Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Interrogations

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**Missouri v. Seibert, 542 U.S. 600** (2004)

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*Police officers in Rolla, Missouri, suspected Patrice Siebert was responsible for a fire that killed Donald Rector, a teenager living with the Siebert family. Following a standard police protocol, Seibert was arrested and questioned, but not given* Miranda *warnings. When Siebert confessed to the crime, the police gave her* Miranda *warnings and then asked her to repeat her confession. Siebert complied with this request. Siebert's attorney at trial moved that both her prewarning and postwarning confessions be excluded, but the trial court excluded only the prewarning confession. The jury found Siebert guilty of second-degree murder. The Supreme Court of Missouri overturned the conviction on the ground that admitting the postwarning confession violated the Fifth and Fourteenth Amendments. Missouri appealed to the Supreme Court of the United States.*

*The American Civil Liberties Union and an organization of former prosecutors, judges, and law enforcement officials filed amicus briefs urging the Supreme Court to declare unconstitutional the common police practice of eliciting a confession, giving* Miranda *warnings and then asking the suspect to repeat the confession. The brief of former prosecutors, judges and law enforcement officials asserted,*

> *We have worked within* Miranda*'s warning requirement on a daily basis and have found it not to be a barrier to effective law enforcement and prosecution. We urge the Court not to overrule a critical component of* Miranda *– that a suspect* ***must*** *be warned of his or her rights prior to custodial questioning. We believe that a statement should be excluded from evidence when it is derived from an objectively unreasonable failure to provide* Miranda *warnings.*

*The United States filed an amicus brief urging justices to permit this common police practice. The brief for the Bush administration stated,*

> *Creation of a new category of police practices – such as the intentional failure to give warnings – that falls short of coercion yet still may taint the voluntariness of a second statement, is not justified by Fifth Amendment principles. . . . A defendant may make a knowing and voluntary decision to speak after receiving* Miranda *warnings; the officer's prior intentional elicitation of unwarned but voluntary statements does not invalidate that choice.*

*The Supreme Court by a 5–4 vote declared that the police in Rolla violated Siebert's constitutional rights. Justice Souter's plurality opinion declared that police could not adopt practices designed to make* Miranda *warnings ineffective. All the opinions in* Siebert *discussed a previous precedent,* Oregon v. Elstad *(1985). What are the most important factual similarities and differences between* Elstad *and* Siebert*? What differences did the plurality emphasize? What differences did the dissent emphasize? Who had the better of the argument?*

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join.

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[T]his Court in [*Miranda v. Arizona* (1966)] concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored," *Miranda*

conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver. To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent.

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The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda.* Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation . . . At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court." . . .

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

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The threshold issue when interrogators question first and warn later is whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. . . .

There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. 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, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon v. Elstad,* (1985), but the argument disfigures that case. In *Elstad,* the police went to the young suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a "brief stop in the living room," where the officer said he "felt" the young man was involved in a burglary. The suspect acknowledged he had been at the scene. This Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest and described the incident as having "none of the earmarks of coercion." The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother." At the outset of a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession. In holding the second statement admissible and voluntary, *Elstad* rejected the "cat out of the bag" theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda,* determined the character of the later, warned confession, on the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated." Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.

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. . . The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It 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. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

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Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible. . . .

JUSTICE BREYER, concurring.

In my view, the following simple rule should apply to the two-stage interrogation technique: Courts should exclude the "fruits" of the initial unwarned questioning unless the failure to warn was in good faith. . . .

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JUSTICE KENNEDY concurring in the judgment.

The interrogation technique used in this case is designed to circumvent *Miranda v. Arizona* (1966). . . .

The *Miranda* rule has become an important and accepted element of the criminal justice system. At the same time, not every violation of the rule requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction. . . .

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In my view, *Elstad* was correct in its reasoning and its result. . . . 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. In light of these realities 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. . . .

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Further, the interrogating officer here relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. This shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." . . .

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The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

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The plurality's rejection of an intent-based test is also, in my view, correct. Freedom from compulsion lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we focus our analysis on the way in which suspects experience interrogation. . . .

Thoughts kept inside a police officer's head cannot affect that experience. . . . A suspect who experienced exactly the same interrogation as Seibert, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give *Miranda* warnings, would not experience the interrogation any differently. . . .

Because the isolated fact of Officer Hanrahan's intent could not have had any bearing on Seibert's "capacity to comprehend and knowingly relinquish" her right to remain silent, it could not by itself affect the voluntariness of her confession. Moreover, recognizing an exception to *Elstad* for intentional violations would require focusing constitutional analysis on a police officer's subjective intent, an unattractive proposition that we all but uniformly avoid. In general, "we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" . . .

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I would analyze the two-step interrogation procedure under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*. *Elstad* commands that if Seibert's first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances: . . . . Although I would leave this analysis for the Missouri courts to conduct on remand, I note that, unlike the officers in *Elstad*, Officer Hanrahan referred to Seibert's unwarned statement during the second part of the interrogation when she made a statement at odds with her unwarned confession. Such a tactic may bear on the voluntariness inquiry.

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