalties under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and thus face a sentence of between fifteen years and life in prison. JA61 (plea agreement). By the time of sentencing, however, changes in the law prevented the government from proving he was an armed career criminal, and thus Moore faced a maximum sentence of ten years' imprisonment. *See* JA70.

[12] Moore's case itself is a good example of this principle. The district court imposed a sentence *above* the final guidelines range (and yet still within the statutory sentencing range) based on its consideration of various aggravating factors under § 3553(a). *See* JA70 (judgment setting forth reasons for above guidelines sentence).

federal sentencing guidelines range should be considered part of the offense for purposes of the *Blockburger* analysis. But for offenses that are factually related, given the guidelines' directive that courts consider relevant conduct in selecting the guidelines range, U.S.S.G. § 1B1.3, it will almost always be the case that facts underlying elements of a different statute could be taken into account by the guidelines. And even if a particular fact would not increase a defendant's guidelines range, after *United States v. Booker*, 543 U.S. 220 (2005), that fact could still be used to increase the defendant's sentence under § 3553(a). In other words, because all of the elements of a separate offense could impact the defendant's federal sentence through various provisions of the guidelines or through consideration of the § 3553(a) factors, there would be no way to say that any factually related state offense is not the same as (or a lesser included offense of) any federal offense. The holding of *Cobb* would be rendered meaningless.

Moore's *pro se* brief raises two additional arguments, but neither warrants reversal. *First*, Moore seems to argue that because the questioning on September 24 focused on the state charges, for which his right to counsel had already allegedly attached, and not on the federal charges, his Sixth Amendment rights were violated. Moore *Pro Se* Br. at 9-13. The short answer to this argument is that it mis-understands the Sixth Amendment.[13] The Supreme

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[13] In addition, this argument seems to rest on the premise that the police violated his Sixth Amendment rights at the time (continued...)

Court has repeatedly held the Sixth Amendment is "offense specific." *Cobb*, 532 U.S. at 164. In reiterating this holding in *Cobb*, the Supreme Court took pains to reject a theory that had been accepted by a number of lower courts that, if the charged and uncharged offenses were "factually related," then the Sixth Amendment protection applicable to the charged offense also covers the uncharged conduct. *Id.* at 168. The Court derided such a test as being inherently vague and creating the type of uncertainty that would frustrate legitimate police investigations of uncharged crimes. "Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether." *Id.* at 174.

Because the right to counsel is offense specific, inculpatory statements as to charged crimes, for which the right to counsel has attached, would be inadmissible in a trial of those crimes, while at the same time,

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[13] (...continued)
of their questioning. But there is no "violation" of the Sixth Amendment right to counsel simply because police engage in post-attachment questioning of the accused without a valid waiver of counsel. Rather a Sixth Amendment violation does not occur unless the resulting information is used against the defendant at trial. As the Supreme Court wrote in *Massiah v. United States*, a defendant is "denied the basic protections of th[e] [Sixth Amendment] guarantee *when there [i]s used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. 201, 206 (1964) (emphasis added).

"[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached," would be "admissible at a trial of those offenses." *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985).

As applied in this case, these principles make clear that, where evidence of other uncharged crimes is obtained, it is admissible in a later trial of those charges, even if it might not be admissible at the trial of the charges that were pending at the time. *See Moulton*, 474 U.S. at 179-80 & n.16. Here, Moore's request that the evidence be suppressed notwithstanding that the federal and state charges are not the same is a thinly-veiled attempt to resurrect the discarded theory that the Sixth Amendment applies to offenses that are "factually related" to the charged offenses. The Supreme Court squarely rejected the "factually related" theory of Sixth Amendment protection in no uncertain terms in *Cobb*, and the rationale for jettisoning it there applies equally here: Suppression here would have the deleterious effect of preventing police from pursuing their fundamental responsibility of protecting the public as well as unduly restricting the societal interest in having law enforcement officers thoroughly investigate uncharged crimes.

Finally, Moore's *pro se* brief suggests that this Court's decisions in *Mills* and *United States v. Worjloh*, 546 F.3d 104 (2d Cir. 2008) (per curiam), *cert. denied*, 130 S. Ct. 3434 (2010), require reversal. Neither case, however, helps Moore. In *Mills*, this Court held that the Sixth Amendment precluded the use of statements in a *federal* trial made after the defendant's right to counsel had

attached on identical *state* charges, even though the federal charges had not been pending at the time the statements were made. 412 F.3d at 328, 330. In that case, however, there was no dispute that the state and federal offenses at issue required proof of identical elements and thus were the "same offense" under *Blockburger*. The *Mills* Court merely rejected application of the dual sovereignty doctrine, usually applicable in the *Blockburger* analysis, and held that because the federal and state offenses were identical, the Sixth Amendment precluded use of the statements in the federal trial. *Id.* at 330. Here, by contrast, even assuming *Mills* was correctly decided, there is no colorable argument – much less a concession by the government as there was in *Mills* – that the offenses are the "same offense" under *Blockburger*.

Worjloh limited the application of *Mills*. In *Worjloh*, the defendant was arrested and indicted on state charges, and ten months later, was arrested on federal charges arising out of a longstanding federal investigation into separate but related conduct. 546 F.3d at 106-107. The defendant made statements after his arrest and subsequently moved to suppress those statements in his federal case. This Court affirmed the district court's denial of the suppression motion, and in so doing, rejected the defendant's argument that *Mills* required suppression. *Id.* at 108-109. The *Worjloh* Court noted that in *Mills*, the government had conceded that the state's interrogation of the defendant had violated his Sixth Amendment rights on the state charges and held that "information obtained by state officials was not admissible in the subsequent federal prosecution because 'Sixth Amendment violations are

offense specific and, consequently, *evidence obtained in violation of the Sixth Amendment* is not admissible in subsequent prosecutions for the "same offense."'" *Id.* at 108 (quoting *Mills*, 412 F.3d at 330).

The *Worjloh* case was different because the federal prosecutors there, unlike in *Mills*, were not trying to offer evidence obtained by the state in violation of the defendant's right to counsel; they were only seeking to introduce statements made in the federal investigation, an investigation that was independent of the state arrest. Accordingly, "because the federal interrogation was not conducted in violation of the Sixth Amendment and the questioning of Worjloh at issue was done exclusively by federal agents, there [was] no need to consider whether the state and federal prosecutions arose from the 'same offense.'" *Id.* at 109. After reaching this conclusion, the *Worjloh* Court went on to state that the *Mills* holding "is limited to situations in which federal prosecutors seek to admit evidence obtained by state and local prosecutors in violation of the Sixth Amendment." *Id.*

In short, after *Worjloh*, it is only when evidence is obtained by state prosecutors in violation of the Sixth Amendment that the Sixth Amendment precludes admission of those statements in a subsequent federal prosecution for the *same offense*. This gloss on *Mills*, of course, did not expand its holding to apply to cases such as this one where the offenses at issue are not the "same offense." Aside from the fact that any such holding by the *Worjloh* Court would be dicta, such a holding would be directly contrary to Supreme Court precedent, described in

detail above, that the Sixth Amendment only precludes the use of statements made without the assistance of counsel in subsequent prosecutions for the same offense.

In sum, even if Moore's Sixth Amendment right to counsel had attached with respect to the state charges at the time of his statements, it had not yet attached with respect to the separate and distinct federal charge.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Certification per Fed. R. App. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,702 words, exclusive of the Table of Contents, Table of Authorities and this Certification.

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