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2-1060 Illinois v. Lidster

Ruling Below: (Ill., 202 Ill. 2d 1, 779 N.E.2d 855, 72 Crim. L. Rep. 79)

Roadblock at which vehicles were stopped, without suspicion, for purpose of finding leads about crime that had occurred in same area approximately one week earlier violated Fourth Amendment as interpreted in Indianapolis, Ind. v. Edmond, 531 U.S. 32, 69 U.S.L.W. 4009 (2000); evidence of drunk driving discovered in stop at roadblock must be suppressed.

Question Presented: Does Indianapolis, Ind. v. Edmond prohibit police officers from conducting checkpoint organized to investigate prior offense, at which checkpoint law enforcement officers briefly stopped all oncoming motorists to hand out flyers about – and look for witnesses to – offense, under circumstances in which checkpoint was conducted exactly one week after – and at approximately same time of day as – offense, and checkpoint otherwise met reasonableness standard articulated in Brown v. Texas, 443 U.S. 47 (1979)?


Supreme Court of Illinois

Decided October 18, 2002.

[Excerpt; some footnotes and citations omitted]

Justice FREEMAN delivered the opinion of the court:

Following a bench trial, the circuit court of Du Page County convicted defendant of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 1996)). The appellate court found that the roadblock where the police arrested defendant did not comply with the constitutional standards set forth in City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Accordingly, the appellate court reversed defendant's conviction. 319 Ill.App.3d 825, 254 Ill.Dec. 379, 747 N.E.2d 419. We granted the State's petition for leave to appeal (177 Ill.2d R. 315(a)), and allowed the Illinois Association of Chiefs of Police to file an amicus curiae brief in support of the State. For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

On August 30, 1997, the Lombard police department set up a roadblock on North Avenue in Lombard, Illinois. A police officer stopped defendant at the roadblock and directed him to a side street where another police officer had defendant perform several field-sobriety tests. Defendant failed a number of the tests and was taken into custody.

Defendant was subsequently charged with the offense of driving under the influence of
alcohol. He filed a motion to quash his arrest and suppress evidence. At the hearing on the motion, Detective Ray Vasil testified that Lieutenant Glennon, third in command at the Lombard police department, authorized the roadblock. The purpose of the roadblock was to obtain information from motorists regarding a hit-and-run accident that took place one week earlier, at the same location, and at the same time of day. In particular, the police wanted information regarding a Ford Bronco or full-sized pickup truck implicated in the accident.

The Lombard police department has a general order regarding the use of roadblocks. The order, however, does not contain guidelines regarding the use of roadblocks to obtain information from crime witnesses. The roadblock at issue was not videotaped. Further, the police did not publicize the roadblock.

Between 6 and 12 police vehicles participated in the roadblock. Detective Vasil wore an orange reflective vest with the word "Police" on it, and stood between the eastbound lanes of North Avenue, 15 feet from the roadblock. A line of cars formed at the roadblock. As each vehicle pulled up to Detective Vasil, he handed a flyer to the driver of the vehicle requesting information regarding the accident. Because defendant's Mazda minivan almost hit him, Detective Vasil requested defendant's driver's license and insurance card. Detective Vasil smelled alcohol on defendant's breath and noticed that defendant's speech was slurred. Detective Vasil directed defendant to a side street where Detective Roy Newton had defendant perform several sobriety tests.

The trial court denied defendant's motion.

At defendant's subsequent bench trial, Detective Newton testified that he was assigned to the corner of North Avenue and Craig. His duties were to ensure that drivers did not skirt the roadblock and to provide help to the officers in the event they experienced any problems with the vehicles or drivers stopped at the roadblock. The officers at the roadblock directed several cars, including defendant's vehicle, to Detective Newton's location. At Detective Newton's request, defendant produced a driver's license and insurance information. Detective Newton then had defendant perform several sobriety tests and placed defendant under arrest.

The court found defendant guilty of driving under the influence of alcohol. The court sentenced defendant to one year of conditional discharge and required that defendant participate in counseling, complete 14 days in the "Sheriff's Work Alternative Program," and pay a fine of $200.

ANALYSIS

As noted above, the appellate court relied on 

Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333, in finding the roadblock at issue invalid. In Edmond, the United States Supreme Court invalidated checkpoints set up by the police on Indianapolis roads in an effort to interdict unlawful drugs. Initially, the Court observed:

"The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an 'irreducible' component of reasonableness [citation], we have recognized only limited circumstances in which the usual rule does not apply....

We have also upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens, Martinez- Fuerte, [428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) ], and at a sobriety checkpoint aimed at removing drunk drivers from the road, Michigan Dept. of State Police v. Sitz, 496 U.S. 444[, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).] Edmond, 531 U.S. at 37,
The Edmond Court concluded that the Indianapolis checkpoints were invalid, stating:

"The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance 'the general interest in crime control,' [citation]. We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."

Edmond, 531 U.S. at 44, 121 S.Ct. at 455, 148 L.Ed.2d at 345.

In the present case, the appellate court held the roadblock at issue invalid under Edmond. The appellate court noted "that the roadblock's ostensible purpose was to seek evidence of 'ordinary criminal wrongdoing.'" 319 Ill.App.3d at 828, 254 Ill.Dec. 379, 747 N.E.2d 419. The court concluded "[t]his is the type of routine investigative work that the police must do every day and does not justify the extraordinary means chosen to further the investigation." 319 Ill.App.3d at 828, 254 Ill.Dec. 379, 747 N.E.2d 419.

The State asserts that Edmond is distinguishable because the roadblock at issue had a specific purpose of assisting the authorities in solving a crime that had already been committed and was known to the police. Thus, police efforts were not directed at general crime control. Unlike in Edmond, the Lombard police department did not seek to interrogate and inspect motorists to ferret out evidence that the motorists themselves had committed crime that was as yet unknown to police. Defendant was only subjected to further investigation because he narrowly missed hitting an officer in the area where vehicles were stopped.

The State's interpretation of Edmond is incorrect. First, as the Court reaffirmed in Edmond, the general rule is that "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." Edmond, 531 U.S. at 37, 121 S.Ct. at 451, 148 L.Ed.2d at 340. Certainly the Lombard roadblock does not fall within the scope of the limited exceptions heretofore approved by the Supreme Court.

Second, the Court in Edmond was keenly aware that an exception for roadblocks "designed primarily to serve the general interest in crime control" would abrogate the general rule requiring individualized suspicion of wrongdoing. See 4 W. LaFave, Search & Seizure § 9.6 (3d ed. Supp.2002). Accordingly, the Court drew a bright line that when the primary purpose of a roadblock is general crime control, the roadblock is unconstitutional. The Court explained:

"Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." Edmond, 531 U.S. at 42, 121 S.Ct. at 454, 148 L.Ed.2d at 344.

In the case at bar, the State ignores the concerns expressed by the Court in Edmond. In spite of the clear admonishment in Edmond against the use of roadblocks to advance "the general interest in crime control," the State requests that we allow a roadblock for precisely that purpose.

Third, the State finds a distinction between
gathering information leading to the arrest and prosecution of a motorist as the perpetrator of a crime, and gathering information from a motorist leading to the identification of another motorist as the perpetrator of a crime. According to the State, gathering information leading to the arrest and prosecution of a motorist as the perpetrator of a crime is a part of general crime control. However, the State maintains that gathering information from a motorist leading to the identification of another motorist as the perpetrator of a crime is not considered a part of general crime control. Taking the State's reasoning a step further, a police investigation tool such as canvassing a neighborhood to find identification witnesses to a crime is not considered to be a part of general crime control. In the State's view, crime control involves arresting the perpetrator directly; it does not involve gathering information leading to the arrest of the perpetrator. We must reject this contention. In investigating and solving any crime, police efforts are directed at general crime control. This holds true whether the police happen upon the perpetrator of the crime at the roadblock or obtain information from a roadblock detainee identifying the perpetrator of the crime.

Lastly, an exception for informational roadblocks has the potential to make roadblocks "a routine part of American life." Edmond, 531 U.S. at 42, 121 S.Ct. at 454, 148 L.Ed.2d at 344. In 2000, 870 murders, 49,652 assaults, 25,168 robberies, 77,947 burglaries, 306,805 thefts, 55,222 motor vehicle thefts, and 2,899 arsons were known by police to have been committed in Illinois. J. Fitch, 2001 Illinois Statistical Abstract 764 (16th ed.2001). [...] Should the police have been allowed to set up roadblocks to obtain information from potential witnesses for each murder? What of a robbery, an aggravated criminal sexual assault, an arson or any other serious crime? According to the State, for a period of at least a week after each crime, police could set up roadblocks with the specific purpose of making inquiries of persons who were possibly witnesses to a crime. The troubling specter then arises that the streets of Cook County, or at least the streets of Chicago, would be adorned with roadblocks, an outcome clearly unacceptable under Edmond.

Amicus suggests that exigent circumstances justified the use of the roadblock. Amicus asserts that police needed to act quickly to contact possible witnesses or else risk losing vital information. The Court in Edmond left open the possibility that an emergency may justify a law enforcement roadblock. The Court explained:

"Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. [...]"

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The State and amicus fail in their attempts to distinguish Edmond. Edmond clarifies that "[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, * * * stops can only be justified by some quantum of individualized suspicion." Edmond, 531 U.S. at 47, 121 S.Ct. at 457, 148 L.Ed.2d at 347.

CONCLUSION

The laws of this state require that a motorist remain at the scene of an accident. In the present case, the motorist left the scene of the accident. The police set up a roadblock to obtain information regarding the identity of the motorist. The goals of the police in doing so are laudable.

This court is sympathetic to the efforts of the police in identifying the motorist involved in the accident. Sympathy, however, does not justify the roadblock at issue. As the Supreme Court
observed in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973):

"The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[…]

The right of an individual to be free from unreasonable searches and seizures is an indispensable freedom, not a mere luxury. It cannot give way in the face of a temporary need for the police to obtain information regarding the identity of the motorist at issue. As the protector of the constitutional rights of all citizens of this state, this court is commanded to draw a "line at roadblocks designed primarily to serve the general interest in crime control." *Edmond*, 531 U.S. at 42, 121 S.Ct. at 454, 148 L.Ed.2d at 344. Without such a line, the fourth amendment will do little to prevent intrusive searches and seizures from becoming a routine part of American life. *Edmond*, 531 U.S. at 42, 121 S.Ct. at 454, 148 L.Ed.2d at 344.

The judgment of the appellate court is affirmed.

Justice THOMAS, dissenting:

The majority has misconstrued *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), by reading it to prohibit the type of roadblock at issue here. *Edmond* is factually distinguishable, and its language does not condemn the strictly informational roadblock instituted by the Lombard police department in this case. Additionally, I believe that the majority erroneously creates a *per se* rule that roadblocks involving police canvassing for information about a specific, known crime are constitutionally impermissible. Consequently, the majority abrogates the balancing test of *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), which is normally applied in roadblock cases. For all of these reasons and as more fully explained below, I respectfully dissent.

I. *Edmond* Is Distinguishable and Is Not Determinative

In *Edmond*, the Court considered the constitutionality of an Indianapolis checkpoint program that had as its primary purpose the interdiction of illegal drugs. In contrast to the 10 to 15 second stops in the present case, which were conducted for the sole purpose of handing out an informational flyer, the total duration of the stops in *Edmond* lasted between two and five minutes. Moreover, unlike the roadblock here, drivers in *Edmond* were asked to produce a license and registration while an officer looked for signs of impairment. The officer also conducted an open-view examination of the vehicle from the outside. Meanwhile, a narcotics-detection dog was walked around the outside of the stopped vehicle. Thus, the nature, purpose, and scope of the roadblocks were completely different in the two cases.

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In concluding that a checkpoint designed primarily to catch drug offenders and interdict illegal narcotics violates the fourth amendment, the *Edmond* Court stated the following:

"We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." (Emphasis added.) *Edmond*, 531 U.S. at 44,
121 S.Ct. at 455, 148 L.Ed.2d at 345.

...I believe that the majority improperly relies on the first sentence in the above-quoted passage from Edmond and disregards the second sentence, which, modifying the first, plainly proscribes checkpoints for the purpose of exposing unknown crimes to the police . . . Instead, I would find that absent either exigent circumstances or a sufficient relationship to highway safety or border concerns, Edmond categorically prohibits only checkpoints whose primary purpose lies in discovering that the subjects of the seizure have committed some crime (Edmond, 531 U.S. at 43-44, 121 S.Ct. at 455, 148 L.Ed.2d at 345). . . .

Here, the roadblock at issue had a specific purpose of assisting the authorities in solving a crime that had already been committed and was known to the police. Thus, police efforts were not directed at general crime control within the meaning of Edmond. Unlike in Edmond, the Lombard police department did not seek to interrogate and inspect motorists to ferret out evidence that the motorists themselves had committed a crime that was as yet unknown to police. The present defendant was subjected to investigation only because his erratic driving nearly resulted in his collision with an officer in the area where vehicles were stopped for purposes of handing out flyers. Once the officers witnessed defendant's erratic driving, they clearly had reasonable suspicion to detain defendant for further inquiry. See People v. Sorenson, 196 Ill.2d 425, 433, 256 Ill.Dec. 836, 752 N.E.2d 1078 (2001); People v. Brodack, 296 Ill.App.3d 71, 74, 230 Ill.Dec. 540, 693 N.E.2d 1291 (1998). As the Court in Edmond recognized, its holding was not meant to "impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose." Edmond, 531 U.S. at 48, 121 S.Ct. at 457, 148 L.Ed.2d at 347.

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The conclusion that Edmond does not compel the result reached by the majority here is supported by the recent decision of the Supreme Court of Virginia in Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (2001), which is the only other reported case decided in the aftermath of Edmond to assess the validity of a roadblock established with the hope of discovering witnesses to a specific, known crime, as opposed to a roadblock established to discover evidence of crime in general. There, police set up a roadblock . . . in the hopes of discovering witnesses to a brutal murder that occurred in a nearby house between the same hours on September 20-21, 1998.

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In holding that the roadblock did not violate the fourth amendment, the Supreme Court of Virginia first considered and weighed the factors enunciated in Brown. Burns, 261 Va. at 322, 541 S.E.2d at 883.

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Similarly, I would find that the roadblock in the present case did not violate fourth amendment principles. At the time police set up the roadblock, the offender remained at large with his identity unknown. Thus, he continued to pose a safety risk to others on the road. Moreover, even if the perpetrator was not an immediate threat, the same exigent circumstances found to exist in Burns were present here because police had to move relatively quickly to canvass the area at the appropriate time or risk losing information about the crime.

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II. Application of the Brown Balancing Test

Given my conclusion that Edmond does not categorically prohibit the type of roadblock at issue in the present case, I believe that it is incumbent upon this court to assess the validity of the roadblock in relation to the factors noted in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). It is well settled that a vehicle stop at a roadblock or highway checkpoint effectuates a seizure within the meaning of the fourth amendment. Edmond, 531 U.S. at 40, 121 S.Ct. at 453, 148 L.Ed.2d at 342; People v. Bartley, 109 Ill.2d 273, 280, 93 Ill.Dec. 347, 486 N.E.2d 880 (1985). However, a roadblock where individuals are stopped without probable cause or individualized suspicion is not a per se violation of the fourth amendment; the question of whether a roadblock violates the fourth amendment is one of reasonableness, requiring the weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Brown, 443 U.S. at 50-51, 99 S.Ct. at 2640, 61 L.Ed.2d at 361-62; Bartley, 109 Ill.2d at 280, 93 Ill.Dec. 347, 486 N.E.2d 880.

The factors set forth in Brown require a court to balance the State's asserted interest for the roadblock against the "objective" and "subjective" intrusion on the motorist. Prouse, 440 U.S. at 656, 99 S.Ct. at 1397, 59 L.Ed.2d at 669; Martinez-Fuerte, 428 U.S. at 558, 96 S.Ct. at 3083, 49 L.Ed.2d at 1128. The objective intrusion is measured by such factors as the length of the stop, the nature of the questioning, and whether a search is conducted; the subjective intrusion relates to the concern, fright, or annoyance on the part of the motorist. Bartley, 109 Ill.2d at 282, 93 Ill.Dec. 347, 486 N.E.2d 880.

Application of the Brown factors to the instant case leads to the conclusion that the roadblock established by the Lombard police department passed constitutional standards. The department made the decision to set up the roadblock because of a fatal hit-and-run accident that had been committed in the precise area of the roadblock, and officials did not know the identity of the offender responsible for the crime. That the perpetrator was still at large was indeed a matter of grave public concern, and the roadblock advanced that concern by aiding in the investigation of the crime. Moreover, the timing of the roadblock, exactly one week after the crime at approximately the same time of day, was purposely designed to stop motorists who might routinely travel that route at the end of their work shift and thus was narrowly tailored for maximum effectiveness. Thus, I would find that the State's interest in the roadblock was sufficient to outweigh a minimal intrusion on the motorist.

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Likewise, the subjective nature of the intrusion was minimal. The record indicates that a high-ranking lieutenant in the police department called the meeting to inform the officers that they were to participate in the roadblock. Vehicles were stopped in a systematic and preestablished manner – all eastbound traffic was stopped and this was not a roving patrol. Although an officer participating in the roadblock admitted that there were no written guidelines for "informational roadblocks" contained in the department's written guidelines, the department did have guidelines for roadblocks generally, and there is no indication that the officers in the field did not follow the preestablished procedure for this particular roadblock. Although the roadblock itself may not have been publicized in advance, it is clear that the basis for the roadblock had been well-publicized, which would have likely minimized any apprehension motorists may have otherwise
experienced upon encountering it. Finally, any anxiety motorists may have felt was dissipated by the official nature of the operation – there was a large number of emergency vehicles present with flashing lights and officers clad in orange police vests.

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IV. Conclusion

For the foregoing reasons, I would reverse the judgment of the appellate court and reinstate defendant's conviction. Accordingly, I respectfully dissent.

Justices FITZGERALD and GARMAN join in this dissent.
The U.S. Supreme Court agreed Monday to hear a case out of Lombard that tests the constitutionality of police roadblocks as part of an investigation.

Police in the west suburb put up a roadblock in 1997 and briefly stopped every car that passed, passing out leaflets seeking information about a fatal hit-and-run.

Robert Lidster, who police say nearly hit an officer as he drove up to the checkpoint, was charged with drunken driving and convicted.

But the Illinois Supreme Court later threw out Lidster's conviction, ruling that the roadblock amounted to an unconstitutional search of drivers and that police could not stop drivers at random every time they needed tips about a crime. The U.S. Supreme Court agreed to hear an appeal of that decision filed by the Illinois attorney general's office on behalf of the Lombard police.

"When the police are conducting an investigation into a crime, they should not be barred from taking action when another crime is committed in front of them," Melissa Merz, a spokeswoman for Attorney General Lisa Madigan, said Monday.

At issue in the Lombard case is whether police can set up checkpoints to seek information about a recent crime – then arrest people for drunken driving or other wrongdoing.

Lidster's attorney, G. Joseph Weller, told justices that, if the police wanted to seek information, they could have used other ways, such as radio and television stations.

Lombard Police Chief Ray Byrne said Monday that police checkpoints are useful in solving crimes and he wants the court to uphold a conviction he sees as the result "of just good police work."

"It was a crime-solving technique that was very unobtrusive," said Byrne, who was not with the Lombard department at the time of Lidster's arrest.

The police set up the roadblock that caught Lidster at the same spot and time of day that the hit-and-run took place. They hoped to find someone who used the route and had seen the collision. Police stopped each car for 10 to 15 seconds--long enough to mention the crash and hand out a flier asking for help.

The nation's high court already has said police officers can set up sobriety checkpoints to randomly detect drunken drivers and border roadblocks to intercept undocumented immigrants. But the justices ruled in 2000 that random roadblocks intended for drug searches are an unreasonable invasion of privacy under the constitution.
Lombard Case Could Affect Police Roadblocks

Chicago Daily Herald

October 19, 2002

Robert Sanchez Daily Herald Staff Writer

Law enforcement authorities said they're troubled by an Illinois Supreme Court ruling Friday that puts strict limits on when they may use roadblocks to stop drivers.

In a 4-3 decision, the court threw out the DUI conviction of Robert Lidster, who was arrested in 1997 at a roadblock Lombard police set up to seek information about an earlier hit-and-run.

The court upheld a lower court ruling that the roadblock amounted to an unconstitutional search of drivers.

Police cannot randomly stop drivers every time they need tips about a crime, the court held.

"The right of an individual to be free from unreasonable searches and seizures is an indispensable freedom, not a mere luxury," Justice Charles Freeman wrote. "It cannot give way in the face of a temporary need for the police to obtain information."

DuPage County state's attorney's office officials who prosecuted Lidster said they were troubled by the ruling.

First Assistant State's Attorney John Kinsella said police were not randomly searching cars or questioning drivers.

"They were literally handing out fliers asking motorists if they had any information relative to this crime," Kinsella said. "To suggest that police can't do that is very troublesome. That's going to be a concern to all police."

Jim Sotos, an attorney for the Illinois Association of Chiefs of Police, also said the ruling "eliminates a useful police tool that enlists the support of the citizenry in solving crimes."

"It appears the court gave short shrift to the public's interest in solving crimes," Itasca attorney Sotos said.

Police have a tough enough time solving crimes without further restrictions, he said.

"When you take away a tool which allows them to enlist the support of everyday drivers, that just makes their job that much more difficult," he said.

Carol Stream attorney Elaine Sofferman, who argued the case in the Supreme Court on Lidster's behalf, disagreed.

"I don't think it's going to make much difference," she said. "Police still have so many other methods to investigate crimes."

Sofferman said roadblocks are legitimate if used in emergencies or specific circumstances like checking for drunken drivers or searching for a fleeing suspect. She said Lombard's roadblock didn't meet those standards.
"You can't set up a roadblock every time there is a crime," she said. "There are other, more effective ways to catch criminals."

Kinsella said he agrees it's improper to set up roadblocks as random dragnets.

"Here we had a specific crime that occurred at a specific location," he said. "The informational roadblock was set up at a time and location to investigate that crime.

"This was not a general investigation of criminal activity where we are trying to sort out if any of the motorists were committing a crime."

DuPage prosecutors are still considering an appeal to the U.S. Supreme Court.

Lidster, at the time a Bartlett resident, nearly hit a detective with his minivan in 1997 after police handed him a flier requesting information about a hit-and-run accident that killed a 70-year-old bicyclist on North Avenue.

Suspecting he'd been drinking, police stopped Lidster, who failed field sobriety tests.

But those tests - the only evidence against Lidster - were thrown out last year by the 2nd District Appellate Court.

- Daily Herald news services contributed to this report.
In this post 9/11 America, filled as it is with terrorists, clouds of war and even snipers, the tension between our constitutionally guaranteed civil liberties and the government's efforts to provide security are as great, or greater, than they have ever been in the history of our nation. Nowhere is that tension greater than at the interface of our Fourth Amendment rights to be free from unreasonable search and seizure and law enforcement efforts to address the public's demands for the prevention and the solving of crimes.

One type of police-citizen encounter that can definitely be expected to become far more common is the roadblock. In the days and weeks after the Sept. 11 attacks, the use of blockades in and around New York and Washington was well publicized. Many emergency plans to deal with terrorist threats call for their use, as the recent incident with the three Islamic medical students terrorists in Florida made clear.

In just the last few weeks, the nation watched as the police set up dozens of roadblocks to try and capture the Washington-area sniper.

On Oct. 18, a divided Illinois Supreme Court rendered an important decision in a case dealing with one type of roadblock that led to a confrontation between individual rights and law enforcement efforts.

Today's column, the first of two on this case, looks at the majority ruling in People v. Robert Lidster, No. 91522 (Oct. 18). The second installment on Friday will examine the dissent.

The Lidster majority held that a police roadblock set up to attempt to find witnesses to a hit-and-run accident had violated the Fourth Amendment guarantee against unreasonable search and seizures. In doing so, the court not only provided an extremely thorough and thoughtful discussion of the U.S. Supreme Court's landmark decision in City of Indianapolis v. Edmond, 531 U.S. 32, 148 L.Ed.2d 333, 121 S.Ct. 447 (2000), which also dealt with roadblocks, but also made an important statement about where this court may strike the balance between the Fourth Amendment's guarantees of individual liberty and law enforcement's needs.

In August 1997, Lombard police set up a roadblock on a busy street in the western suburb. The roadblock was intended to find potential witnesses to a fatal hit-and-run accident that had occurred one week earlier at the location. At the roadblock, instituted at the same time of day as the accident, all motorists were stopped by a number of police and funneled past other officers standing in the road. The motorists were handed a flier that solicited information regarding the accident.

When one passing motorist, defendant Lidster, was stopped by the police, a officer requested to see his driver's license and insurance card. The officer later claimed that the defendant had almost struck him with his car as he pulled up to the roadblock. Additionally, after he approached
the defendant, the officer said he detected both
the smell of alcohol and slurred speech.

The police officer directed the defendant to
proceed to a nearby side street, where other
police officers were stationed. On the side
street, the police ordered him to perform several
field sobriety tests. The defendant apparently
failed and was charged with driving under the
influence of alcohol.

Before trial, the defendant moved to suppress
the police seizure of his person and the
subsequent fruits of that seizure as having been
obtained in violation of his Fourth Amendment
rights.

The trial court denied the motion, and the
defendant was found guilty after a bench trial.
He was sentenced to one year of conditional
discharge, a fine and 14 days of community
service.

On appeal, the Appellate Court reversed the
denial of Lidster's motion to suppress. The court
relied heavily on the U.S. Supreme Court's
decision in Edmund and found that the
roadblock the Lombard police employed was
unconstitutional. (That Appellate Court opinion
was discussed in this column last year.)

The state petitioned for leave to appeal to the
Illinois Supreme Court, which accepted the case
and allowed the Illinois Association of Chiefs of
Police to file an amicus curiae brief in support
of the state.

The majority affirmed the Appellate Court's
finding that the roadblock was unconstitutional.

The majority began its analysis with a thorough
discussion of Edmund. The Edmund court found
that check points set up by the police on roads in
and around Indianapolis in an effort to interdict
unlawful drugs violated the Fourth Amendment.
Specifically, the Edmund court rooted its
analysis on the Fourth Amendment's
requirement that searches and seizures be
reasonable and that a search or seizure is
ordinarily considered unreasonable in the
absence of individualized suspicion of
wrongdoing.

The Edmund court recognized that in a few
very narrowly limited circumstances the
government is allowed to conduct searches or
seizures of citizens without individualized
suspicion.

For example, the Edmund court noted, brief
seizures of motorists at fixed border checkpoints
designed to intercept illegal aliens had been
approved as an exception to the general rule. In
addition, Edmund acknowledged that sobriety
checkpoints aimed at removing drunken drivers
from the road have also been upheld. These
narrow exceptions were allowed because the
roadblocks in each instance were designed to
meet important and "special needs beyond the
normal need for law enforcement" -- and thus
did not significantly undermine the liberty
interest the Fourth Amendment seeks to protect.

Turning to the Indianapolis police roadblocks
designed to find illegal drugs, Edmund ruled
that such a roadblock was not designed to serve
any "special need" beyond the normal
investigative purposes of law enforcement.
Indeed, the Edmund court made it clear that the
Supreme Court had "never approved any
checkpoint program whose primary purpose was
to detect evidence of ordinary criminal
wrongdoing," such as those employed by the
Indianapolis police. The Edmund court
concluded its analysis by stating that the Fourth
Amendment drew a line at "roadblocks designed
primarily to serve the general interest in crime
control."

A failure to draw a line prohibiting such
roadblocks, the high court said, would have the
potential to permit such governmental intrusions
on the liberty of the citizens to "become a routine part of American life," a result that the Fourth Amendment could not allow.

Applying the lessons of Edmond to the Lombard roadblock, the Illinois Supreme Court majority agreed with the Appellate Court and found that "the roadblock's ostensible purpose was to seek evidence of ordinary criminal wrongdoing." As such, the court held that the seizure and search of the defendant by the Lombard police violated the Fourth Amendment prohibition against searches not based on individualized suspicion of wrongdoing. The Lombard roadblock did not fall within the recognized limited exceptions to that rule, the majority said.

The majority proceeded to spend considerable time addressing the arguments raised by the state and the amicus curiae brief.

First, the state asserted that because the Lombard roadblock was designed to find evidence of a specific crime that had already occurred -- the hit-and-run -- as opposed to seeking evidence of possible crimes that might be occurring, and because the roadblock was not designed to seek evidence against the stopped motorists themselves, it did not fall within the roadblock type condemned in Edmond.

The majority rejected this attempted distinction, finding that contrary to the state's assertion, there was no constitutional distinction to be drawn between police seizure and interrogation of citizens seeking evidence against the person seized for unknown possible crimes and police seizure and interrogation of citizens seeking evidence against a third party for a specific crime. The infringement of the seized citizen's right to be free from seizure by the police absent individualized suspicion is the same.

The majority added that the state's attempt to fit the Lombard roadblock into the limited exceptions to the requirement of individualized suspicion misinterpreted Edmond and "ignores the concerns expressed by the court in Edmond." Indeed, the Illinois Supreme Court majority noted that the Edmund court was "keenly aware" that an exception for roadblocks designed primarily to serve the general interest of crime control would abrogate the general rule requiring individualized suspicion of wrongdoing -- and seriously undermine the Fourth Amendment protections.

Such a broad interpretation of the government's right to seize and search citizens would soon have the consequence of turning roadblocks into a "routine part of American life."

In a very striking section of its opinion, the majority provided specific statistics as to the number of crimes of various types, including murders, assaults, robberies, burglaries, thefts, motor vehicle thefts and arsons, that have occurred in the state, Cook County and Chicago during one year, 2000. The opinion is worth reading by every citizen of the State of Illinois if only for the chance to see the truly stunning numbers of crimes being committed around us, on us and by us. The Illinois Supreme Court's purpose, however, in citing the statistics was not to reassure all criminal law practitioners that there is little chance that we will soon see a decline in business but, rather, was to raise what can be fairly termed the "nightmare scenario" that could occur if the state's arguments were accepted. The majority asked the question, Why, if the Lombard roadblock to find the driver in a fatal hit-and-run accident was to be found constitutional, law enforcement agencies around the state could not set up roadblocks to investigate any of the literally thousands upon thousands of crimes that occur every year.

Specifically, the majority noted that according to the state's arguments, "for a period of at least a week after each crime" police could set up roadblocks with a specific purpose of making
inquiries of persons who were possible witnesses to a crime.

The troubling specter then arises that the streets of Chicago "would be adorned with roadblocks, an outcome clearly unacceptable under Edmund." Indeed, in Chicago alone for the year 2000 there were 627 murders and 26,660 assaults. Even if the police limited their use of investigatory roadblocks to the most serious of crimes it is conceivable that there could be a hundred roadblocks a year set up at various places and at various times.

Indeed, it seems that this is the "routine part of American life" that the Edmund court so vigorously stated roadblocks should never become.

The majority also addressed an argument made by the amicus brief. Specifically, the majority rejected the argument that "exigent circumstances" justified the use of the Lombard roadblock. Amicus counsel correctly pointed out that the Edmund court had left open the possibility that emergencies might arise that would allow law enforcement to employ roadblocks even in the absence of individualized suspicion, for instance, to stop an imminent terrorist threat or to prevent a serious criminal from escaping the scene of a crime.

The majority, however, rejected the amicus argument, finding that exigent circumstances simply did not exist in the Lombard situation. The majority noted that there was "no indication" that the motorists being sought from the hit-and-run posed any imminent threat of danger to any local resident or was even still in the vicinity where the roadblock was set up. Additionally, there was no indication that the motorist from the hit-and-run had necessarily been driving recklessly or had been under the influence of alcohol. Thus, the majority found that there were no exigent circumstances present that could justify the Lombard roadblock.

Nonetheless, it is perhaps quite significant that even the majority in Lidster acknowledged that exigent circumstances of a kind that we have all seen much more of post-9/11 may well require this court, like this nation, to further loosen the constraints of the Fourth Amendment on police action. -- Friday: The Dissent

Criminal Law By Patrick J. Cotter Cotter is a partner in the law firm of Arnstein & Lehr, where he concentrates in criminal defense. Cotter and Arnstein partners Patrick A. Tuite and Ronald D. Menaker rotate authorship of this column.
There's a great tension these days between our Fourth Amendment rights to be free from unreasonable search and seizure and law enforcement efforts to fight crime.

On Oct. 18, a divided Illinois Supreme Court rendered an important decision in a case dealing with one crime-fighting measure -- a roadblock Lombard police erected in August 1997 to track down the motorist responsible for a fatal hit-and-run accident in the western suburb.

But the roadblock netted someone else. Robert Lidster was arrested on a drunken driving charge after police shunted him off to the side to check his license and insurance, apparently because he nearly hit one of the officers running the roadblock.

Lidster unsuccessfully moved to suppress the seizure, was found guilty, but won on appeal to the 2d District Appellate Court. The state then took the case to the Supreme Court.

Today's column, the second of two on this case, looks at the dissent in People v. Robert Lidster, No. 91522 (Oct. 18). The first installment on Wednesday examined the majority ruling that the roadblock violated the Fourth Amendment.

In doing so, the majority not only provided an extremely thorough discussion of the U.S. Supreme Court's landmark decision in City of Indianapolis v. Edmond, 531 U.S. 32, 148 L.Ed.2d 333, 121 S.Ct. 447 (2000), but also made an important statement about where this court may strike the balance between the Fourth Amendment's guarantees of individual liberty and law enforcement's needs.

In the dissent, however, three judges of the Supreme Court took issue with the majority's interpretation of Edmund, as well as the analytical approach taken to the entire issue of roadblocks.

The dissent agreed with the state that Edmund was distinguishable from the case at bar in that the nature, purpose and scope of the roadblocks in the two cases were "completely different." The dissent noted that the evidence in the record suggested that the Lombard roadblock stops were far shorter in duration than the stops in Edmund and that the roadblock in Edmund was designed to identify possible criminal activity of which the police had no prior knowledge, unlike the specifically targeted roadblock in Lombard.

The dissent took the position that these distinctions placed the Lombard roadblock closer to the category of roadblocks the U.S. Supreme Court has found to be constitutional, such as border stops and DUI roadblocks.

It is worth noting perhaps that the Lidster
dissenters focused much, if not all, of their analysis on the nature of the police actions involved. While this is, of course, an appropriate inquiry in Fourth Amendment cases, the majority, and the Edmund court, seemed to weigh more heavily the effect of the police actions on the individual citizen.

As to the individual citizen stopped by the roadblock in Lombard, the effect of the police seizure is the same whether the police are seeking information about crime in general or about a specific crime and a specific criminal. Perhaps it is this difference in emphasis -- police motivation versus impact on citizen liberty -- that explains the difference in analyses of the majority and dissent.

The dissent raised several additional arguments, apparently not raised by the state, including that the Lombard roadblock could be seen as a roadblock in the interest of "highway safety" and therefore akin to DUI roadblocks. The dissent noted that language in Edmund seems to contemplate the constitutionality of roadblocks to check for driver licenses. The dissent argued that if a roadblock to check for licenses would be considered constitutional then a roadblock seeking information regarding a "deadly hit-and-run crime" should also be constitutional.

This point by the dissent, however, may be mixing apples and oranges.

The highway safety exception for DUI roadblocks and, possibly for drivers' license checks, are premised on the notion that such roadblocks would not be used to seek evidence of "ordinary criminal wrongdoing" but, rather, as the only practical method of regulating and ensuring legal and safe use of public roads. The far broader, and therefore far more invasive, use of roadblocks as an additional tool for the investigation of ordinary criminal activities is what the Edmund court said the Fourth Amendment forbids.

Seeking evidence of a fatal hit-and-run would seem to be, by any reasonable definition, well within the concept of ordinary criminal investigation. That roadblocks for both DUI and hit-and-run evidence would be set up on a road and relate to activities on a road does not in and of itself seem logically to bring them under the same category of highway safety nor to render them equally constitutional.

The dissent also discussed a case from the Virginia Supreme Court: Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (2001). A post-Edmund case, the Burns court upheld a police roadblock and distinguished Edmund, noting that the roadblock in the Virginia case was not to investigate "ordinary criminal wrongdoing" but was "specifically designed to investigate a particular murder that had recently occurred in the area where the roadblock was placed."

The dissent certainly seems to be correct that the Virginia Supreme Court accepted the distinction between investigation of "ordinary criminal wrongdoing" and investigation of a particular crime, which the majority of the Illinois high court rejected in Lidster.

The real question, however, is whether the U.S. Supreme Court in Edmund would accept this distinction. The Virginia Supreme Court, as explained by the dissent, seems to have also relied, at least in part, on a notion that the roadblock in the Illinois case was somehow necessitated by an "emergency," a claim similar to one that the Lidster majority specifically rejected.
After having explained why the majority had misunderstood Edmund, the dissent went on to suggest that the proper analysis was to be found in Brown v. Texas, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979). Essentially, the Brown case requires courts reviewing roadblocks to engage in a balancing analysis that places the state's asserted interest in balance against the intrusion on the motorist. Without going through the entire Brown analysis, suffice it to say that the dissent found that had a Brown balancing analysis been conducted in this case, it would have found that the state's interest in the roadblock was sufficient to outweigh what the dissent considered to be the minimal intrusion on citizens.

The dissent did not discuss what, if any, the effect of the Edmund case from 2000 has had on the approach suggested by the Brown case in 1979, nor did it explain why the Supreme Court in Edmund did not rely on Brown.

Finally, the dissent attempted to assuage the majority's concern about a "proliferation of roadblocks" should the Lombard roadblock be found to be constitutional. The dissent suggested that the Lombard roadblock could be upheld on the basis that it was related to a highway crime: the fatal hit-and-run accident; and therefore, such a holding would stand only for the proposition that roadblocks would be allowable in searching for evidence of crimes occurring on the highway. This argument, of course, depends on whether one is persuaded by the dissent's attempt to place the Lombard roadblock into the same category with the sobriety checkpoints.

The dissent also suggested that the majority's "nightmare scenario" of hundreds of roadblocks around the city and state is highly unlikely because "the amount of roadblocks would be limited by the scarce public resources available to the police." Thus, the dissent appears to be making the arguments that even if a ruling upholding the Lombard roadblock might make it constitutional for the police to erect roadblocks in relation to hundreds, if not thousands, of cases, as long as the police do not have enough money and manpower to do so there should be no serious concern on the part of the citizenry.

This rather novel argument, linking as it does the extent of the citizens' freedom from government seizure to the particular level of government resources at any given time, is certainly creative, though unsupported by citation.

The majority in Lidster concluded its opinion by explicitly noting the "constant tension" between the Constitution's protections of the individual versus the exercise of official power. The court was also explicitly sympathetic to law enforcement's need to protect citizens from many threats. However, the Illinois Supreme Court majority made clear that, in its role as the "protector of the constitutional rights of all citizens of this state," it is compelled to draw the line where governmental action violates the Fourth Amendment protections of the individual citizen.

The majority declared that the right of an individual to be free from unreasonable searches and seizures is "an indispensable freedom, not a mere luxury."

There can be little doubt that in the months and years to come this proposition will be put to severe test in numerous cases yet to arise. As those cases come before the Illinois Supreme Court and other courts around this country, the opinion in Lidster will, I believe, loom ever larger. It is therefore
incumbent on every practitioner and judge in this state to not only read Lidster but to seriously consider the issues raised by the case.

Criminal Law By Patrick J. Cotter Cotter is a partner in the law firm of Arnstein & Lehr, where he concentrates in criminal defense. Cotter and Arnstein partners Patrick A. Tuite and Ronald D. Menaker rotate authorship of this column.
A BETTER INTERPRETATION OF "SPECIAL NEEDS" DOCTRINE AFTER EDMOND AND FERGUSON

Yale Law Journal

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Jonathan Kravis

[Excerpt; some footnotes omitted]

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Part I of this Comment summarizes the special needs doctrine as interpreted in Edmond and Ferguson; Part II offers an alternative approach to the doctrine...

In discussing the DNA Act searches, both the Miles and Reynard courts relied on City of Indianapolis v. Edmond and Ferguson v. City of Charleston. In Edmond, the Court struck down Indianapolis's highway checkpoint program, under which randomly stopped cars were visually inspected by officers and sniffed by narcotics-detecting dogs. Unlike highway checkpoints with virtually identical effects upheld in earlier cases, Indianapolis's program was created for the "primary purpose [of detecting] evidence of ordinary criminal wrongdoing." Thus, the Border Patrol could stop cars near the border, and the police could stop motorists for sobriety checks, because in both cases the searches were justified by a primary purpose distinct from "general crime control ends," namely, safeguarding the border and removing drunk drivers from the roads. But because Indianapolis had conceded that its program "unquestionably [had] the primary purpose of interdicting illegal narcotics," the program could not be similarly justified.

In Ferguson, Charleston proved that it had learned from Indianapolis's unwise concession in Edmond. Charleston argued that a public hospital's policy of testing pregnant women for cocaine use had the primary non-law-enforcement purpose of protecting the health of mother and child, and therefore fell within the special needs exception. The Court nevertheless struck down the program, concluding that while the "ultimate goal of the program" may have been to get the women into treatment, the "immediate object of the searches was to generate evidence for law enforcement purposes in order to reach that goal."

How did the Court distinguish the "immediate object of the searches" at issue in Ferguson from the warrantless drug-testing programs upheld in earlier cases? Here again, the Court defined the special needs category by considering the primary purpose to which the government intended

13 Miles, 228 F. Supp. 2d at 1135-38; Reynard, 220 F. Supp. 2d at 1165-68.

to put the results of the search. Each of the earlier programs upheld by the Court was justified by a purpose that did not involve arrest and prosecution: protecting the integrity of the front lines in the war on drugs, gathering reliable data on train accidents caused by substance abuse, or ensuring the safety of high school students. The Charleston policy, by contrast, focused on "the arrest and prosecution" of the drug-abusing mothers.

Taken together, Edmond and Ferguson articulate a kind of evidentiary approach to special needs analysis. In determining whether a warrantless search falls under the special needs exception, the court asks, "What is the primary purpose to which the government intends to put the results of the search?" If the answer is simply, "to generate evidence for law enforcement purposes," then the exception does not apply. If, however, the government can plausibly argue that it needs the search results primarily for something other than criminal prosecution, then the special needs exception applies.

The Miles and Reynard courts faithfully applied this test in their analyses of the constitutionality of the DNA Act searches. In both cases, the government argued that the primary purpose of the searches was to create a more accurate DNA database, which would assist law enforcement in solving past and future crimes and thereby ensure a more accurate criminal justice system. The Miles court concluded that this purpose was "indistinguishable from the government's basic interest in enforcing the law," since the evidence was being used to solve and prosecute crimes. The Reynard court, on the other hand, found that "the creation of a more accurate criminal justice system" was a purpose that went beyond "the normal need for law enforcement."

Thus, the debate between the Miles and Reynard courts over the constitutionality of the DNA Act searches amounted to a semantic disagreement over the meaning of "law enforcement purposes." By focusing their attention on whether the creation of a more accurate criminal justice system is a "law enforcement purpose," both courts ignored many of the central issues pertaining to the reasonableness of the DNA Act searches.

This definitional quandary, moreover, is inevitable under the special needs test as articulated in Edmond and Ferguson. Those cases frame the special needs inquiry in terms of whether the government's primary purpose in obtaining the results of the search is law-enforcement-related. In applying this test, lower courts faced with special needs arguments will have to determine (1) whether a given purpose is non-law-enforcement-related, and (2) if so, whether that is the primary purpose of the search.

But there are several reasons why these questions are not helpful in determining whether warrantless searches are reasonable, which is, after all, the point of the special needs exception. First, there is no reason to believe that searches conducted primarily for non-law-enforcement purposes are categorically more likely to be reasonable than law enforcement searches. The Court has noted, "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of


Second, the distinction between law enforcement and non-law-enforcement purposes is not entirely clear. Most of the warrantless searches upheld under special needs analysis had a law enforcement purpose in the sense that they ultimately led to an arrest and/or criminal prosecution. Conversely, nearly any law enforcement search could also be said to have a non-law-enforcement purpose, since "law enforcement involvement always serves some broader social purpose or objective." Thus, most warrantless searches will have both law enforcement and non-law-enforcement purposes. Edmond and Ferguson suggest that a special needs search is one in which the non-law-enforcement purpose is "primary," but offer little guidance about how to distinguish primary from secondary purposes.

Third, the special needs test suggests that subjective intent is relevant to the reasonableness of the search: "[O]ur special needs . . . cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue." But this approach is inconsistent with the Court's holding in Whren v. United States that an actor's motive does not "invalidate[] objectively justifiable behavior under the

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31 Camara v. Mun. Court, 387 U.S. 523, 530 (1967) (applying the warrant requirement to municipal housing inspections); see also Michigan v. Tyler, 436 U.S. 499, 504 (1978) ("The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime."); William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016, 1017 (1995) ("[M]uch of what the modern state does outside of ordinary criminal investigation intrudes on privacy just as much as the kinds of police conduct that Fourth and Fifth Amendment law forbid.").

...
particularized study of a given car.”
Likewise, suspicionless drug testing of railroad employees immediately after an accident is necessary because the delay required to obtain a warrant would destroy much of the toxicological evidence the government needs to determine whether the accident was drug- or alcohol-related—again, an administrative consideration. And so on.

The administrative interpretation of the special needs doctrine suggests that the Edmond highway checkpoint program was unconstitutional because, with the narrow exception of border searches, highway checkpoints cannot be justified by an administrative special need. Drug couriers are the targets of everyday law enforcement. Their illegal activities are supposed to make them susceptible to apprehension through ordinary law enforcement methods. The suspicionless searches at the highway checkpoints were simply a shortcut around these methods.

The key fact in Ferguson was that law enforcement and city prosecutors were involved in the hospital’s drug-testing program from its inception—deciding who would be tested, how and when the tests would be conducted, and even establishing a chain of custody for the evidence. Unlike the drug tests of railroad employees (upheld in Skinner) or high school students (upheld in Earls), the drug tests in Ferguson were not administered by officials unfamiliar with Fourth Amendment jurisprudence. Nor was there any danger, as in Skinner, that evidence would be lost because of the delay necessary to obtain a warrant, since the women were in the hospital for an extended period to give birth. The involvement of police and prosecutors in the administration of the program has constitutional significance, not because it reveals a primary law enforcement purpose, but rather because it suggests that, as in Edmond, the warrantless search program was nothing more than a police shortcut.

This brief account of the Court’s recent cases suggests that, under the administrative interpretation, the special needs doctrine would likely apply when (1) the search is administered by non-law-enforcement officials; (2) the delay necessary to obtain a warrant would result in the loss of evidence or otherwise frustrate the purpose of the search; or (3) the context in which the search is conducted necessarily requires randomness, for example because of the sheer number of searches involved.

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Police visit to indicted defendant's residence, at which time they informed defendant that they were there pursuant to indictment and that they wanted to discuss defendant's involvement in use and distribution of drugs and his associations with certain persons, but did not warn him of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), did not constitute police interrogation within meaning of Sixth Amendment rule that guarantees assistance of counsel at post-indictment interviews, and thus inculpatory statements defendant made at his home did not taint subsequent inculpatory statements that he voluntarily and knowingly made at jail after being given *Miranda* warnings, signing *Miranda* waiver, and agreeing to speak with officers.

**Question Presented:** (1) Did court of appeals err when it concluded that defendant's Sixth Amendment right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964), was not violated because defendant was not "interrogated" by government agents, when proper standard under Supreme Court precedent is whether government agents "deliberately elicited" information from defendant? (2) Should second statements--preceded by *Miranda* warnings--have been suppressed as fruit of illegal post-indictment interview without presence of counsel, under this court's decisions in *Nix v. Williams*, 467 U.S. 431 (1984), and *Brown v. Illinois*, 422 U.S. 590 (1975)?

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**UNITED STATES of America, Appellee,**

**v.**

**John J. FELLERS, Appellant.**

United States Court of Appeals  
For the Eighth Circuit

Filed: April 8, 2002.  
Rehearing Denied: May 7, 2002.

[Excerpt; some footnotes and citations omitted]

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

I.

On February 24, 2000, two policemen went to Fellers' Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine.

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1The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.
After Fellers’s admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his Miranda rights.

The officers then escorted Fellers to jail, where they advised him of his Miranda rights. Fellers signed a written Miranda waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers’s home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his Miranda rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers’s request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers’s past criminal conduct, the district court raised Fellers’s criminal history category to III and sentenced him to 151 months’ imprisonment.

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his Miranda rights at the jail.

The voluntariness of a confession is a legal inquiry subject to plenary appellate review. United States v. Robinson, 20 F.3d 320, 322 (8th Cir. 1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." Id. (citing Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)) (internal citation omitted).

Contrary to Fellers's contention otherwise, we conclude that Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), renders admissible the statements made by Fellers at the jail. In that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his Miranda rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. Id. at 300-302, 105 S.Ct. 1285. In
holding that the statement given at the sheriff's office was admissible, the Court stated:

It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.


Citing *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. See *Elstad*, 470 U.S. at 314-15, 105 S.Ct. 1285; *Robinson*, 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

III.

Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie*, 257 F.3d 908, 915 (8th Cir.2001).

Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart*, 122 F.3d 625, 627 (8th Cir.1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.' " *United States v. Santana*, 150 F.3d 860, 864 (8th Cir.1998) (quoting *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir.1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana*, 150 F.3d at 864 (citing *United States v. Anderson*, 78 F.3d 420, 422-23 (8th Cir.1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This
testimony was sufficient to support Fellers's conviction.

Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

*United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir.2001) (citing *Lindhorst v. United States*, 658 F.2d 598, 602 (8th Cir.1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

IV.

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana*, 150 F.3d at 864 (quoting *United States v. Moss*, 138 F.3d 742, 745 (8th Cir.1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable to Fellers during the course of the conspiracy was more than 50 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth*, 257 F.3d 871, 878 (8th Cir.2001), it is "proper for the sentencing judge to then make more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Payne*, 940 F.2d 286, 293 (8th Cir.1991). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

Fellers challenges district court's denial of his motion for downward departure. So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable, *United States v. Evidente*, 894 F.2d 1000, 1004-05 (8th Cir.1990), and thus Fellers's challenge
Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." United States v. Alvarez, 235 F.3d 1086, 1090 (8th Cir. 2000) (quoting United States v. Hale, 1 F.3d 691, 694 (8th Cir. 1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. Massiah v. United States, 377 U.S. 201, 205-06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. See id. at 206, 84 S.Ct. 1199. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. See United States v. Henry, 447 U.S. 264, 270-71, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Brewer v. Williams, 430 U.S. 387, 399-401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); cf Rhode Island v. Innis, 446 U.S. 291, 300-02 & 300 n. 4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret ... compromises the voluntariness of a subsequent informed waiver." Id. at 312, 105 S.Ct. 1285. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.
The extent to which police officers may question a suspect without first reciting the now-familiar "Miranda rights" is at issue as the U.S. Supreme Court considers a Nebraska drug case that challenges the 37-year-old ruling.

The original ruling came in an Arizona case.

"I've been a police officer since 1958, before we had Miranda," said Pima County Sheriff Clarence Dupnik, "and for those out there interrogating, there's been a feeling that eventually, interrogation is going to be a lost art. And in my judgment, it has (become one)."

For defense attorneys, the announcement yesterday that the justices will consider an appeal by a man who claims he was tricked into confessing to authorities is good news.

"Normally, they don't accept appeals from defendants," said Tucson attorney Michael L. Piccarreta. "The Supreme Court has traditionally been pro-government. The fact that they've accepted this case bodes well for defendants. They may wish to decide the issue for the whole country as to whether a second Mirandized confession covers the first un-Mirandized confession."

The case the Supreme Court will consider involves John J. Fellers of Lincoln, Neb., who claims he was chatting with officers at his home and because of his ease with one officer, freely admitted being involved with illegal drugs after having some personal problems.

Fellers had been under indictment, but says he was not told by officers that they were there to arrest him and he was not given his Miranda rights, which state that suspects "have the right to remain silent" when questioned by police.

University of Texas law professor Susan Klein said the situation is played out around the country as officers try to elicit a confession from a suspect, catching him off guard, without giving a Miranda warning.

If Fellers wins, Klein said, "Police officers can no longer intentionally circumvent Miranda by questioning first, getting a statement, then saying, 'Oh, by the way, now that you've spilled the beans, here's your rights.'"

If Fellers loses, officers will have more freedom to question suspects without bringing up Miranda, she said.

Fellers maintains that his constitutional rights were violated during the home interview and again when he talked to police at the jail after being advised of his rights. He said the first questioning tainted the later jailhouse interrogation, during which he confessed.

"What this (Miranda) decision and others like it do is make billions of dollars for the legal profession, the legal community," Dupnik said.

"Why should we do things to make guilty people not tell the truth? What Miranda has done is taken a bill of rights and turned it into a
Piccarreta said Miranda is not a burden to authorities.

"Miranda has worked well for everybody for the last 30 years," Piccarreta said. "It hasn't been a burden to police. They know what they have to do.

"One would think it's only common sense that if you have an un-Mirandized statement, that taints any other statement. You don't have to be a lawyer to figure that out. This could be a chance for the court to restate the obvious: That you have to Mirandize the statement of an individual that you are arresting or intend to arrest. That's not too much to ask of cops. They'll do it."

The Miranda warning takes its name from the Supreme Court's ruling in a 1966 case involving the use of a confession in Maricopa County in the prosecution of Ernesto Miranda, who was accused of rape.

Three years ago the Supreme Court reaffirmed in a 7-2 decision that police must warn the people they arrest of their right to remain silent when questioned. Suspects must be told that anything they say may be used against them, they can remain silent or have a lawyer's help while answering, and that a lawyer will be appointed to help them if they cannot afford to hire one.

A decision is expected soon from the Supreme Court in another police interrogation case, this one involving the questioning of a wounded farmworker who was shot repeatedly by police and then subjected to a lengthy interrogation as he awaited medical treatment.

The worker was never told of his Miranda right to remain silent, and he said a sergeant kept questioning him even after he said that he did not want to answer.

The question before the court in this case is whether the worker may sue the officer for damages on grounds that his constitutional right against self-incrimination was violated.

The Associated Press contributed to this report.
Inmate Takes Case to High Court Without Lawyer

Omaha World-Herald

March 11, 2003

Robynn Tysver

Without the help of a lawyer, a former Nebraska man has persuaded the U.S. Supreme Court to review his drug conviction.

John J. Fellers, originally from Lexington, Neb., is serving a 12-year sentence for conspiracy to distribute methamphetamine.

Acting as his own attorney, Fellers argued in briefs filed with the nation's high court that Lincoln police improperly obtained statements from him prior to his arrest and without informing him of his constitutional rights.

This is not the first time an inmate has taken a case to the high court through a "pauper" appeal and without a lawyer, but it is rare for the court to agree to hear such appeals.

Perhaps the best known example is Clarence Gideon, a Florida inmate who filed a handwritten appeal in 1963. That case, Gideon v. Wainwright, established that all Americans accused in criminal cases have the right to legal counsel.

Fellers, 40, is currently in a Minnesota penitentiary. He was convicted in U.S. District Court in Omaha.

"It is clear that once a defendant is indicted, the government may not deliberately elicit information from him without the presence of counsel," Fellers wrote in his appeal. His mother, Beverley Fellers of Lexington, said her son always had good writing skills. She said he has a high school diploma but has never gone to college.

"He has always written, so I'm not surprised at this," she said.

At issue in the Fellers case is when police must notify the accused of their "Miranda rights" - the rights to remain silent and to have an attorney present during police interrogations.

Those rights were established in a landmark 1966 ruling involving the use of a confession in the prosecution of Ernesto Miranda on rape charges.

Fellers said that in February 2000, police went to his home in Lincoln to arrest him for allegedly dealing in drugs. He let the police into his home.

They told him about his indictment on the drug charge, he argued, but they did not tell him they planned to arrest him. Fellers said police told him they wanted to discuss his involvement in a meth ring.

Fellers told police that he had associated with some people in the ring and that he had used meth. He said that at no time during this conversation was he informed of his Miranda rights.

At the police station, Fellers signed a Miranda waiver form and agreed to talk to police. He repeated the statement he made at his home.
Later, in court, Fellers tried to have both statements suppressed.

A magistrate judge initially agreed, saying the police officers used deceptive tactics to prompt the first statement.

However, U.S. District Judge Lyle Strom suppressed Fellers' first statement but allowed the second - the one made at the police station - to be used at his trial.

Fellers was convicted of conspiring to distribute and possess between 50 and 500 grams of methamphetamine.

A three-judge panel of the 8th U.S. Circuit Court of Appeals rejected Fellers' appeal and affirmed his conviction last year.

"The record amply supports the district court's finding that Fellers' jailhouse statements were knowingly and voluntarily made following the administration of the Miranda warning," wrote Chief Judge Roger Wollman.

Fellers then filed his appeal to the U.S. Supreme Court. It is unknown when oral arguments in the case will be scheduled, and it is likely that the high court will appoint a lawyer for Fellers.

In 1988, a Douglas County district judge sentenced Fellers to two to five years in prison for manslaughter in the accidental shooting of a friend during a game with a gun.
The U.S. Supreme Court has agreed to hear a rather unusual case regarding the famous Miranda statement of rights police are supposed to recite to suspects, named after a 1966 case that introduced the requirement. It's the "you have the right to remain silent, anything you say can and will be used against you ..." phrase that is now echoed so often in movie and TV scripts featuring police.

John J. Fellers didn't use an attorney to file his appeal from prison. He even filed as a "pauper" so he wouldn't have to pay court costs. Against the odds, the Supreme Court will hear his case (though it will probably appoint an attorney to argue it for him). It's an interesting case.

Some officers visited him in his home in Lincoln, Neb., and he knew one of them from working together as hospital volunteers. When they asked him, apparently casually and informally, about getting into trouble with drugs after his marriage broke up and his business went south, he talked openly. What Fellers didn't know, and what the officers didn't tell him, was that they already had an indictment in hand charging him with methamphetamine distribution.

After they had elicited incriminating information from him, they arrested him and then read him his rights, after which he told them again what he had told them before. Once in prison, Fellers decided his second confession, which was admitted into evidence at the trial, shouldn't have been, because he never would have made it if he had been informed of his rights and that he was a suspect in the first place. The 8th Circuit Court disagreed, arguing that his second confession was given after the police had followed proper procedures. The Supreme Court could decide otherwise.

"Because he had already been indicted, he not only had the right to remain silent, he had a right to have an attorney present when the police first talked to him," says University of Southern California law professor Erwin Chemerinsky. "I realize it's a close call on the post-Miranda confession, but my fear is that if this conviction is not overturned the police will have strong incentives to find clever ways to circumvent the Miranda requirements."

We're inclined to agree, though our opinion could be modified if new information emerges. But if this practice of questioning first and reading rights later is widespread, as University of Texas law professor Susan Klein contends, it should be curbed.
Dickerson v. United States: Miranda is deemed a Constitutional Rule, but does it Really Matter?

*Arkansas Law Review*

2002

Conor G. Bateman

[Excerpt; footnotes omitted]

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While Brown v. Illinois addressed an issue "at the crossroads of the Fourth and Fifth Amendments," the issue of the "fruits" doctrine and a voluntary confession under the Fifth Amendment was squarely presented to the Supreme Court in the 1985 case of Oregon v. Elstad. In Elstad, an eighteen-year-old male was suspected of burglary, and police detectives went to his house with a warrant for his arrest. When the officers arrived at the defendant's home, one officer took the defendant's mother into the kitchen, while the other officer questioned him in the living room. When the detective asked the defendant if he knew anything about the burglaries, he stated: "Yes, I was there." The defendant was then taken to the police station, where he was read his Miranda rights for the first time and made a full and voluntary statement to the detectives, which he read and signed.

Elstad moved to suppress both of his statements to the police—the statement he made in his living room before he was read his Miranda rights and the full statement made at the police station after he was read his Miranda rights. Elstad asserted that the second statement was "fruit" of the "poisonous tree" that resulted from the detectives failing to deliver the Miranda warnings before his response to the detectives' questions in his living room. The trial judge excluded the first confession because of the detectives' failure to administer the Miranda warnings, but allowed the second confession into evidence. The trial judge based this ruling on the fact that once Elstad was read his Miranda warnings, he was fully apprised of his rights, and the taint was sufficiently purged. Thus, suppression of the first statement was a sufficient remedy to protect Elstad's constitutional rights. The Oregon Court of Appeals reversed Elstad's conviction. It concluded that the "cat was sufficiently out of the bag" after the first confession and that there was an inherently coercive atmosphere during the second confession, which indicated that it, too, should be suppressed.

The Supreme Court disagreed with the ruling of the Oregon Court of Appeals, finding that the court had misconstrued the protective nature of the Miranda decision. The Court noted that Fourth Amendment violations require a different application of the exclusionary rule than do Miranda violations, by stating: "[T]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." The Court found that where a Fourth Amendment violation "taints the confession," "a finding of voluntariness for the
purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted into evidence." Subsequent to this threshold determination, the prosecution would also have to show there was a "sufficient break" in the causal chain to defeat the presumption "that the confession was caused by the Fourth Amendment violation."

The Court differentiated the Miranda exclusionary rule by stating that it "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." The Fifth Amendment prohibits the prosecution from using compelled testimony in its case; the failure to administer Miranda warnings "creates a presumption of compulsion." Ultimately, the Court concluded that the simple failure to administer the Miranda warnings did not per se "taint" the entire investigatory process and render any subsequent, voluntary statements inadmissible. This conclusion was largely based on the fact that the Miranda rules were judicially created and were only "prophylactic standards" intended to safeguard the suspect's Fifth Amendment privilege, and were not a constitutionally mandated standard. The Elstad Court held that while Miranda did require that the first statement be suppressed, the analysis of whether to suppress subsequent statements should turn on whether they were knowingly and voluntarily made. The Court further found that absent deliberate, coercive, or improper tactics used to obtain the first statement, the mere fact that a suspect made an unwarned admission did not warrant a presumption of compulsion.

The following question thus remained after Elstad: Were other types of derivative evidence, such as witness testimony and physical evidence, admissible if there had been a technical violation of the Miranda rules during a suspect's voluntary statements to police?

The Supreme Court has not yet decided this issue. However, numerous lower federal courts, and most commentators, believe that evidence discovered as a result of a tainted confession is admissible, and therefore, the "fruits" of the confession may still be admitted into evidence. The Dickerson case presented a factual issue along these lines. While the Supreme Court's opinion was devoted to the constitutionality of § 3501, the Court may have taken one step closer to making a clear decision on the issue of the voluntary confession as a "poisonous tree." Legal commentators and scholars had been questioning for some time what Miranda's proper place was in modern American jurisprudence. The answer to this question was provided when the Supreme Court rendered its decision in Dickerson v. United States.

IV. ANALYSIS

In Oregon v. Elstad, the Supreme Court held that a failure to administer the Miranda warnings to the defendant required suppression of his first confession. However, the defendant's second confession was not suppressed because it came after the Miranda warnings had been properly administered. As it did in Quarles and Tucker, the Court noted that a Fourth Amendment violation requires a "broad application of the 'fruits' doctrine," whereas a Miranda violation is treated differently from a Fourth Amendment violation. The Court held that Miranda created a "presumption of compulsion," and thus, otherwise voluntary statements required exclusion in light of a failure to give the warnings.

Clearly then, Elstad's first statement to the police required suppression. However, while the Court held that the Miranda presumption was irrebuttable for the prosecution's case in chief, it certainly did "not require that the

328 Elstad, 470 U.S. at 318.
statements and their fruits be discarded as inherently tainted." The Court found that the two rationales for the purpose of the exclusionary rule—trustworthiness and deterrence—would not be served by broadening the scope of the rule when the evidence sought to be excluded was the "fruit" of a Miranda violation. Once the suspect had been given the required Miranda warnings, if he then made voluntary statements to the police, there would be no basis to exclude those statements. When the warnings were administered they would "cure the condition that rendered the unwarned statement inadmissible," and any statements made by the defendant after that would "ordinarily be viewed as an 'act of free will.'"

The Elstad majority directed courts not to establish a rigid rule in determining the voluntariness of confessions. Instead, when there has been a technical violation of Miranda, the Court found that there is no basis to presume that the statement given was the product of coercion, if it was made voluntarily. The Court felt that the purposes of the Miranda decision and the Fifth Amendment were satisfied when the statement obtained in technical violation of Miranda was barred from use against the defendant. However, the Court stated that "[n]o further purpose" would be served by 'imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." Thus, Elstad clearly stands for the proposition that if a voluntary statement was obtained in violation of Miranda then it must be suppressed. However, once the warnings are administered, this seems to be sufficient to purge any taint that may have occurred by the failure to deliver the warnings. Therefore, while the voluntary statements required suppression, it is clear that unless there was some actual coercion present during the interrogation, then the derivative "fruits" could still be admitted into evidence if the taint had been sufficiently purged. The following passage from the Elstad opinion is of primary importance:

It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Prior to Dickerson, this proposition was seemingly based on the fact that Miranda was merely a "prophylactic rule," and that there had been no concrete statement from the Court that Miranda was a constitutional mandate. However, in Dickerson the Court held that Miranda did in fact announce a constitutional rule. Now that the Supreme Court has declared Miranda to be a constitutional rule, it would seem that the failure to adequately deliver the warnings to a suspect in custody would be a "primary illegality." Therefore, failure to deliver the warnings would require suppression of the defendant's statements and all subsequent evidence obtained thereafter. However, upon closer inspection, this may not be the case because of the Supreme Court's differential treatment of Fourth and Fifth Amendment violations.
02-1183 United States v. Patane

Ruling Below: (10th Cir., 304 F.3d 1013, 71 U.S.L.W. 1192, 71 Crim. L. Rep. 675)

Physical evidence discovered through statements elicited in violation of Miranda v. Arizona, 384 U.S. 436 (1966), is subject to Fifth Amendment's exclusionary rule, even if statements were not coerced.

Question Present Does failure to give suspect warnings prescribed by Miranda v. Arizona require suppression of physical evidence derived from suspect's unwarned but voluntary statement?

UNITED STATES of America, Plaintiff-Appellant,

v.

Samuel Francis PATANE, Defendant-Appellee.

United States Court of Appeals
For the Tenth Circuit

Decided September 17, 2002.

[Excerpt; some footnotes and citations omitted.]

EBEL, Circuit Judge.

The Government appeals from the district court's order suppressing the physical evidence against Samuel Francis Patane on charges of gun possession by a felon. The district court based its suppression order on its conclusion that the evidence was insufficient to establish probable cause to arrest Patane. We conclude, contrary to the district court, that probable cause existed to arrest Patane. However, we affirm the district court's order on the alternative ground that the evidence must be suppressed as the physical fruit of a Miranda violation.

I. BACKGROUND

Patane was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court held a suppression hearing at which the police investigation leading to discovery of the gun was detailed. Ruling from the bench a week later, the court granted defendant's motion to suppress. Patane's arrest resulted from the intersection of two essentially independent investigations — one by Colorado Springs Detective Josh Benner regarding Patane's gun possession, and another by Colorado Springs Officer Tracy Fox regarding Patane's violation of a domestic violence restraining order.

[Officer Tracy responded to a complaint by Linda O'Donnell, Patane's ex-girlfriend, that he violated his temporary restraining order by calling her. Detective Benner had been contacted by an ATF agent who had learned Patane possessed a gun.]

Detective Benner and Officer Fox then spoke by phone. Officer Fox said she
planned to arrest Patane for violating the restraining order by calling O'Donnell, and the two arranged to go to Patane's house. Officer Fox knocked on the door while Detective Benner went out back in case Patane attempted to flee. The woman who answered the door summoned Patane. Officer Fox asked Patane to step outside, which he did. She asked him about the hang-up call, and Patane denied having made the call or having contacted O'Donnell in any way. Officer Fox told Patane that he was under arrest and handcuffed him shortly afterward.

With Patane arrested and handcuffed, Detective Benner emerged from the back of the house and approached Patane. Detective Benner began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights. No further *Miranda* warnings were given, a fact which the Government concedes on appeal resulted in a *Miranda* violation. Detective Benner told Patane he was interested in what guns Patane owned. Patane replied, "That .357 is already in police custody." Detective Benner said, "I am more interested in the Glock." Patane said he was not sure he should tell Detective Benner about the Glock pistol because he did not want it taken away. Detective Benner said he needed to know about it, and Patane said, "The Glock is in my bedroom on a shelf, on the wooden shelf." Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner went inside, found the gun where Patane described, and seized it. Detective Benner then told Patane, as the detective later testified, that "I wasn't going to arrest him for the gun at this time because I wanted to do some more investigations." Officer Fox took Patane to the police station and booked him for violating the restraining order.

The next day, Detective Benner met with Patane's probation officer and verified that Patane had a prior felony conviction for drug possession as well as a misdemeanor third degree assault conviction.

II. PROBABLE CAUSE

On appeal, the Government argues that the district court erred in concluding that the police lacked probable cause to arrest Patane for violating the domestic violence restraining order. We agree with the Government.

*** We have articulated the substantive probable cause standard as follows:

An officer has probable cause to arrest if, under the totality of the circumstances, he learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested. Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than mere suspicion. *United States v. Morris*, 247 F.3d 1080, 1088 (10th Cir.2001) (internal quotation marks and citations omitted).

The district court's ruling that no probable cause existed to arrest Patane for violating the domestic violence restraining order was based on its view that domestic disputes often involve "claims and counterclaims ... thrown between people who have separated some sort of an intimate relationship," and therefore that uncorroborated allegations arising from such disputes are "just inadequate" to establish probable cause.

[The district court listed “unexplored avenues of corroboration” to support its]
claim that the police did not have probable cause to arrest Patane.]

We reject any suggestion that victims of domestic violence are unreliable witnesses whose testimony cannot establish probable cause absent independent corroboration. We have stated, "when examining informant evidence used to support a claim of probable cause for a warrantless arrest, the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." 

Easton v. City of Boulder, 776 F.2d 1441, 1449 (10th Cir.1985); see also Guzell v. Hiller, 223 F.3d 518, 519-20 (7th Cir.2000).

We find no basis for the suggestion that domestic violence victims are undeserving of the presumption of veracity accorded other victim-witnesses. Indeed, our decision in Easton forecloses such a position. In Easton, probable cause to arrest for child molestation was based on the accusations of two children witnesses, one five years old and the other three years old. We rejected as "an entirely unacceptable point of view" the argument that the children's testimony was suspect, stating:

In a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of children. To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.

Easton, 776 F.2d at 1449. A strict corroboration requirement in domestic violence cases would create precisely the same proof problems we found dispositive in Easton.

[The court notes that “neither the district court nor Patane point to any evidence in the record suggesting that O'Donnell lied about the purported hang-up call.”]

In any event, we note that the officers here did corroborate O'Donnell's veracity in two respects. First, the district court found as fact that, prior to the arrest, Detective Benner had learned from a probation officer that Patane possessed a gun. Second, Officer Fox verified that a restraining order had been issued against Patane. The mere fact that further corroboration was possible is not dispositive of whether the information available would lead a reasonable person to believe that an offense had been committed.

[The court dismisses Patane's argument that "as a matter of law, a single hang-up phone call could not constitute a violation of the restraining order." It concludes that "probable cause does not require certainty of guilt or even a preponderance of evidence of guilt, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was committed. Morris, 247 F.3d at 1088. The possibility that the hang-up call here was accidental does not defeat probable cause."]

Accordingly, we conclude that Patane's arrest was supported by probable cause to believe that Patane had violated the domestic violence restraining order.¹

¹ In light of our conclusion that the officers had probable cause to arrest for violation of the restraining order, it is unnecessary to reach the Government's alternative argument that the arrest was justified by probable cause to believe that Patane was a felon in possession of a gun. The district court declined to decide whether the officers had probable cause to arrest on the basis of Patane's gun violation.

*** On appeal, the Government argued that this
III. SUPPRESSION OF THE PHYSICAL FRUITS OF A MIRANDA VIOLATION

Our conclusion that the district court erroneously based suppression of the gun on the absence of probable cause to arrest does not end our inquiry. Patane argues that suppression of the gun should be affirmed because, even if the arrest was proper, the ensuing Miranda violation independently requires suppression of the physical evidence.

The district held, and the Government concedes on appeal, that a Miranda violation occurred when the police questioned Patane about his possession of a gun without administering the complete Miranda warnings. As explained above, this questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to seizure of the gun. The Government correctly concedes that Patane's admissions in response to questioning were inadmissible under Miranda, but argues that the physical fruit of the Miranda violation—the gun—is admissible.

The district court determined that it was unnecessary to decide whether the physical fruits of a Miranda violation must be suppressed because it had concluded that the underlying arrest that led to the confession was unconstitutional. Because we have reversed the conclusion that the arrest was unconstitutional, we are now squarely presented with the issue whether the gun should be suppressed in any event because it was obtained as the fruits of an unconstitutionally obtained confession. ***

Below, we conclude that the physical evidence that was the fruit of the Miranda violation in this case must be suppressed.

A. Supreme Court precedent


Both cases, it is true, declined to apply the fruits of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), to suppress evidence obtained from an un-Mirandized confession. However, both cases were predicated upon the premise that the Miranda rule was a prophylactic rule, rather than a constitutional rule. Elstad, 470 U.S. at 305, 105 S.Ct. 1285 ("The prophylactic Miranda warnings are not themselves rights protected by the Constitution ...." (quoting New York v. Quarles, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)) (internal quotation marks omitted)); id. at 308, 105 S.Ct. 1285 ("Since there was no actual infringement of the suspect's constitutional rights, [Tucker] was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed." (emphasis added)); Tucker, 417 U.S. at 445-46, 94 S.Ct. 2357 (distinguishing Wong Sun because "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by

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reasoning is foreclosed by United States v. Santanaga-Garcia, 264 F.3d 1188, 1192-93 (10th Cir.2001) (officer's subjective belief as to non-existence of probable cause not dispositive); see also Tatro-Haro, 287 F.3d at 1006 (same). Patane correctly conceded that the district court's reasoning was erroneous in light of our precedent, and on appeal he argued only that the officers lacked probable cause to believe that he was a felon in possession of a gun. The district court did not reach this issue, and we decline to do so in the first instance on appeal.
this Court in *Miranda* to safeguard that privilege*). Because *Wong Sun* requires suppression only of the fruits of unconstitutional conduct, the violation of a prophylactic rule did not require the same remedy.

However, the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In *Dickerson*, the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one. *Id.* at 444, 86 S.Ct. 1602 ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively."); see *id.* at 432, 438, 440, 86 S.Ct. 1602. Thus, *Dickerson* undermined the logic underlying *Tucker* and *Elstad*.

Additionally, a close reading of *Tucker* and *Elstad* reveals other distinctions that lead us to conclude that those cases should not be given the sweeping reading the Government is asserting. ***

*Tucker* involved an un-Mirandized custodial interrogation that occurred prior to the issuance of the *Miranda* decision. During the course of the interrogation, the defendant identified a relevant witness of whom the police previously had been ignorant. The defendant argued before the Court that the testimony of the witness so identified by the defendant should have been barred as the fruit of the *Miranda* violation. The Court's rejection of this argument rested largely on its conclusion that excluding the fruits of this confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law that barred only coerced confessions. ***

The other Supreme Court case offered by the Government to support its argument is *Elstad*, 470 U.S. at 306, 105 S.Ct. 1285. In *Elstad*, the defendant made incriminating statements while in custodial interrogation prior to the issuance of *Miranda* warnings. The police then administered *Miranda* warnings, and thereafter the defendant made further incriminating statements. The issue in *Elstad* was whether the defendants post-Mirandized statements must be suppressed as the fruit of the earlier *Miranda* violation. *Id.* at 303, 105 S.Ct. 1285. The Supreme Court held that suppression was not required, rejecting the view that the post-warning statements were the unconstitutional product of "a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag." *Id.* at 311, 105 S.Ct. 1285. After repeating the now-suspect reasoning that a *Miranda* violation was not necessarily a constitutional violation and thus not controlled by the fruits doctrine of *Wong Sun*, the Court stated:

[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted....

In deciding how sweeping the judicially imposed consequences of a failure to administer *Miranda* warnings should be, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate *Tucker*'s Fifth Amendment rights. We believe that this reasoning applies with equal force when the alleged "fruit" of a
noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: *A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized.* The living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.

*Id.* at 307-09, 105 S.Ct. 1285 (first emphasis added, alterations and internal quotation marks omitted). *Elstad* thus drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully Mirandized and fruits consisting of subsequently obtained "inanimate evidentiary objects." *Id.* at 309, 105 S.Ct. 1285. A subsequent, Mirandized confession need not be excluded because it is the product of "volition," willingly offered up by a defendant who already had been made aware of his *Miranda* rights. *Id.* By implication, "inanimate evidentiary objects" would be excludable, because physical evidence derived from the defendant's un-Mirandized statement is not the product of volition after a defendant has been Mirandized properly. 2 *See id.* at 347 n. 29,

105 S.Ct. 1285 (Brennan, J., dissenting) ("[T]oday's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation. The Court relies heavily on individual 'volition' as an insulating factor in successive-confession cases.... [This] factor is altogether missing in the context of inanimate evidence." (citation omitted)). 3

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2 *See also Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). In *Orozco*, the officers interrogated a suspect in custody without giving *Miranda* warnings, learning that the suspect owned a gun and where it was located. *Id.* at 325, 89 S.Ct. 1095. Ballistics tests of the gun indicated that it had been used to commit a murder. *Id.* In a terse holding, the Court held that "the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Id.* at 326, 89 S.Ct. 1095 (emphasis added). The Court did not expressly consider whether the gun and the ballistics evidence would be admissible on remand. However, one plausible reading of *Orozco* is that the reference to the unconstitutional "use" of the statements includes their use by police officers in obtaining the gun, as well as their introduction of the admission at trial.

This reading of *Orozco* is reinforced by the Court's subsequent opinion in *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). *Kastigar* noted that the privilege against self-incrimination "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used," *id.* at 445, 92 S.Ct. 1653, and that "immunity from use and derivative use is coextensive with the scope of the privilege," *id.* at 453, 92 S.Ct. 1653.

Indeed, in *Miranda* itself the Court stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." 384 U.S. 436, 454, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (emphasis added).

3 There is a substantial argument that *Elstad* ought not even be treated as a case involving application of the *Wong Sun* fruits doctrine in the first place, for precisely the reasons emphasized by *Elstad* in its volition discussion. In rejecting the argument that the second confession was the result of some "subtle form of lingering compulsion," *id.* at 311, *Elstad* in effect concluded that the second confession was not evidence "obtained ... as a direct result" of the *Miranda* violation. *Wong Sun*, 371 U.S. at 485, 83 S.Ct. 407. In other words, the post-Mirandized confession in *Elstad* was admitted because it was not (rather than despite the fact that it was) the fruit of the poisonous tree.
The court rejects the argument that dicta in Elstad supports the holding that the physical fruits of a Miranda violation are not subject to the Wong Sun fruits doctrine.

In any event, we do not suggest that the holding in Elstad relying on volition definitively establishes that the physical fruits of a Miranda violation must be suppressed. Rather, the essential point for our analysis is only that Elstad does not definitively establish the contrary rule. [The court quotes Justice White, who says that Elstad left the question of "admissibility of physical evidence yielded from a Miranda violation" open. Patterson v. United States, 485 U.S. 922, 922-23, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988) (White, J., dissenting from denial of certiorari).]

It is true that, prior to Dickerson, the Tenth Circuit applied Tucker and Elstad to the physical fruits of a Miranda violation and concluded that suppression was not required ***. However, once again Dickerson has undercut the premise upon which that application of Elstad and Tucker was based because Dickerson now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation. Dickerson, 530 U.S. at 444, 120 S.Ct. 2326.

Accordingly, we reject the Government's position that Tucker and Elstad foreclose suppression of the physical fruits of a Miranda violation.

B. Lower court approaches

Courts applying Dickerson have split on the proper application of Wong Sun to the physical fruits of a Miranda violation. The Third and Fourth Circuits have ruled that the physical fruits of a Miranda violation never are subject to Wong Sun suppression. The First Circuit, by contrast, has ruled that the physical fruits of a Miranda violation must be suppressed in certain circumstances, depending on the need for deterrence of police misconduct in light of the circumstances of each case. Below, we analyze the merits of each of these approaches. We conclude that the First Circuit is correct that the physical fruits of a Miranda violation must be suppressed where necessary to serve Miranda's deterrent purpose. However, we part company with the First Circuit in the application of that standard, because we conclude that Miranda's deterrent purpose requires suppression of the physical fruits of a negligent Miranda violation. We therefore conclude that suppression of the gun in the present case was appropriate.

1. Sterling & DeSumma

The Third and Fourth Circuits have concluded that the fruits doctrine simply does not apply to Miranda violations even after Dickerson. United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir.2002), cert. denied, 122 S.Ct. 2606, 153 L.Ed.2d 792 (2002); United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir.2001), cert. denied, 122 S.Ct. 1631, 152 L.Ed.2d 641 (2002). Both of these cases held that the physical fruits of a Miranda violation were admissible. Sterling, 283 F.3d at 219 (shotgun found in vehicle as a result of Miranda violation); DeSumma, 272 F.3d at 180-81 (gun found in vehicle as a direct result of Miranda violation). Both Sterling and DeSumma relied on substantially the same reasoning, focusing primarily on an isolated passage in Dickerson. Dickerson noted at the outset of the opinion that "Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." 530 U.S. at 432, 120 S.Ct. 2326. Later in the opinion, in the
course of rejecting various arguments supporting the erroneous view that *Miranda* was not a constitutional decision, the Court stated:

The Court of Appeals also noted that in *Oregon v. Elstad* we stated that "[t]he *Miranda* exclusionary rule ... serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." ***

*Dickerson*, 530 U.S. at 441, 120 S.Ct. 2326 (***, citations and internal quotations omitted).

Both *Sterling* and *DeSumma* viewed this language as amounting to an endorsement of the rule that the *Wong Sun* exclusionary rule does not apply to the physical fruits of a *Miranda* violation. *Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180. *Sterling* explained:

> Although *Dickerson* held *Miranda* to be with Constitutional significance, *Miranda* only held that certain warnings must be given before a suspect's statements made during custodial interrogation can be admitted into evidence. In addition, we are of opinion that the Court's reference to and reaffirmation of *Miranda*'s progeny indicates that the established exceptions, like those in *Tucker* and *Elstad*, survive. Thus, the distinction between statements and derivative evidence survives *Dickerson*. In fact, *Dickerson* reiterated the distinction made in *Elstad* by stating that: "Our decision in that case — refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases — does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."

283 F.3d at 219 (emphasis in original, citation omitted).

There are at least two serious problems with the reasoning in *DeSumma* and *Sterling*. First, we respectfully disagree with their conclusion that *Dickerson*'s reference to the controlling force of "*Miranda* and its progeny in this Court" forecloses the argument that the physical fruits of a *Miranda* violation may be suppressed. Although we agree that, based on this language, the holdings of *Elstad* and *Tucker* survive *Dickerson*, neither *Elstad* nor *Tucker* involved the physical fruits of a *Miranda* violation; as explained above, *Elstad* expressly contrasted the subsequent confession it found admissible from physical fruits, while *Tucker* expressly limited its holding to pre-*Miranda* interrogations. See *Patterson*, 485 U.S. at 922-24, 108 S.Ct. 1093 (White, J., dissenting from denial of certiorari). By wholly undermining the doctrinal foundation upon which those holdings were built, *Dickerson* effectively left *Elstad* and *Tucker* standing but prevented lower courts from extending their holdings. Of course, prior to *Dickerson* many lower courts (including this one) already had expanded the holdings of *Elstad* and *Tucker* by concluding that *Miranda* violations do not require suppression of physical fruits, but *Dickerson* explicitly limited its saving language to *Miranda* 's "progeny in this Court." 530 U.S. at 432, 120 S.Ct. 2326 (emphasis added). Far from endorsing pre-*Dickerson* lower court case law, then, *Dickerson* instead signaled the contrary view.

The second fundamental problem with the reasoning in *DeSumma* and *Sterling* is that the language that they rely on for the proposition that *Dickerson* endorsed the
extension of Elstad to physical fruits in fact said only that Elstad "recognizes ... that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." Dickerson, 530 U.S. at 441, 120 S.Ct. 2326 (emphasis added). The critical question, of course, is how the two are different. At oral argument in the present case, the Government argued only that the way that Fourth Amendment violations differ from Fifth Amendment violations is that the Wong Sun fruits doctrine applies to the former and not the latter. This argument already has been rejected by the Supreme Court. Nix v. Williams, 467 U.S. 431, 442 & n.3, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (noting that the Court has applied the fruits doctrine to violations of the Fifth Amendment, citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)); Kastigar v. United States, 406 U.S. 441, 460-61, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Although Dickerson itself does not explain how searches under the Fourth Amendment are "different," Elstad does just that: "a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." 470 U.S. at 306, 105 S.Ct. 1285 (emphasis added). This language indicates that Miranda violations are "different" because a narrowed application of the fruits doctrine applies to Miranda violations, not because the fruits doctrine does not apply at all. Cf. id. at 306, 105 S.Ct. 1285 (referring to "[t]he Miranda exclusionary rule").

Of course, Elstad's explanation of how application of the fruits doctrine is "different" in Miranda cases begs the question of what a "broad" application means. We conclude that the broad application of the fruits doctrine is that defined in Nix: "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." 467 U.S. at 443, 104 S.Ct. 2501. Application of the fruits doctrine in the Miranda context is not "broad" because a number of exceptions to this pure rule have been recognized, circumstances where the prosecution is permitted to benefit from the Miranda violation. See Elstad, 470 U.S. at 314, 105 S.Ct. 1285; Tucker, 417 U.S. at 447-48, 94 S.Ct. 2357; New York v. Quarles, 467 U.S. 649, 657, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); Harris v. New York, 401 U.S. 222, 225-26 & n. 2, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

One could argue that further narrowing of the pure fruits doctrine in the Miranda context—narrowing beyond that already effectuated by the holdings of Elstad and Tucker also is appropriate. However, we are unpersuaded that the additional narrowing articulated in DeSumma and Sterling (refusing to apply the fruits exclusion to physical evidence obtained as a result of the illegally obtained confession) reflects a correct understanding of the way in which Miranda violations are, in Dickerson's words, "different" from Fourth Amendment violations.

A blanket rule barring application of the fruits doctrine to the physical fruits of a Miranda violation would mark a dramatic departure from Supreme Court precedent. The Court consistently has recognized that deterrence of police misconduct, whether deliberate or negligent, is the fundamental

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4 Tucker's narrowing would seem no longer applicable because it appeared to establish an exception only for questioning that pre-dated Miranda itself. Elstad's narrowing would still have applicability today because it declined to apply the fruits exclusion to a subsequent voluntary confession rendered after the Miranda warnings are given.
justification for the fruits doctrine. Nix, 467 U.S. at 442-43, 104 S.Ct. 2501; see also Elstad, 470 U.S. at 308, 105 S.Ct. 1285; Tucker, 417 U.S. at 447, 94 S.Ct. 2357 (noting "the deterrent purpose of the exclusionary rule"). The Court also has been consistent in narrowing the scope of the fruits doctrine in the Miranda context only where deterrence is not meaningfully implicated. See Elstad, 470 U.S. at 308-09, 105 S.Ct. 1285; Tucker, 417 U.S. at 447-48, 94 S.Ct. 2357.

In sharp contrast with Elstad and Tucker, however, the rule argued for by the Government here risks the evisceration of the deterrence provided by the fruits doctrine, as this case well illustrates. As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction. See generally United States v. Kruger, 151 F.Supp.2d 86, 101-02 (D.Me.2001) ("The exclusion of the cocaine, the substance – indeed essence – of the suppressed statements, is necessary to deter law enforcement officers from foregoing the administration of Miranda warnings ...."), overruled by Faulkingham, 295 F.3d at 92-94; Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L.Rev. 929, 933 (1995) ("Unless the courts bar the use of the often-valuable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods."); David A. Wollin, Policing the Police: Should Miranda Violations Bear Fruit?, 53 Ohio St. L.J. 805, 843-48 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics."). ***

Further, the rule urged upon us by the Government appears to make little sense as a matter of policy. From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under Miranda and Wong Sun, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make greater use of the confession than merely introducing the words themselves.

Accordingly, we decline to adopt the position of the Third and Fourth Circuits that the Wong Sun fruits doctrine never applies to Miranda violations.

2. Faulkingham

With its recent decision in United States v. Faulkingham, 295 F.3d 85 (1st Cir.2002), the First Circuit rejected the Third and Fourth Circuits' blanket refusal to apply Wong Sun suppression to the fruits of a Miranda violation. Id. at 90-91. Faulkingham acknowledged, contrary to Sterling and DeSumma, that Dickerson's recognition that Miranda violations are constitutional violations strengthened the argument that their physical fruits must be suppressed. Id. at 92-93. However, Faulkingham concluded that suppression of the fruits of a Miranda violation was not required in every case. Rather, it adopted a rule mandating suppression of the fruits of a Miranda violation in individual cases where "a strong need for deterrence" outweighs the reliability of that evidence. Id. at 93.
Because the physical fruits of a *Miranda* violation generally will be trustworthy evidence, it appears that in most cases the First Circuit's analysis boils down to a rule excluding the fruits of a *Miranda* violation only when there is a "strong need for deterrence." On each of Faulkingham's two basic points – that Dickerson alters the analysis regarding suppression of the fruits of a *Miranda* violation, and that suppression of the physical fruits is required where necessary to effectuate *Miranda's* deterrent purpose – we agree with the First Circuit. For reasons already stated above, we conclude that each of these propositions is compelled by Supreme Court precedent.

Turning to the application of this standard to circumstances – present both in *Faulkingham* and in the present case – where an officer negligently rather than intentionally violates a defendant's *Miranda* rights, however, we disagree with the First Circuit. In *Faulkingham*, the court concluded that, where the *Miranda* violation resulted from mere negligence on the part of the interrogating officer, there is no strong need for deterrence and thus the physical fruits of the *Miranda* violation need not be excluded. We conclude that *Faulkingham's* cramped view of deterrence leads it to an erroneous conclusion regarding negligent *Miranda* violations.

*Faulkingham* asserted, without elaboration, that "[i]n the un-Mirandized inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary." *Id.* at 92. The heart of the court's analysis is the following:

Where, as here, negligence is the reason that the police failed to give a *Miranda* warning, the role of deterrence is weaker than in a case ... where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information.

Faulkingham's claim, taking all the surrounding circumstances into account, simply does not tip the balance toward a strong need for deterrence. Faulkingham's statement was not the result of "coercive official tactics." There was no deliberate misconduct by the [police] agents here. There was no misleading or manipulation by the government.... The findings of the magistrate judge and the trial judge give us no reason to think that the agents deliberately failed to give the warning in order to get to the physical evidence or that they did so to get to another witness who might or might not incriminate Faulkingham. The agents' negligence resulted in the suppression of Faulkingham's confession, itself a detriment to the agents....

*Id.* at 93-94 (citation to opinion below omitted). The court noted that "Faulkingham himself started talking without much questioning" and observed that "there is nothing to shock the conscience of the court and no fundamental unfairness." *Id.* at 94. In light of the totality of the circumstances, the court held "that Faulkingham's far weaker argument for recognition of a deterrence interest for suppression of derivative evidence arising from a negligent violation of his *Miranda* rights is insufficient to carry the day." *Id.*

We do not believe that "the role of deterrence ... becomes less primary" once the statement itself has been suppressed. *Id.* at 92. Instead, the relevant question remains whether suppression of the statement alone provides deterrence sufficient to protect citizens' constitutional privilege against self-incrimination. As we already have stated above, we answer this question in the
negative.

Nor do we share Faulkingham's view that there is a strong need for deterrence only where the officer's actions were deliberate rather than negligent. Finally, Miranda itself made clear that the privilege against self-incrimination was animated, not by a desire merely to deter intentional misconduct by police, but by the "one overriding thought" that "the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens." Miranda, 384 U.S. at 460, 86 S.Ct. 1602; see also id. ("[T]he privilege has come rightfully to be recognized in part as an individual's substantive right ... to a private enclave where he may lead a private life." (internal quotation marks omitted)). The personal right to be free of government invasions of the privilege against self-incrimination is violated just as surely by a negligent failure to administer Miranda warnings as a deliberate failure. Deterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect - and properly are trained to protect - the constitutional rights of citizens. The call for deterrence may be somewhat less urgent where negligence rather than intentional wrongdoing is at issue, but in either case we conclude that the need is a strong one.

Moreover, we conclude that a rule limiting Wong Sun suppression of the physical fruits of a Miranda violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose. Even in cases where the failure to administer Miranda warnings was calculated, obtaining evidence of such deliberate violations of Miranda often would be difficult or impossible. Cf. Whren v. United States, 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (noting that one reason for the Court's adoption of an objective test for the reasonableness of a seizure was "the evidentiary difficulty of establishing subjective intent" of officers). *** We believe a rule that provides certainty in application and clarity for the officers charged with operating under it better serves the interests of citizens, officers, and judicial efficiency.

Accordingly, we agree with the First Circuit's conclusion that the Wong Sun fruits doctrine may apply to the physical fruits of Miranda violations, but we decline to adopt Faulkingham's view that the physical fruits of a negligent Miranda violation are admissible.***

As explained above, we conclude that Miranda's deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement. We hold that the physical fruits of this Miranda violation must be suppressed.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order suppressing the gun.
The Supreme Court announced yesterday that it will review a Colorado case that could help further define the constitutional ban on forced confessions. At issue is whether physical evidence that authorities discovered because of what a suspect told them before being fully informed of his rights should have been admissible in court.

Under the court's famous 1966 Miranda ruling, a suspect's statement in police custody cannot be used against him unless police first tell him that he has a right to remain silent and to have a lawyer present during questioning.

But in this case, U.S. v. Patane, No. 02-1183, the issue is whether courts must also exclude physical evidence police find based on information a suspect gave without first being "Mirandized."

Legal analysts said the issue is especially relevant to murder investigations, where two crucial pieces of evidence - the victim's body and the murder weapon - are often found only because of comments made by suspects.

"It's not most cases, but it's not unusual," said William J. Stuntz, a professor of law at Harvard University. "They read the warnings, the suspect invokes his right to remain silent, and then they don't stop questioning him. They know the confession is inadmissible, but they feel they can at least use the physical evidence."

The Supreme Court ruled in 1985 that a confession given after a suspect is told of his rights can be used as evidence even if it was obtained thanks to a previous "un-Mirandized" statement.

Lower courts have since interpreted the decision to mean that physical evidence may be likewise included.

But last year, a three-judge panel of the Denver-based U.S. Court of Appeals for the 10th Circuit ruled that the 1985 case had not actually settled the issue. That case, the 10th Circuit noted, had referred to the Miranda warnings as not necessarily required by the Constitution.

In light of a 2000 Supreme Court ruling that reaffirmed that Miranda had established a fundamental constitutional right, the 10th Circuit ruled, physical evidence found thanks to an "un-Mirandized" statement must be suppressed as what legal doctrine calls "fruit of a poisonous tree."

"Now that the court has said Miranda is constitutionally compelled, it's hard to see how you can take un-Mirandized statements and use them without violating the right against self-

The Supreme Court said it will hear the case in response to an appeal by the Justice Department, which argued in its brief that the 10th Circuit's decision would "impose serious costs on the administration of justice."

The Justice Department argued that the 2000 Supreme Court ruling specifically endorsed the notion that courts could admit physical evidence found as a result of suspects' un-Mirandized statements.

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The Fifth Amendment to the Constitution says that no one can be "compelled in any criminal case to be a witness against himself." The Fourth Amendment bars "unreasonable searches and seizures." In other words, police can't force someone to confess to a crime or turn over incriminating evidence, and they can't burst into your home without a warrant.

But no one forced a Colorado Springs man, Samuel Francis Patane, to tell officers where to find a gun that as a convicted felon he had no right to own. Police asked Putane where his Glock was and he told them - and yet the evidence was thrown out in court because Patane hadn't been read his "Miranda warnings." That not only defies common sense, it has nothing to do with the Constitution as it was actually written, and we hope the Supreme Court says so now that it has agreed to hear the case.

To be sure, the high court is hemmed in by its own recent precedents, including an opinion three years ago reaffirming the 1960s requirement that police advise people of their Miranda rights before questioning them. What suspects say before the Miranda warnings, the court reiterated, cannot be used as evidence against them in court.

But what about physical evidence that officers find as a result of what a suspect says before he's heard the warning? Shouldn't that at least be admissible? Lower courts are split on the issue, which is why the Patane case is significant.

Patane actually interrupted an officer who started to read him his rights, saying he understood what they were and didn't need to hear the warning. It was only then that officers asked him where they could find his Glock.

In the real world, most people would say, his rights were adequately protected since he knew them. In cases involving the Fourth Amendment protection against unreasonable searches and seizures, however, the policy has been that any evidence acquired through an illegal search must be suppressed because it is "the fruit of a poisonous tree." In Patane's case, the 10th U.S. Circuit Court of Appeals applied the fruits doctrine broadly and ruled that prosecutors could not use the Glock as evidence. Without it, prosecutors could not convict him of illegal firearms possession.

Other appeals courts have chosen more narrow readings, saying physical evidence obtained as a result of a
Miranda violation need not be suppressed.

Suspects are allowed to waive their Miranda rights, so whether failure to read the complete paragraph should even count as a violation could be arguable, but the government conceded that in Patane's case it was a violation.

Theodore Olson, the U.S. solicitor general, will argue for the government that Miranda covers only confessions, not physical evidence, and that's the position the high court should take. Experienced offenders get to know the legal rules pretty well. If one way to ensure that damning evidence will not be used against them at trial is to announce its existence before arresting officers even have a chance to read the Miranda warnings, expect such announcements to become more frequent.

Suppressing physical evidence revealed at a suspect's initiative does nothing to deter police misconduct, it just makes the prosecution's job harder.
Will the High Court Revisit 'Miranda' – Again?

*The Recorder*

April 16, 2003

Tony Mauro

WASHINGTON - Many commentators were surprised three years ago when the Supreme Court reaffirmed *Miranda v. Arizona* in a 7-2 decision written by Chief Justice William Rehnquist. After all, Rehnquist had been a critic of *Miranda* throughout his 31 years on the court.

A case that goes before the court for consideration at its Friday private conference could give the court an opportunity to show its colors again on the potency of the *Miranda* rule, which requires police to warn suspects of their right to remain silent. The case, *United States v. Patane*, 02-1183, is one of dozens the justices will discuss at the conference.

Under *Miranda*, statements made by a defendant in the absence of a warning cannot be admitted at trial. In *Patane*, the issue is whether physical evidence - in this case a pistol - obtained as a result of an un-Mirandized statement must also be suppressed.

The government asserts that the Supreme Court answered the question long ago when it declined in two cases to apply the "fruits of the poisonous tree" doctrine to suppress evidence obtained as a result of an un-Mirandized confession. The cases cited by the government are *Michigan v. Tucker*, from 1974, and the 1985 ruling *Oregon v. Elstad*.

But both of those rulings came before *Dickerson v. United States*, the 2000 decision authored by Rehnquist that upheld *Miranda*. The Tenth Circuit U.S. Court of Appeals decided in *Patane* that because the *Dickerson* ruling viewed *Miranda* as a decision with constitutional dimensions - not just as a prophylactic rule - "Dickerson undermined the logic underlying Tucker and Elstad." As a result, to give *Miranda* the constitutional weight it was accorded in *Dickerson*, the circuit panel agreed the gun evidence in *Patane*'s case should be suppressed.

"Miranda's deterrent purpose would not be vindicated meaningfully by suppression only of *Patane*'s statement. We hold that the physical fruits of this violation must be suppressed," wrote Tenth Circuit Judge David Ebel.

Samuel *Patane* was arrested in Colorado Springs in June 2001 for violating a domestic violence restraining order imposed to protect his ex-girlfriend.

Officers began to read *Patane* his *Miranda* rights, but stopped when he said he knew his rights. Police then asked him whether he owned firearms. *Patane* revealed he had a Glock pistol. Police seized it and, after learning *Patane* had prior drug convictions,
charged him with violating the federal law against possession of firearms by felons.

In its petition to the Supreme Court, the solicitor general's office notes that the First, Third and Fourth Circuits have ruled on the same issue in light of Dickerson, and ruled that suppression of physical evidence is not always required. As a result, the government says, a circuit conflict exists "on an important constitutional issue that arises with regularity."

Patane's lawyer, Assistant Federal Public Defender Jill Wichlens, says in her brief that because the Tenth Circuit's ruling is consistent with Dickerson, it does not warrant review. She also argues that neither Tucker nor Elstad gave the green light to admitting physical evidence obtained through an improper police interview.

"The fruit of the poisonous tree doctrine applies to the fruit of a Miranda violation ... just as the doctrine applies to the fruit of any other constitutional violation," writes Wichlens.

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The exclusionary rule requires that evidence obtained directly or indirectly through government violations of the Fourth, Fifth, or Sixth Amendments may not be introduced by the prosecution at trial, at least for the purpose of providing direct proof of the defendant's guilt. When a court improperly admits evidence in violation of the exclusionary rule, reversal is required unless the error was harmless beyond a reasonable doubt. The exclusionary rule is not a personal constitutional right, but rather a judicially created remedy to deter government violations of the Constitution. Because the goal of deterrence will not always be advanced by excluding relevant, though illegally obtained, evidence, the Supreme Court has identified several exceptions to the exclusionary rule, which are discussed hereinafter.

Standing. A defendant has standing to challenge the admission of evidence only if the defendant's own constitutional rights have been violated. In cases involving Fourth Amendment violations, courts determine standing by deciding whether a defendant had a reasonable expectation of privacy in the area searched or the items seized. When violations of the Fifth and Sixth Amendments are alleged, courts similarly focus on the personal nature of the rights asserted. A defendant must demonstrate standing before trial unless the court allows otherwise upon a showing of good cause. If the prosecution concedes standing before the trial court, it may be precluded from raising the issue on appeal.

Good Faith Exception. In United States v. Leon, the Supreme Court held that evidence need not be suppressed when police obtain the evidence through objective good faith reliance on a facially valid warrant that is later found to lack probable cause. The Court concluded that a "good faith" exception to the exclusionary rule was proper because under such circumstances suppression would not advance the exclusionary rule's goal of deterring official misconduct. The good faith exception also applies when the police obtain evidence in reliance on a warrant later found technically defective, on a statute authorizing warrantless searches that is later declared unconstitutional, or on an erroneous police record indicating the existence of an outstanding arrest warrant.
warrant. When reviewing suppression rulings, it is within the discretion of the appellate court to proceed directly to the good faith issue without first deciding the issue of probable cause.

The good faith exception does not extend to cases where the police have no reasonable grounds for believing that the warrant was properly issued. The Court has identified four situations where police reliance on a warrant is not objectively reasonable: (1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) when the magistrate failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) when the warrant was so facially deficient that an officer could not reasonably have believed it to be valid.

Attenuation Exception. A court may admit evidence that would not have been discovered but for official misconduct if the causal connection between the illegal conduct and the acquisition of the evidence is sufficiently attenuated. In Wong Sun v. United States, the Supreme Court stated that the proper inquiry is whether the evidence was obtained through exploitation of the initial constitutional violation or by distinguishable means sufficiently attenuated from the primary illegality so as to purge the evidence of its taint. In Brown v. Illinois, the Supreme Court set forth three factors for courts to consider in determining whether the causal chain has been sufficiently attenuated: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

In Brown, the Supreme Court also held that Miranda warnings alone are not sufficient to dissipate the taint of an illegal arrest and detention from a subsequent confession. In contrast, the Supreme Court in Oregon v. Elstad found that Miranda warnings alone ordinarily should suffice to dissipate the taint of an initial Miranda violation and render a second confession admissible, but only if the first confession was given voluntarily. In cases where a first confession was involuntary, however, a subsequent confession may be admitted only if sufficiently attenuated under the Brown factors.

Courts also invoke the attenuation doctrine to admit testimony of a witness whose identity was discovered through illegal means. In United States v. Ceccolini, the Supreme Court upheld the admission of a witness' testimony, even though discovery of his identity was the fruit of an unlawful search, because the witness' uncoerced testimony was deemed sufficiently attenuated from the illegal search. The Court noted that a rigid application of the exclusionary rule "would perpetually

\[3\] 422 U.S. 590, (1975).
disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search."

**Independent Source Exception.** Even if police engage in illegal investigatory activity, evidence will be admissible if it is discovered through a source independent of the illegality. The independent source doctrine reflects the idea that although the government ought not profit from its misconduct, it also should not be made worse off than it would have been had the misconduct not occurred.

**Inevitable Discovery Exception.** The inevitable discovery exception to the exclusionary rule is closely related to the independent source doctrine. Under this exception, a court may admit illegally obtained evidence if the evidence inevitably would have been discovered through independent, lawful means. For example, in Nix v. Williams, the Supreme Court held that evidence concerning the location and condition of a murder victim's body was admissible even though the police obtained this information in violation of the defendant's Sixth Amendment right to counsel. The Court reasoned that a comprehensive search already under way at the time of the police illegality would have inevitably resulted in the discovery of the body.

**Collateral Uses.** Even if no exception to the exclusionary rule applies, the government may still use illegally obtained evidence in contexts outside of the prosecution's case-in-chief. For example, the government may introduce tainted evidence in federal civil tax proceedings, habeas proceedings, grand jury proceedings, civil deportation proceedings, parole revocation proceedings, and at a defendant's sentencing hearing.

Illegally obtained evidence can also be used to impeach the testimony of a defendant given on direct examination or to impeach a defendant's testimony on cross-examination, provided that the prosecution's questioning on cross-examination was reasonably suggested by defendant's testimony during direct examination. The prosecution, however, may not use illegally obtained evidence to impeach witnesses other than the defendant.

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02-1371 Missouri v. Seibert

Ruling Below: (Mo., 93 S.W.3d 700, 72 Crim. L. Rep. 231)

Rule announced in Oregon v. Elstad, 470 U.S. 298 (1985)--that "careful and thorough administration" of warnings prescribed by Miranda v. Arizona, 384 U.S. 436 (1966), will ordinarily be enough to remove taint of earlier, unwarned questioning--does not apply when police intentionally violate warnings requirement to facilitate questioning by weakening defendant's ability to knowingly and voluntarily exercise constitutional rights and then obtain confession off record, give warnings, and record second confession.

Question Presented: Is rule of Oregon v. Elstad, that suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given requisite Miranda warnings, abrogated when initial failure to give Miranda warnings was intentional?


Supreme Court of Missouri

Decided December 10, 2002.

[Excerpt; some footnotes and citations omitted.]

MICHAEL A. WOLFF, Judge.

The question presented here is whether a law enforcement officer's intentional violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in obtaining a statement requires suppression of a second statement, secured after a Miranda warning was given, where the second statement was based on the first. Essential to this inquiry is whether the presumption that the first statement was involuntary carries over to the second statement. In the circumstances here, where the interrogation was nearly continuous, the Court holds that the second statement, clearly the product of the invalid first statement, should have been suppressed.

Patrice Seibert was convicted of second-degree murder for her role in the death of Donald Rector in a fire intentionally set in the mobile home where Rector resided. She was sentenced to life imprisonment. On appeal, Seibert asserts the trial court committed reversible error when it allowed the State to introduce inculpatory statements she made while in custody. Seibert did not testify at trial.

*** The judgment of the trial court is reversed, and the case is remanded.

Facts – The Mobile Home Fire and Death of Donald Rector

Seibert lived in a mobile home in Rolla with her five sons. The victim, Donald Rector,
17, who was on medication for a mental disorder, also lived with them. Jonathan, 12, one of Seibert's sons, was seriously handicapped with cerebral palsy. He could not walk, talk or feed himself. On February 12, 1997, Jonathan died in his sleep. Seibert was afraid to report his death. He had bedsores, and she was afraid authorities would believe she had been neglecting him.

In Seibert's presence, two of her teen-aged sons and two of their friends discussed a plan to set the mobile home on fire to cover up Jonathan's death. They decided Donald should be present in the fire so it would not look as though Jonathan had been left alone. In her statements, Seibert admitted that Donald, who died in the fire, was supposed to die in the fire. According to the trial testimony of Jeremy, one of her son's friends, Seibert was crying, "pretty much in hysterics," during the discussion with her two sons and their friends. She suggested sending her two younger sons, Patrick and Shawn, to church during the fire. Seibert was not present when the fire started.

Darian, age 17, the oldest of Seibert's sons, and his friend Derrick were to set the fire. Darian testified that Derrick poured gas around the trailer and then hit Donald, who was having a seizure and convulsing on the floor. Derrick set the fire before Darian was out of the trailer. Darian suffered serious burns to his face. Donald's dead body was found kneeling in front of and partially lying on a sofa in the west bedroom with a penetrating wound on the back of his skull. The cause of death was asphyxiation secondary to exposure to fire.

**The Two-Step Interrogation**

On February 17, 1997, five days after the trailer fire, St. Louis County officer Kevin Clinton woke Seibert at 3:00 a.m. She was at a hospital in St. Louis County, where Darian was being treated for burns. Rolla officer Richard Hanrahan arranged for Officer Clinton to arrest Seibert. Officer Hanrahan specifically instructed Officer Clinton not to advise Seibert of her *Miranda* rights.

Once at the police station, Seibert was left in a small interview room for 15 to 20 minutes to "give her a little time to think about the situation." Without issuing a *Miranda* warning, Officer Hanrahan then questioned her for 30 to 40 minutes. He squeezed her arm and repeated the same statement, "Donald was also to die in his sleep," throughout much of the interview. After she made an admission indicating that she knew Donald was to die in his sleep, she was given a 20-minute break for coffee and a cigarette. Officer Hanrahan then resumed the interview, this time using a tape recorder, and advised Seibert of her *Miranda* rights. Seibert signed a waiver form.

Officer Hanrahan began the second stage of the interview by referring to the first stage: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" Then, with occasional reference back to the first stage, pre-*Miranda* interview, Officer Hanrahan continued to question Seibert. She repeated statements she had made prior to receiving *Miranda*. This tape-recorded interview was played to the jury at trial.

Officer Hanrahan testified that he made a conscious decision to withhold *Miranda* hoping to get an admission of guilt. He testified that an institute, from which he has received interrogation training, has promoted this type of interrogation "numerous times" and that his current department, as well as those he was with previously, all subscribe to this training. In
the second stage of the interview, Officer Hanrahan began by reminding Seibert that they had been "talking for a little while" about the trailer fire, which occurred on February 12. Thus, he was able to link together the unwarned interview with the warned interview. Seibert was reminded of the statements she made during the first stage, which occurred before he gave Seibert a *Miranda* warning. He also used Seibert's pre-warning statements to phrase his questions. For example, consider the following excerpt from the second stage of the interview (emphasis added):

Officer Hanrahan: Now, in discussion you told us, you told us that there was an understanding about Donald. (Here, he is referring to the unwarned portion of the interview.)
Seibert: Yes.
Hanrahan: Did that take place earlier that morning [February 12, 1997]? Seibert: Yes. Hanrahan: Ok. And what was the understanding about Donald?
Seibert: If they could get him out of the trailer, to take him out of the trailer.
Hanrahan: And if they couldn't?
Seibert: I, I never even thought about it. I just figured they would.
Hanrahan: Trice, *didn't you tell me that he was supposed to die in his sleep?*
Seibert: If that would happen, 'cause he was on that new medicine, you know....
Hanrahan: The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?
Seibert: Yes.

Officer Hanrahan, in order to secure an admissible confession, used information he gained from Seibert's previous inadmissible confession. As a result, Seibert's post-warning statements were closely tied to the lengthy unwarned interrogation.

The Purpose and Protections of *Miranda*

To preserve the Fifth Amendment right against self incrimination where an accused is subjected to custodial interrogation, which "exacts a heavy toll on individual liberty and trades on the weakness of individuals," the United States Supreme Court created the now well-known safeguard: the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 455, 86 S.Ct. 1602, 16 L.Ed.2d 694. *Miranda* provided that, "prior to any questioning " a person must be informed of certain rights, including the right to remain silent, which can only be waived knowingly, voluntarily and intelligently. *Id.* at 444, 86 S.Ct. 1602 (emphasis added).

The *Miranda* requirement serves several purposes. "For those unaware of the privilege, the warning is needed simply to make them aware of it – the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.* at 468, 86 S.Ct. 1602. Beyond providing these protections, the *Miranda* decision and its progeny serve to guide police and deter improper conduct. The Supreme Court granted certiorari in *Miranda* to "give concrete constitutional guidelines for law enforcement agencies and courts to follow."

to this case, the Court in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), held that a defendant's prior remark, in answer to a question during the police investigation, does not — "without more" — make a subsequent statement inadmissible after a *Miranda* warning was given. *Elstad*, 470 U.S. at 300, 309, 105 S.Ct. 1285.

As *Elstad* and *Tucker* reiterate, the goals of *Miranda* are to deter improper police conduct and to assure trustworthy evidence, specifically evidence that has not been obtained in circumstances that appear to be coercive. *Elstad* dealt with what the Court described as "a simple failure to administer the warnings." 470 U.S. at 309, 105 S.Ct. 1285. There was no intentional violation of *Miranda* in *Elstad*, and the Court held "the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

But what about circumstances such as this case where the violation of *Miranda* was intentional? An intentional violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence — though that is still a major concern — to the goal of deterring improper police conduct.

**Intentional *Miranda* Violations**

The police officer in this case purposefully withheld a *Miranda* warning as part of a two-step interrogation technique designed to elicit an initial confession before reading the accused her rights, hoping that she would repeat that confession. As noted, Officer Hanrahan testified that he made a conscious decision not to advise Seibert of her rights because he was hoping to get an admission from her and specifically asked the arresting officer not to give a *Miranda* warning.

Officer Hanrahan characterized the strategy as follows:

"Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda*, and she repeated the items she had told us."

Securing a first admission — no matter how small — is often called the "breakthrough" or "beachhead". Interrogators are taught that procuring the first admission is the "biggest stumbling block" that, once overcome, usually leads to a full confession. "The subject must be motivated to make the first admission, no matter how apparently small or trivial," according to Arthur S. Aubry, Jr., & Rudolph R. Caputo, Criminal Interrogation 290 (3d ed.1980). "If this admission is related to the crime and to the subject matter of the interrogation, there is every reason to expect that the first admission will lead to others, and eventually to a full confession."

Once the officer has the initial admission, the officer uses "skillfully applied interrogation techniques" to "motivate the suspect into making the confession." *Id.* at 26. One of these techniques is to confront the suspect with the earlier admission, which is what occurred in this case.

If a *Miranda* warning precedes the interrogation, this is a perfectly legitimate technique. But in this case, the interrogation proceeded without the required warning, and then after the first admission was made, only a short break and then a *Miranda* warning interrupted the interrogation.
This was undeniably an "end run" around *Miranda*. When an officer chooses to use this tactic, the officer should, under *Miranda*, understand the risks of doing so. The biggest risk is that the prosecution may not be able to use the statement in its case in chief. That risk, of course, may be weighed against the desirability of getting information, such as the names of witnesses or location of physical evidence. And it may well be, under circumstances that differ from those in this case, that the prosecution may nevertheless be able to show that the confession was voluntary despite the *Miranda*-based presumption to the contrary.

**Voluntariness of the Subsequent Admission**

Upon finding an intentional *Miranda* violation, a court must ascertain whether the warned statement was voluntary. In doing so, the court examines the facts and circumstances to "determine the degree of causal connection between any unconstitutional conduct (and the statement resulting therefrom) and the confession made later." *State v. Fakes*, 51 S.W.3d 24, 30 (Mo.App.2001) (citing *State v. Wright*, 515 S.W.2d 421, 426 (Mo. banc 1974)). The court should ascertain whether the purpose of the violation was to "undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309, 105 S.Ct. 1285.

In light of the record in this case, this Court presumes the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. If the truth were otherwise, Officer Hanrahan would not have specifically instructed the arresting officer to refrain from giving a *Miranda* warning. He wanted to secure a "breakthrough" admission before warning Seibert of her rights because he feared that she would assert those rights were she made aware of them.

Another important consideration in determining voluntariness is the proximity in time and place of the subsequent confession. If the warned confession is far enough removed from the first confession, the accused more likely made a voluntary decision to speak again. While each situation is fact-specific, courts can look to whether the subsequent confession closely followed the first and was obtained by the same officials in the same surroundings. For example, in the case at bar, Seibert was questioned for 30 to 40 minutes, in an intense manner. She became emotional during the interview and, at one point, Officer Hanrahan squeezed her arm and repeatedly stated, "Donald was to die in his sleep." He continued in this manner until Seibert agreed that Donald was supposed to die in the fire. Then, after a 20-minute break, Seibert was read and waived her *Miranda* rights. The same officers interrogated her in the same room only minutes after her unwarned confession. It was at this point that she confirmed her unwarned statements.

In these circumstances, little if any weight can be given to the fact that Seibert signed a *Miranda* waiver. In *State v. Fakes*, the court of appeals suppressed a similar confession. Fakes was interrogated at length while at the police station before receiving the *Miranda* warning. The interrogation was intense, and officials did not give Fakes a *Miranda* warning.

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1 This is true even though Officer Hanrahan read each part of *Miranda* to Seibert, having her orally express her understanding of each right independently and then instructing her to initial and sign a waiver form. Adherence to such formality 30 minutes into the interrogation does not change the fact that she was subjected to a nearly continuous interrogation, which began without a proper *Miranda* warning.
warning until she became emotional. Fakes, 51 S.W.3d at 32. In suppressing Fakes' post-Miranda confession, the court questioned the voluntariness of Fakes' Miranda waiver: "In view of the fact that she was so extensively interrogated before she was advised of her rights, it is not as clear as in Wright and Elstad that she later voluntarily waived those rights when, after finally having been advised of her rights, she confirmed the statements made earlier." Id. at 33. In situations such as these, where the accused is subjected to a nearly continuous period of interrogation, it is unreasonable to assume—and there is nothing in the record to support such an assumption—that the simple recitation of Miranda would resurrect the opportunity to obtain a voluntary waiver.

The Eighth Circuit, in United States v. Carter, suppressed a written confession, which was executed after an initial unwarned interrogation that was followed by a Miranda warning. In Carter, postal inspectors interrogated the suspect, without giving the Miranda warning, about his alleged possession of stolen mail for nearly an hour before he confessed. The interrogation took place in the bank president's office, in the building where Carter worked, with Carter seated between the two inspectors. United States v. Carter, 884 F.2d 368, 372 (8th Cir.1989). The court found the second warned confession "came almost directly on the heels" of the first unwarned confession and that the unwarned confession, subsequent warnings and confession were "part and parcel of a continuous process." Id. at 373.

When presented with different circumstances, the result may be different. In Wright, for example, the accused was brought into the interrogation room while the officer was questioning another suspect. Without first advising Wright of his constitutional rights, the officer asked him, "What did you do with the shotgun?" or words to that effect. Wright replied, "Leroy, you know I gave you the shotgun. I don't know where it is at." The officer advised Wright not to make any further statements. Wright was then placed in juvenile custody. Wright, 515 S.W.2d 421, 423 (Mo. banc 1974). In finding that Wright's subsequent statements were not coerced, the court noted the second interrogation was held the following day, at a different location (the juvenile building instead of the police station), and with different people present (Wright's mother and juvenile officers). Id. at 427.

Elstad also is distinguishable in that there was no evidence, as in the instant case, that the breach of Miranda was part of a premeditated tactic to elicit a confession. "The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect, but to notify his mother of the reason for the arrest." Elstad, 470 U.S. at 315, 105 S.Ct. 1285. The Elstad court did not find that the police engaged in "improper tactics".

Here, however, Officer Hanrahan candidly admitted that the breach of Miranda was intentional and part of a tactic to elicit a confession. It is presumed that this strategy was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. Further, a 20-minute break and Miranda warning separating the unwarned confession from the warned confession was not enough to disturb the continuity of the interrogation where Officer Hanrahan tied the two stages of the interview together by using her statements in the first stage to correct her during the second stage.
Officer Hanrahan's intentional omission of a 
*Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. Both stages of the interview formed a nearly continuous interrogation – she was interrogated by the same officials in the same place with only minutes separating the unwarned and warned questioning. There are no circumstances that would seem to dispel the effect of the *Miranda* violation. For these reasons, Seibert's post-*Miranda* waiver and confession was involuntary and, therefore, inadmissible. To hold otherwise would encourage future *Miranda* violations and, inevitably, *Miranda*'s role in protecting the privilege against self-incrimination would diminish. Were police able to use this "end run" around *Miranda* to secure the all-important "breakthrough" admission, the requirement of a warning would be meaningless. Officers would have no incentive to warn, knowing they could accomplish indirectly what they could not accomplish directly. Almost 20 years ago, in his *Elstad* dissent, Justice Brennan predicted in what the *Elstad* majority described as an "apocalyptic tone" that *Elstad* would deliver a "crippling blow" to *Miranda*. *Elstad*, 470 U.S. at 318 n. 5, 319, 105 S.Ct. 1285. ***

And, as evidenced by the testimony of Officer Hanrahan, officers not only have incentive to intentionally interrogate suspects without administering *Miranda* – they are being trained to do so. The *Elstad* majority, however, said Brennan's apocalyptic prediction – which is what happened in this case – would not result. ***

**Prejudice**

Because the trial court erred in admitting Seibert's post-*Miranda* confession, the case should be reversed and remanded for a new trial unless the error was harmless. *State v. Miller*, 650 S.W.2d 619, 621 (Mo. banc 1983). Seibert was convicted of second degree murder as an accessory for knowingly killing Donald Rector. The jury was able to both read and hear her statements that she knew the mobile home was to be burned and that Donald could die in his sleep because he was on Prozac. At one point, she agreed with Officer Hanrahan that Donald was supposed to die in his sleep after he reminded her of her pre-*Miranda* confession. Because of the evidentiary strength of a confession, and because of the contents of Seibert's involuntary statements, her statements certainly were not harmless.

**Conclusion**

The interrogation was set up to violate *Miranda* to secure a confession. The trial court suppressed only the unwarned portion of the interrogation. But on this record, the prosecution has not overcome the presumption that this tactic produced an involuntary confession. The confession in the remaining portion of the interrogation also should have been suppressed.

The judgment is reversed, and the case is remanded for a new trial.

BENTON, J., dissents in separate opinion filed. LIMBAUGH, C.J., and PRICE, J., concur in opinion of BENTON, J.

DUANE BENTON, Judge.


*Elstad* holds that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving [her] rights and confessing after
[she] has been given the requisite Miranda warnings." Elstad, 470 U.S. at 318, 105 S.Ct. at 1298, 84 L.Ed.2d at 238. Patrice Seibert's unwarned responses to Officer Hanrahan's questioning did not prevent her from waiving her rights and confessing.

"In these circumstances [where the preceding admission is unwarned but voluntary], a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." Elstad, 470 U.S. at 310-311, 105 S.Ct. at 1294, 84 L.Ed.2d at 233. In this case, the administration of Miranda warnings was careful and thorough, as demonstrated by the tape recording of the administration, and by the form that Seibert initialed, dated and signed. As in Elstad, the reading of Seibert's rights was undeniably complete and recorded. Elstad, 470 U.S. at 314-315, 105 S.Ct. at 1296, 84 L.Ed.2d at 236. Moreover, Seibert was 39 years old when she confessed. Appendix A to this opinion is the "Warning & Waiver Form." Appendix B is the testimony discussing it.

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"Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." Elstad, 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232. In this case, Seibert's unwarned admissions were suppressed. The circuit court found that the warned statement was knowingly and voluntarily made. ***

"It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise [her] free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." Elstad, 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232. In this case, there was no "actual coercion" of Seibert, or "other circumstances" that undermined her free will. Elstad holds flatly that the "psychological impact of voluntary disclosure of a guilty secret" is not coercion, nor does it compromise the voluntariness of a subsequent informed waiver. Elstad, 470 U.S. at 312, 105 S.Ct. at 1294, 84 L.Ed.2d at 234. The Elstad opinion disapproves such "cat out of the bag" logic as "expansive." Id.

"[A]bsent 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." Elstad, 470 U.S. at 314, 105 S.Ct. at 1296, 84 L.Ed.2d at 235. In Seibert's case, there were no deliberately coercive tactics. *** There is no evidence of deliberately coercive tactics.

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If there were substantial evidence that the officer did the following – "inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke [her] rights once they are read to [her]" – then the warned confession should be suppressed. See Elstad, 470 U.S. at 317, 105 S.Ct. at 1297, 84 L.Ed.2d at 237.

At this critical point, the majority presumes that the officer's strategy had the purpose "to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." No evidence supports this assumption. Seibert did not testify at any
hearing or at trial. Officer Hanrahan testified at the hearing that his "hope" and "intent" were to gain some sort of confession or admission of guilt. The officer did not mention "breakthrough" or "beachhead" interrogation. In addition to the "rolling the dice" paragraph quoted in the principal opinion, Officer Hanrahan testified that withholding Miranda rights at the outset means:

A. You may not get any information at all.
   Q. In which part of the interrogation?
   A. In either part. You may never even get to the second stage.

Officer Hanrahan testified that based on two prior conversations with Seibert, he believed she expected to be arrested and would have a story rehearsed. Although defense counsel asked Officer Hanrahan about interrogation techniques at both the suppression hearing and the trial, the Officer — the only witness to testify about the confession — stated that his hope and intent was to gain a confession or admission.

Elstad expressly commends confessions: "Voluntary statements 'remain a proper element in law enforcement.'" Elstad, 470 U.S. at 305, 105 S.Ct. at 1291, 84 L.Ed.2d at 229, quoting Miranda v. Arizona, 384 U.S. at 478, 86 S.Ct. at 1630. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.... Absent some officially coerced self-accusation, the Fifth Amendment is not violated by even the most damning admissions." Elstad, 470 U.S. at 305, 105 S.Ct. at 1291, 84 L.Ed.2d at 229. "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." Elstad, 470 U.S. at 312, 105 S.Ct. at 1294-95, 84 L.Ed.2d at 234.

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The principal opinion, in emphasizing the factors of lapse-of-time, change-of-place, change-of-interrogators, and need-to-dissipate-taint, echoes the Oregon court reversed in Elstad, and the other courts criticized in Elstad. Elstad, 470 U.S. at 303, 310, 317-18, 105 S.Ct. at 1290, 1293, 1297, 84 L.Ed.2d at 228, 233, 237. Elstad makes clear that these factors are considered only if the first confession is coerced. Id.

***

The principal opinion asserts that Elstad does not apply where police intentionally withhold Miranda warnings before the initial unwarned statement. True, Elstad, at one point, describes the initial unwarned statement as "technically in violation of Miranda." Elstad, 470 U.S. at 318, 105 S.Ct. at 1297-98, 84 L.Ed.2d at 238. This passing comment in Elstad does not support the principal opinion, as demonstrated in recent opinions by the Courts of Appeals.

On facts nearly identical to this case, the United States Court of Appeals for the Ninth Circuit, en banc, held that Elstad applies so long as the initial unwarned statement is not actually coerced. United States v. Orso, 266 F.3d 1030, 1035, 1039 (9th Cir. en banc), full en banc hearing denied, 275 F.3d 1190 (2001). The United States Supreme Court denied certiorari on the Orso case, while this case was pending. 123 S.Ct. 125, 154 L.Ed.2d 42 (2002).

It is also true that the Eighth Circuit has made statements to the contrary. United States v. Carter, 884 F.2d 368, 372-74 (8th Cir.1989). However, yet another Circuit, the First, called Carter's statements "dicta" and
"facially inconsistent with the Supreme Court's holding in Elstad." United States v. Esquilin, 208 F.3d 315, 320 (1st Cir. 2000). The First Circuit then holds that deliberate withholding of Miranda rights before the unwarned admission does not make a later warned statement inadmissible. Id. at 320-21. Directly refuting the principal opinion's reliance on "deterrence" against "improper tactics," the First Circuit holds:

Although Elstad does not permit suppression of Esquilin's voluntary statement made after he was informed of his Miranda rights and voluntarily waived them, the basic Miranda rule still operates here to render Esquilin's initial unwarned (but voluntary) statement inadmissible. The Supreme Court has ruled that Miranda's deterrence rationale requires no more than that, see Elstad, 470 U.S. at 308, 105 S.Ct. 1285, 84 L.Ed.2d 222, and we are not free to ignore that judgement.

Id. at 321. The Esquilin case also specifically holds that Elstad rejects the "nearly continuous" and "time lapse" arguments, both invoked by the principal opinion. Id. at 319.

As for the other authority the principal opinion discusses, Elstad renders obsolete the contrary approach in this Court's decision eleven years earlier in State v. Wright, 515 S.W.2d 421, 426-27 (Mo. banc 1974), and in the Court of Appeal's decision last year in State v. Fakes, 51 S.W.3d 24, 30 (Mo.App.2001).

*** On this record, there is substantial evidence that both the unwarned and warned statements were voluntary. Thus, under Elstad, the warned statement is admissible, as the trial judge ruled.
APPENDIX A

227 S. Central, Clayton
Div. Crime Inward
St. Louis Co. P.D.
ST. LOUIS COUNTY DEPARTMENT OF POLICE

WARNING & WAIVER FORM

Before we ask you any questions, you must understand what your rights are:

1. You do not have to make any statement at this time and have a right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You are entitled to consult with an attorney before any interview and to have an attorney present at the time of interrogation.
4. If you cannot afford an attorney, one will be appointed for you.

5. (Juvenile Suspects Only) If you are fourteen years of age or older you could be tried in court as an adult.

I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signature of Suspect

Date / Time

Witness

Date / Time

I hereby certify that the foregoing Warning and Waiver was read by me to the above suspect, that the suspect also read it, and the suspect has affixed his (her) signature hereon in my presence.

Signature - Police Officer

Witness (in the case of a Juvenile suspect, the attending Deputy Juvenile Officer)

F-1621a

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APPENDIX B

Trial Testimony of Officer Richard E. Hanrahan (Excerpt ***)

Q. When you arrived at the station, you had an initial conversation with her – is that correct?

A. That's correct.

Q. After that initial conversation did you inform the Defendant of her rights under the Miranda decision?

A. Yes, I did.

Q. I'd like to hand you what's been marked as State's Exhibit 37 and ask you if you can tell me what this is please?

A. Yes, sir – this is a rights advisement provided by the detective with St. Louis County that night.

Q. And was that, in fact, read to the Defendant?

A. Yes, sir, it was.

Q. And did you ask her if she understood each of those rights as you read them to her?

A. As I read them to her, I simply check-marked them when I was finished. I asked her if she understood each right.

Q. Did she indicate to you in some fashion whether she did or not?

A. Yes, she did.

Q. And what was her response in each case?

A. She indicated that she understood and she signed next to each of the rights to state that she understood.

Q. And sir, did you then read the waiver portion of the form?

A. I believe I let her read the waiver. I'd have to check my report to be sure. I usually allow the suspect to read the waiver.

Q. How does that waiver read?

A. It says – "I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

Q. In fact, did you threaten the Defendant in any fashion?

A. I did not.

Q. *** Did you do anything that would be taken as threatening by the average person?

A. I don't believe so – no, sir.

Q. Did you promise the Defendant any benefit of any kind in order to induce her to speak with you?

A. The truth would make her feel much better.

***
A divided Missouri Supreme Court on Tuesday overturned the murder conviction of a woman who implicated herself in a fatal house fire, ruling police failed to properly notify her of the right to remain silent.

The court ordered a new trial for Patrice Seibert, who had been sentenced to life in prison on a second-degree murder conviction for her involvement in a February 1997 fire at her Rolla mobile home.

Authorities say the fire was set by Seibert's 17-year-old son and his friend to cover up the apparently natural death of her 12-year-old son, Jonathan, who had cerebral palsy. But the fire killed Donald Rector, 17, who was on medication for a mental disorder and had been living at the house.

A Rolla police officer intentionally questioned Seibert without informing her of her Miranda rights to remain silent or have an attorney present. After Seibert acknowledged that Donald was supposed to die in the fire, the officer took a short break, informed her of her Miranda rights and renewed the questioning, referring to the initial interview to get Seibert to repeat her statements.

Only Seibert's second statement was used in her trial.

In a 4-3 decision, Missouri's highest court said both statements should have been barred from evidence. Judges appointed by Democratic governors made up the majority; Republican-appointed judges dissented.

"The (initial) interrogation was set up to violate Miranda to secure a confession," Judge Michael Wolff wrote for the majority. "The confession in the remaining portion of the interrogation also should have been suppressed."

Wolff's opinion said the interrogating officer specifically told the arresting officer not to read Seibert her Miranda rights as part of a tactic to elicit a confession. Wolff also said there was not enough separation between the two interrogations.

In dissent, Judge Duane Benton asserted that the Missouri ruling ran contrary to a 1985 U.S. Supreme Court precedent, as well as a 2001 federal appeals court case with a nearly identical situation to Seibert's.

Seibert's first statement was not coerced and her second statement was voluntary. So her conviction should have been upheld, Benton said.

Rolla Police Chief Dave Pikka said the police officer who questioned Seibert no longer works for the department. But he said the two-step interrogation process—including the delayed notification of Miranda rights—was not an unusual tactic.
"It is common among police in general, not just in Rolla," Pikka said. "Many times what could happen is if you offer them the Miranda warning on the front end, they won't give you that statement."

Seibert had been tried on a first-degree murder charge, for which prosecutors would have sought the death penalty. But jurors acquitted her of that and instead convicted her of the second-degree murder charge, which cannot result in the death sentence.

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New clamor on right to silence Miranda: Several local and Supreme Court cases are the latest to test the long-standing warnings

The Baltimore Sun

June 26, 2003

Andrea F. Siegel

Over nearly four decades, Miranda warnings have become so culturally ingrained - from America's courtrooms to television dramas - that the timeworn declaration by police would seem to be settled and routine. Far from it.

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And the U.S. Supreme Court has agreed to hear three cases that could give police more leeway with the warnings. In one case, Missouri police, who were trained to sidestep the Miranda protections, used a two-part interrogation to obtain a confession in a murder case.

"These cases pose a great danger to Miranda," says supporter Yale Kamisar, a law professor at the University of Michigan and the University of San Diego who has been writing about confessions for 40 years. "If the court backs away, the original opinion doesn't mean anything."

The warnings, which begin "You have the right to remain silent," combine two rights aimed at preventing police abuses in questioning suspects: the constitutional rights to a lawyer and to not incriminate oneself.

Today, the four warnings are a staple of American culture - so ingrained that suspects in Italy and Spain, where the protections do not apply, have asked to be read their rights, says Robert McCrie, chairman of the Department of Law and Police Science at New York's John Jay College of Criminal Justice.

The warnings have long been a target of conservative groups and others concerned about the effect on crime control. Although critics and supporters of Miranda point to studies and anecdotal evidence to back their positions, there is no definitive study about the case's effect.

"So many of us in law enforcement are going to seek to confine Miranda. And people in criminal defense want to expand Miranda," says Joshua K. Marquis, who is district attorney for Clatsop County, Ore., and a board member of the National District Attorneys Association.
Miranda and later rulings require that police, before questioning a suspect in custody, must explain the right to remain silent, to have a lawyer and to have a lawyer appointed if the suspect cannot afford one. Police must also tell the suspect that if he decides to talk, those words may be used against him.

Today, most police departments incorporate the warnings into written forms that suspects sign. Still, gray areas have emerged ever since the ruling, and the high court has made exceptions to the Miranda rule.

For example, police need not give the warnings if they feel there is a public safety emergency. And even if a suspect's statement is thrown out because Miranda warnings weren't given, a prosecutor can sometimes use it to show the suspect lied on the witness stand.

"It keeps coming up because you have all these little wrinkles. Was that an interrogation? Was he in custody?" says Abraham A. Dash, professor at the University of Maryland School of Law. "There is a line. But where the line is, God knows."

The three pending Supreme Court cases could shift that line.

"The court will take this opportunity to explain and fine-tune and possibly cut back on Miranda vs. Arizona," says Byron L. Warnken, professor at the University of Baltimore School of Law who has counseled police about Miranda and served as a defense attorney.

Most worrisome for Miranda's proponents is a two-step process - headed for Supreme Court review - that police used with murder suspect Patrice Seibert in a Missouri case. In overturning her murder conviction, that state's highest court called it "undeniably an 'end-run' around Miranda."

An officer - who admitted that his and other police departments were trained this way - questioned her without explaining her rights. After she confessed, he gave the Miranda warnings, which she waived, and questioned her based on what she had told him previously.

Defense lawyers say that technique, if allowed by the Supreme Court, would gut Miranda because it would encourage police to use confessions and data gained by deliberately not giving the warnings to unwary people.

But Paul D. Kamenar, senior executive counsel of the Washington Legal Foundation, says it makes more sense for judges to focus on whether a confession is voluntary. Crucial evidence should not be tossed aside for a procedural glitch. That, he says, risks freeing a person who admitted to a crime.

Another case up for Supreme Court review is the Nebraska drug conviction of John Fellers, who says he was tricked by police at his home. Police told him they were there because he was indicted and asked about his involvement with certain people and drug activities. He spoke freely. Police then arrested him and, while he was in custody, gave him Miranda warnings. At that point, he waived his rights and again spoke with them.
In the third case under review by the high court, Samuel Patane cut police off as they tried to explain his rights at his Colorado home, insisting he knew the rights. He then told them where to find his gun. A federal appellate court ruled the gun inadmissible before Patane could be tried on a firearms charge; the government has appealed.

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The Supreme Court cases come as police look increasingly to scientific evidence, such as DNA analyses that can point to a suspect with a mathematical certainty. "There is less reliance on custodial interrogation," says David B. Mitchell, former Maryland State Police superintendent. He now teaches in the Police Executive Leadership Program at the Johns Hopkins University.

Still, a confession is prized evidence and can make or break a case. A trial judge's ruling on alleged police misconduct can trigger a plea, abruptly end a prosecution or even land cases before the Supreme Court for further honing of Miranda.

"It is never," says Marquis, the Oregon prosecutor, "going to be fully resolved."

Miranda warnings

Before questioning a suspect who is being taken into custody, police must issue a version of these warnings:

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to have an attorney present during questioning.

If you cannot afford an attorney, one will be provided for you.

Source: Adapted from Black's Law Dictionary.

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Almost twenty years ago, in *Miranda v. Arizona*, the Warren Court pronounced the most widely publicized criminal justice opinion of its era, holding that suspects held in police custody must be notified of their fifth and sixth amendment rights prior to any interrogation and that confessions elicited without such warnings cannot be admitted into evidence against them in criminal proceedings. In the 1970s, however, a new majority of the Court began to limit the scope of the *Miranda* exclusionary rule in certain contexts. Last Term, in *Oregon v. Elstad*, the Court still more sharply circumscribed *Miranda*'s exclusionary scope by holding that a suspect's 'voluntary' confession obtained in violation of *Miranda* does not presumptively taint a later confession elicited after proper warnings were given. In a more sweeping pronouncement, the Court further held that the established rule barring the use of evidence derived from constitutional violations does not apply to a 'simple' failure to administer *Miranda* warnings. In so doing, the Court gave short shrift to the general concerns for judicial competence and economy and its declared goal of deterring improper police practices. More fundamentally, although the Court purported to adhere to *Miranda*, its reasoning evinces practical and theoretical doubts about the continuing viability of the *Miranda* requirements.

On December 17, 1981, two county police officers went to the home of eighteen-year-old Michael James Elstad with a warrant for his arrest in connection with a neighborhood burglary. Elstad's mother allowed them in the house. After summoning Elstad alone into the living room, one of the officers asked him a series of questions without administering any *Miranda* warnings. The officer said that he believed Elstad had been involved in the burglary, and Elstad stated, 'Yes, I was there.' The officers then took Elstad to the sheriff's office, where they advised him for the first time of his *Miranda* rights. Elstad proceeded to give a full oral statement of his involvement in the burglary, which was later reduced to a signed confession.

At his trial for first-degree burglary, Elstad moved to suppress the first oral statement and the written confession, the latter on the ground that the oral admission elicited in violation of *Miranda* had induced him to make the later confession. After excluding Elstad's first oral statement, the trial court admitted the written confession, finding that it was both voluntarily given and untainted by the improperly obtained statement. Elstad was found guilty and

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subsequently appealed. Relying on United States v. Bayer, the Oregon Court of Appeals held that the statement obtained in violation of Miranda let the cat "sufficiently out of the bag to exert a coercive impact" on Elstad during his subsequent interrogation. Noting that only a brief period had separated the two confessions, the court of appeals held the written confession inadmissible and overturned Elstad's conviction.

The Supreme Court reversed. Writing for a six-member majority, Justice O'Connor first rejected the applicability of the so-called 'tainted fruit' or derivative-evidence doctrine to evidence derived from 'simple' Miranda violations. The Court emphasized that the Miranda exclusionary rule "sweeps more broadly than the Fifth Amendment itself because it may operate to exclude testimony that was not actually compelled. In the Court's view, then, although a failure to administer Miranda warnings creates an irrebuttable 'presumption' that a suspect's statement was coerced, it does not itself violate a constitutional right; the statement therefore is not 'inherently tainted.' Justice O'Connor concluded that if a suspect voluntarily confesses before the prescribed warnings have been given, Miranda requires suppression of the confession itself, but not of any evidence derived from it. Relying on Michigan v. Tucker, Justice O'Connor explained that "the absence of any coercion or improper tactics undercuts the twin rationales--trustworthiness of evidence and deterrence of improper police conduct -- for a broader rule.'

Recognizing that the subsequent confession must itself by voluntary in order to be admissible, Justice O'Connor next argued that the psychological impact of having once confessed neither constitutes coercion by the state nor can be presumed to be the motivating force behind the second confession through some 'subtle form of lingering [psychological] compulsion.' In the Court's view, as long as the first confession was 'voluntary' in fact and the second confession was obtained after proper administration of Miranda warnings, the second confession should not be presumed to have been given involuntarily. A contrary rule, the Court reasoned, would 'immunize a suspect who responds to pre-Miranda warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent.'

Finally, the Court rejected Elstad's contention that he was unable to give a completely informed waiver of his fifth amendment rights in making the second confession because he was unaware that his prior admission could not be used against him. Citing a number of cases in which a suspect's ignorance of the 'full consequences' of his decisions had not been held to negate their voluntariness, the Court concluded that the police need not inform a suspect of the legal consequences of an improperly obtained confession in order for the suspect to give a knowing and voluntary waiver of his Miranda rights. The Court explicitly rejected as 'neither practicable nor constitutionally necessary' Elstad's suggestion that an additional warning should have been provided to him respecting the possible inadmissibility of his prior confession.

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1 331 U.S. 532 (1947).
In a lengthy dissent, Justice Brennan, joined by Justice Marshall, rejected virtually every conclusion reached by the majority. Justice Brennan first disputed the majority's view that an admission obtained in violation of *Miranda* should not presumptively compromise the voluntariness of a subsequent confession. Relying on the conclusions of numerous criminal interrogations specialists, Justice Brennan argued that a defendant's belief that he has little to lose by repeating an earlier confession can compromise the voluntariness of the second confession. The majority was content to rely on the subsequent recitation of *Miranda* warnings to cure whatever coercion results from a suspect's having confessed without the benefit of proper warnings. Justice Brennan, on the other hand, insisted the only certain well-recognized intervening factors—such as a warning that any earlier confession might be inadmissible, a significant lapse of time between the confessions, a change in location, or the intervention of counsel—should be presumed to transform a coercive atmosphere into one conducive to the exercise of free will.

Justice Brennan then attacked the majority's holding that the derivative-evidence doctrine has no application to simple *Miranda* violations. Arguing that *Miranda* procedures are not merely prophylactic safeguards of the privilege against self-incrimination, Justice Brennan contended that the fifth amendment not only requires exclusion of improperly obtained statements, but also affirmatively requires that the police give suspects *Miranda* warnings. Justice Brennan therefore dismissed as fallacious the majority's position that a statement elicited in violation of *Miranda* can at once be irrebuttably presumed to have been compelled and yet actually uncoerced. Hence Justice Brennan contended that the rule excluding evidence derived from compelled statements is 'coextensive with the scope of the privilege' against self-incrimination itself.'

The Court's decision in *Elstad* artificially bifurcates *Miranda*'s presumption that testimony induced without the benefit of proper warnings is the product of coercion. Under the Court's new framework, *Miranda* procedures will continue to serve as a bright-line test by which courts may distinguish coercive from noncoercive interrogation for the purpose of determining whether the fifth amendment requires exclusion of a suspect's custodial statements. When considering the admissibility of derivative evidence, however, courts are no longer bound by this bright-line test. Because the costs of lost evidence are high and the benefits of further exclusion are low, courts must find 'actual' coercion in obtaining the original statement in violation of *Miranda* in order to bar admission of derivative evidence. When evaluated against familiar justifications for bright-line judicial presumptions, such as considerations of judicial competence and economy, efficient translation of legal norms into actual practices, and fulfillment of constitutional objectives, the Court's reformulation of *Miranda*'s bright-line test leaves much to be desired.

The decision in *Elstad* also affords law enforcement officers positive incentives to withhold *Miranda* warnings strategically and thus vitiates
the ability of Miranda's bright-line test to instill norms of proper conduct in law enforcement agents. With the assurance that any evidence derived from a voluntary confession taken in violation of Miranda will be presumed admissible in court, police officers can simply 'forget' to give timely warnings. Assuming that Miranda warnings deter some suspects from confessing, police under Elstad can only gain by employing such tactics. Suspects who would have confessed even if given proper Miranda warnings will arguably still confess under more coercive conditions, and police can elicit the same statements by prompting the suspects to repeat their confessions after tardy administration of the warnings. For suspects who would not have confessed if initially notified of their rights, and for suspects who refuse to repeat their confessions once so notified, the police at least gain the information and evidence derived from the statements elicited in violation of Miranda. As they have in other contexts, police officers may be expected to push the Elstad derivative-evidence loophole to its limits and withhold Miranda warnings whenever strategic objectives are served.

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Arrest of defendant after he voluntarily stopped his vehicle, exited it, and began to walk away with no awareness of police presence did not justify search of vehicle under rule of New York v. Belton, 453 U.S. 454 (1981), which held that Fourth Amendment permits police to search passenger compartment of vehicle incident to arrest of occupant; in absence of any other justification, search was illegal and its fruits should have been suppressed.

Question Presented: When police arrest recent occupant of vehicle outside vehicle, are they precluded from searching vehicle pursuant to New York v. Belton unless arrestee was actually or constructively aware of police before getting out of vehicle?

The STATE of Arizona, Appellee,
 v.
Rodney Joseph GANT, Appellant.

Court of Appeals of Arizona,
Division 2, Department A.

Decided March 29, 2002

BRAMMER, Presiding Judge.

After a jury trial, appellant Rodney Gant was found guilty of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. The trial court sentenced him to concurrent, mitigated prison terms, the longest of which was three years. Because we agree with Gant that the trial court erred in denying his motion to suppress evidence, we reverse his convictions.

Standard of Review and Background

Gant argues that the trial court erred in denying his motion to suppress a handgun and a plastic bag of cocaine found when his vehicle was searched after his arrest, asserting that the warrantless search violated his Fourth Amendment rights. When reviewing a trial court's ruling on a motion to suppress evidence based on an alleged Fourth Amendment violation, we defer to the court's factual findings but review de novo mixed questions of law and fact. State v. Wyman, 197 Ariz. 10, 3 P.3d 392 (App.2000). Because warrantless searches are presumptively unreasonable and unconstitutional under the Fourth Amendment, the state bears the burden of proving the lawfulness of the acquisition of evidence seized without a warrant. Rodriguez v. Arellano, 194 Ariz. 211, 979 P.2d 539 (App.1999); see also State v. Valle, 196 Ariz. 324, 996 P.2d 125 (App.2000). In determining whether the state has carried that burden, we consider only the evidence presented at the suppression hearing. See State v. Sanchez, 200 Ariz. 163, 24 P.3d 610 (App.2001). And, we view that evidence in the light most favorable to sustaining the trial court's ruling. Id.
At the hearing on Gant's motion to suppress, the court stated:

Are any of the facts in issue? It seemed to me that from your respective briefs, that there didn't seem to be any disagreement. As I understand the facts – and let me repeat what I understand they are: That this arose out of a report of possible narcotic activity; police went to the residence, knocked on the door. The defendant answered....

... [The police] ran a computer check on Rodney Joseph Gant and found that he was wanted on a suspended driver's license and, also, an outstanding warrant for failure to appear....

... [The police] left and then came back to the residence, found a man and a woman around the residence. The woman had a crack pipe. The man, they didn't apparently find any contraband on him. Then the defendant arrived, driving a vehicle, and the officer, as the car pulled into the driveway, shined his flashlight into the car, recognized Mr. Gant as the individual he had previously met at the door and identified him as Mr. Gant.

And as the officer was walking toward the vehicle, Mr. Gant got out of the vehicle and started walking toward the officer when the officer called him by name, and he responded that that was who he was. And the officer took him in custody for the outstanding warrant and suspended driver's license, having seen him operating a motor vehicle.... [T]here's no question that [the officer] could legally arrest and did lawfully arrest the defendant on the outstanding warrant and for operating a motor vehicle without a driver's license.

Gant was removed from the vehicle – from the vicinity of the vehicle to the officer's patrol car and placed in the back of the patrol car, and the officers then did a search of the defendant's vehicle, found a weapon and found the jacket. And, apparently, feeling the jacket, felt something that they felt might be drugs and took it out of the pocket and found cocaine.

Gant's counsel stated that, "if the State concedes those are the facts, I think those are facts sufficient to proceed on the motion." The prosecutor replied: "I have no disagreement with the facts. I'd be happy to submit, also, on my pleading as well." Consequently, the parties did not introduce any evidence at the suppression hearing either in support of or in opposition to Gant's motion.

In his motion to suppress the evidence found in his vehicle, Gant did not contest the lawfulness of his arrest but, rather, argued only that the ensuing warrantless search of his vehicle was illegal because no exceptions to the Fourth Amendment's warrant requirement applied. The state argued that the search was lawful because it had been conducted incident to Gant's arrest or, alternatively, that, because the police had probable cause to search his vehicle, a warrantless search was permissible under the automobile exception to the Fourth Amendment's warrant requirement. The trial court denied Gant's motion, finding that the search of the car was lawful because it was a search incident to his arrest. We disagree.

**Warrantless Search Incident to Arrest**

In *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694 (1969), the Supreme Court held that, when police make a lawful arrest, they may, without a warrant, search the person in custody as well as the "area from within which he might gain possession of a weapon or destructible evidence." Applying that principle to a situation in which the person arrested had been occupying a vehicle when police initiated contact with him, the Court later held that officers may search the entire
passenger compartment of a vehicle, and all containers therein, as a "contemporaneous incident" of a lawful arrest. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768, 775 (1981). This rule, denominated "bright-line" by one of the dissenting justices, id. at 463, 101 S.Ct. at 2866, 69 L.Ed.2d at 777, was premised on the generalization, rather than the probability in a given case, that objects within a vehicle's passenger compartment are within an arrestee's reach. Even so, the Court specifically stated that its holding was limited to the "particular and problematic" context in which it had arisen, and did not "alter[ ] the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460 n.3, 101 S.Ct. at 2864 n. 3, 69 L.Ed.2d at 775 n. 3; see also State v. Lopez, 198 Ariz. 420, 10 P.3d 1207 (App.2000).

The state contends that the question of whether

Belton applies to Gant's situation "appears to be a matter of first impression in Arizona."2 We agree and conclude that, not only are Belton and McLaughlin both factually distinguishable from this case, but also that the rationale underlying those cases does not extend to this situation. We further conclude, therefore, that the warrantless search of Gant's vehicle was not a lawful search incident to his arrest.

In Belton, an officer stopped the vehicle in which Belton was a passenger because the officer had seen the vehicle speeding. In McLaughlin, an officer stopped the vehicle because it had an illegally tinted rear window. Here, in contrast, the facts as summarized by the trial court do not show, nor can we infer, that Gant was or should have been aware either of the police presence at the residence as he approached it or of the light the officer shined into his vehicle. And if, as the state suggested at oral argument in this court, the trial court implicitly drew either inference, we conclude it erred in doing so because neither inference is reasonably suggested by these facts. What is clear from these facts, however, is that Gant voluntarily — that is, not in response to police direction — stopped his vehicle, exited it, and began to walk away from it. We believe that this factual distinction is significant and requires a different result than that in Belton and McLaughlin.

We agree with the holding of United States v. Strahan, 984 F.2d 155 (6th Cir.1993), in which the Sixth Circuit Court of Appeals determined that Belton was inapplicable to a situation in which an arrestee had been apprehended

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1 In Belton, the Court also used the term "recent occupant," which, when read in context, clearly refers to someone who, once arrested and removed from a vehicle, necessarily becomes its "recent occupant." 453 U.S. at 460, 101 S.Ct. at 2864, 69 L.Ed.2d at 775. Some courts have, in our opinion, misconstrued this language to justify extending Belton's reach to cases in which a person voluntarily exited a vehicle before the police initiated any contact. See, e.g., Glasco v. Commonwealth, 257 Va. 433, 513 S.E.2d 137 (1999).

2 In contrast to that assertion in its brief, at oral argument in this court, the state referred to this as a "run-of-the-mill Belton case," citing State v. Crivellone, 138 Ariz. 437, 675 P.2d 697 (1983), and State v. Hanna, 173 Ariz. 30, 839 P.2d 450 (App.1992). Crivellone and Hanna, however, both involved situations in which officers stopped a suspect's vehicle, which was not the case here. The state's reliance on these cases, therefore, is misplaced.
approximately thirty feet from his automobile because the police had not initiated contact with him until that time and, therefore, he was not an occupant of the vehicle. The court instead held that the test outlined in *Chimel* applied. We further agree with the reasoning expressed in *United States v. Fafowora*, 865 F.2d 360 (D.C.Cir.1989), in which the court held inapplicable the rationale underlying *Belton*’s bright-line rule allowing police to search the entire passenger compartment of a vehicle—that it is, at least hypothetically, within the reach of its arrested occupant—to a case in which the police had first encountered the arrestee outside the automobile. In such cases, the court said, the twin concerns of officer safety and evidence preservation that justify, at least theoretically, the search-incident-to-arrest exception to the warrant requirement discussed in *Chimel* disappear because the vehicle’s passenger compartment is not available to the arrestee at the time the police encounter or arrest the person. Other courts have expressed similar reasoning and have reached similar results. *Lewis v. United States*, 632 A.2d 383 (D.C.1993); *Thomas v. State*, 761 So.2d 1010 (Fla.1999); *State v. Foster*, 127 Idaho 723, 905 P.2d 1032 (Ct.App.1995); *People v. Stehman*, 324 Ill.App.3d 54, 257 Ill.Dec. 607, 753 N.E.2d 1233 (2001); *Commonwealth v. Santiago*, 410 Mass. 737, 575 N.E.2d 350 (1991); *People v. Fernengel*, 216 Mich.App. 420, 549 N.W.2d 361 (1996).

By its own terms, *Belton* is limited to the particular factual situation in which it arose. Accordingly, it applies only when "the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation ... while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile)." *United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir.1995); see also *Thomas*. We believe that "the Belton objectives and Fourth Amendment principles are best served by limiting Belton's" reach in this way. *Foster*, 905 P.2d at 1039. However, we emphasize that, when police attempt to initiate contact by either confronting or signaling confrontation, a vehicle's occupant cannot avoid *Belton*’s application and create a haven for contraband simply by exiting the vehicle when officers are seen or approach. If the record shows that police overtly initiated contact before a suspect exits a vehicle and the suspect is subsequently arrested, the vehicle may nonetheless be searched without a warrant incident to an arrest under *Belton*. See, e.g., *United States v. Mans*, 999 F.2d 966 (6th Cir.1993).

The two cases the state asserts "are not meaningfully distinguishable" from this case, *State v. Wanzek*, 598 N.W.2d 811 (N.D.1999), and *People v. Savedra*, 907 P.2d 596 (Colo.1995), can, in fact, be distinguished on this very basis. In *Wanzek*, the arresting officer testified that, when he had pulled up next to the defendant in his patrol car, she had "looked over [him], looked straight ahead, backed the vehicle up, and exited the vehicle." 598 N.W.2d at 813. And, in *Savedra*, the court stated that, because the defendant had been in his vehicle when he "first saw the police officer approach," it was "not unreasonable to assume that he exited the vehicle to avoid contact with the police officer." 907 P.2d at 599-600.

In contrast, the summarized facts here do not show, nor can we infer, that the police attempted to initiate contact with Gant while he was still in

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3 We acknowledge that not all courts agree with this construction of *Belton*. See, e.g., *United States v. Sholola*, 124 F.3d 803, 817 (7th Cir.1997) (extending *Belton* to a case in which the defendant was not an occupant but was "positively linked" to the vehicle at the time of his arrest), quoting *United States v. Adams*, 26 F.3d 702, 705 (7th Cir.1994); *United States v. Snook*, 88 F.3d 605 (8th Cir.1996); *United States v. Schecter*, 717 F.2d 864 (3d Cir.1983); see also *Glasco*. 

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his vehicle or that he had attempted to evade contact with the police by exiting his vehicle. Contrary to the state's assertion, we do not believe that, by shining a flashlight into Gant's vehicle, the officer necessarily initiated contact with him. These facts do not show the distance between Gant's vehicle and the officer, either when he shined the flashlight at Gant's car or when the officer approached it after Gant had exited it, or that a person in Gant's position would even have been aware that a light had been shined into the vehicle, much less who had shined it. Nothing shows or suggests that Gant looked in the direction of the light when it was shined or that he had seen officers or any other sign of police activity at the residence, such as flashing emergency lights, marked police vehicles, or uniformed officers, either when he arrived at the residence or before he exited his vehicle. The record is also silent about the lighting in the areas where Gant parked his vehicle, those places where the officers were positioned when he arrived, and the spaces that separated those areas. Additionally, the record does not support a finding that Gant was or should have been aware of anyone's approach as he exited his vehicle. Furthermore, nothing in the record shows that, by shining the light, the officer was attempting to signal his intent to confront Gant. Rather, the officer might simply have been attempting to ascertain the identity of the vehicle's occupant as he observed the vehicle approach the residence. Lastly, the record does not reflect the time each of these various events consumed nor the time intervals separating them.

It is unfortunate that the record was not based on witnesses' testimony, under both direct and cross-examination but, rather, on the trial court's apparently extemporaneous summary of the facts as it understood them from the materials contained in Gant's motion to suppress and the state's opposition to it. We believe the better practice is to have the facts flow from witness testimony and other admitted evidence or to be stated in a written stipulation of the parties. Indeed, the law favors a stipulation of facts, especially if the stipulation is carefully considered and crafted in advance of a hearing or trial, that would be binding both below and on appeal. See State v. Sorrell, 109 Ariz. 171, 506 P.2d 1065 (1973); Bennett ex rel. Arizona State Personnel Comm'n v. Beard, 27 Ariz.App. 534, 556 P.2d 1137 (1976). We can only observe that many of the critical facts that bear upon resolution of the contested issues would likely have been addressed had the parties questioned witnesses. We appreciate a trial court's attempt to conserve judicial resources by acknowledging its understanding of the factual background and the parties' relative positions at the outset of a contested matter. But, this does not relieve the party bearing the burden of persuasion, here the state, from ensuring that the record contains adequate information for judicial decision-making at both the trial and appellate levels. See State v. Rogers, 186 Ariz. 508, 924 P.2d 1027 (1996) (stressing necessity of making factual record below in order for appellate court to decide fact-intensive issue and base holding on it).

Accordingly, the record before us does not support a finding that the police were attempting to initiate contact with Gant while he was in the vehicle either by confronting him or by signaling an intent to confront him, notwithstanding the officer's shining the flashlight. Therefore, the search of Gant's

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4 Citing the following statements the trial court made when denying Gant's motion to suppress, the state asserts that the court made implicit factual findings that Gant had been aware of the police presence at the residence and had been only a few steps away from the officer when contact occurred. The court stated: "I don't think [Gant] can limit the scope of the search by vacating the car faster than the officers can get up to the car," and "[t]he fact that Mr. Gant was fast enough or clever enough to get out of the vehicle I don't think limits the officer's ability to search the vehicle." But, nothing in the trial court's factual summary, nor any reasonable inferences therefrom, supports those remarks.
vehicle was outside the scope of Belton. See Lewis, 632 A.2d at 388 ("[A]ppellant had left the vehicle and [had] become a pedestrian before the police officer initiated contact with him; he was not an 'occupant' within the meaning of Belton."). Because the narrow Belton exception is inapplicable, the search must satisfy the Chimel test to have been a lawful search incident to Gant's arrest. See Strahan; see also Fafowora. Because the passenger compartment of his vehicle was not "within his immediate control" at the time of his arrest, Chimel, 395 U.S. at 763, 89 S.Ct. at 2040, 23 L.Ed.2d at 694, the search was not conducted as an incident to his arrest. Strahan; see also Fafowora. Because the state failed to meet its burden of proving that the warrantless search of Gant's vehicle was a lawful search incident to his arrest, we must reverse the trial court's denial of his motion to suppress the evidence found in his vehicle. See Valle.

Probable Cause

Because we can uphold a trial court's ruling on a motion to suppress if the court reached the correct result even though based on an incorrect reason, State v. Nadler, 129 Ariz. 19, 628 P.2d 56 (App.1981), we must consider the state's alternative argument that the police were justified in searching Gant's vehicle independent of the search-incident-to-arrest exception. The state asserts that, because Gant was present at a house where narcotics trafficking was suspected to be occurring and where the police had found a person with drug paraphernalia, the police had probable cause to search Gant's vehicle under the automobile exception to the warrant requirement. See State v. Weinstein, 190 Ariz. 306, 947 P.2d 880 (App.1997) (police may search vehicle without warrant if vehicle readily mobile and if they have probable cause to believe it contains contraband). That exception, however, is inapplicable here.

The state has not cited any case, nor have we found any, in which the police were found to have probable cause to search a vehicle based on facts such as these. Based on the sparsely developed factual record before us on this issue, we must conclude that the police did not have probable cause to believe that Gant's vehicle contained contraband. Indeed, it would be inappropriate for us to do otherwise. See Rogers.

Conclusion

In sum, the state failed to meet its burden of proving the legality of the warrantless search of Gant's vehicle. See Valle; Rodriguez. Therefore, the trial court erred in denying Gant's motion to suppress the evidence found in his vehicle. Because of our resolution of this issue, we need not address Gant's remaining argument on appeal. We reverse Gant's convictions and sentences.

FLOREZ, J., concurs.

PELANDER, Judge, specially concurring.

I concur with the court's opinion but write separately to make several additional observations. Cases such as this are difficult and have produced disparate results around the country primarily because the law relating to warrantless vehicle searches after Belton has become so muddled. As Justice Lacy noted in her concurring opinion in Glasco v. Commonwealth, 257 Va. 433, 513 S.E.2d 137, 142 (1999) (Lacy, J., concurring):

[N]othing in Belton specifically defined what
circumstances qualified an arrestee as a "recent occupant." Consequently, from its inception, application of the so-called "bright line" Belton rule has not provided clear resolution of search issues in cases with facts that do not mirror the facts in Belton or the precise words of the rule.

The Belton rule was premised, at least theoretically, on concerns for officer safety and evidence preservation. See New York v. Belton, 453 U.S. 454, 457, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768, 773 (1981); State v. Hanna, 173 Ariz. 30, 32, 839 P.2d 450, 452 (App.1992). As routinely applied, however, the rule "may be invoked regardless of whether the arresting officer has an actual concern for safety or evidence." United States v. McLaughlin, 170 F.3d 889, 891 (9th Cir.1999). See also Hanna; State v. Wanzek, 598 N.W.2d 811 (N.D.1999); Glasco. As Judge Trott aptly noted in his concurring opinion in McLaughlin: "In our application of Belton's 'bright-line' [rule] ... the rationales behind the search incident to arrest exception have been abandoned, the purpose has been lost, and, as Chief Justice Rehnquist predicted, little certainty remains." 170 F.3d at 894 (Trott, J., concurring).

"The purposes behind Belton were two-fold: to create a single familiar standard to guide police officers in automobile searches and to eliminate the need for litigation in every case to determine whether the passenger compartment of the vehicle is within the scope of a search incident to arrest." Wanzek, 598 N.W.2d at 815. See also Belton, 453 U.S. at 458-60, 101 S.Ct. at 2863-64, 69 L.Ed.2d at 774-75; Glasco, 513 S.E.2d at 141. Based on the varying results of cases decided in the twenty years following Belton, it is questionable whether those purposes have been achieved. And, I have some concerns that our ruling today, although correct on the very sparse, undeveloped record before us, may frustrate those purposes and incorporate unintended nuances into this already complicated Fourth Amendment arena. As the state points out, the fine lines that courts may have to draw in this area are problematic:

[W]ould a suspect who has one foot in the vehicle and one on the ground be deemed "in" or "out" for purposes of Belton? Would that depend on whether some part of his body was still touching the seat? What if he had both feet on the ground but the door is still open and he's leaning into the passenger compartment--or just reaching in? What if he's sitting on the tailgate of a station wagon but his feet are touching the ground--could he merely stand up to render Belton inapplicable? What if the suspect is standing outside the vehicle but has left the engine running? ... [C]ould the initial contact [by police] be non-verbal, such as a signal by hand, whistle, or flashlight? Or, because an actual-occupancy concept necessarily depends on the suspect's precise physical location at the time of contact, would the initial contact have to involve at least the officer's present ability to make immediate physical contact? Under such a rule, given the endless variations in the facts that Fourth Amendment issues inevitably engender, suppression hearings on Belton searches could become extended mini-trials on factual minutiae, and the actions of police officers in the field would have no predictable legal consequences in the courtroom.

Regardless of whether those issues and concerns may be legitimate, this case does not raise any of them. Fourth Amendment determinations typically involve fact-intensive inquiries and, inevitably, line-drawing. And resolution of any such issues, of course, depends on analysis of specific facts actually presented in a particular case. Based on the record here, the state simply did not carry its burden of establishing the legality of the warrantless search of Gant's vehicle.

Nonetheless, I agree with the state's protest that
"police should not have to run a footrace to implement Belton." See Wanzek, 598 N.W.2d at 815 ("Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search."); Thomas v. State, 761 So.2d 1010, 1014 (Fla.1999) ("[T]he arrest and subsequent search should not be invalidated merely because the defendant is outside the automobile. The occupants of a vehicle cannot avoid the consequences of Belton merely by stepping outside of the vehicle as the officers approach."). Indeed, our opinion expressly emphasizes that point. I further note that we do not limit Belton's reach to cases in which police first initiate or attempt to initiate contact with the arrestee when he or she is in a moving, as opposed to a parked or otherwise stationary, vehicle.

Despite my concerns about the state of the law in this area, affirming the trial court's ruling here essentially would not only overlook, but also tacitly approve of the significant factual deficiencies in the record; minimize the state's burden of establishing the legality of this warrantless search; disregard the Supreme Court's cautionary note in Belton that it was "in no way alter[ing] the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests," 453 U.S. at 460 n. 3, 101 S.Ct. at 2864 n. 3, 69 L.Ed.2d at 775 n. 3; and stretch the concept of "recent occupant" beyond Belton's intended, contextual meaning. See Glasco, 513 S.E.2d at 144 (Lacy, J., concurring) (noting that in all but one case cited in Belton on this point, "the arrestee was arrested while in the vehicle, and in all the cases the search of the vehicle occurred after the arrestees exited the vehicles at the direction of the police and while they were still within close proximity of the vehicles"). Accordingly, I concur that the trial court erred in denying Gant's motion to suppress.
WASHINGTON (AP) - The Supreme Court agreed Monday to take a fresh look at police rules for searching stopped cars.

The court agreed to hear an appeal from Arizona, in which police arrested a man who had just parked his car in a driveway.

A search of Rodney Gant's car turned up cocaine and drug paraphernalia. A state appeals court ruled that the evidence could not be used against Gant because he did not know police were after him when he parked the car.

The appeals court wrongly interpreted an earlier Supreme Court case when it ruled for Gant on that point, and other state and federal courts have made the same mistake, former Arizona Attorney General Janet Napolitano wrote.

The lower court determined that under the 1981 Supreme Court ruling, police should have confronted Gant or signaled to him before he parked.

An officer walked toward the parked car and shined a flashlight inside. Gant then got out and met the officer outside the car. He was arrested on an outstanding warrant in an unrelated case.
III. BRIGHT LINE RULES

There are many more examples which could be offered to show that the world of law enforcement as described by the Supreme Court is very different from the real world as perceived by many people. But, as there are other subjects to cover, it is time to turn to the subject of bright line rules. I submit that the only bright line rules that make sense and provide reasonable guidance to law enforcement, while appropriately protecting privacy, are those based on principle.

A. Searches Incident to Arrest

In Chimel v. California, the Court, after much vacillation, finally decided how far police could go in searching a home incident to arrest and, in the process, articulated a rationale that any reasonable police officer should have been able to follow. The Court said there are two reasons for making a search incident to arrest. First, officers need to take any weapons away from an arrestee that could be used to resist arrest or harm officers or the subject. Second, officers need to prevent destruction of evidence. With these rationales clearly stated, the Court offered a reasonable rule: officers may search the subject's person and the area into which a subject could reach in order to obtain a weapon. This rule is so clearly based upon the rationales offered for the search that any officer should have little doubt how to apply it. It might be true that some officers would intuit that a suspect could reach farther than other officers might, but such differences of view should matter little in day-to-day police work. Any reasonable judgment by the police should be upheld.

When a rationale is so clear, cases that otherwise might be hard should be easy. In United States v. Edwards, the Court actually should have had a much easier time than it did in upholding a search of an arrestee's clothes some hours after the arrest. The Court maintained that the arrest process was not completed, but it is hard to see what remained. The better approach would have been to focus on the rationales of Chimel and hold that, if it is possible that an arrestee may still have evidence or a weapon, a search incident is permissible. Principles matter, and when they are clear, they provide guidance as to how to deal with new facts.

Despite the clarity of the rationales offered by Chimel, the Court maintained that there

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42 Id. at 762-63.

was a need for a "bright line" rule in New York v. Belton.\footnote{45 453 U.S. 454 (1981).} An officer stopped a car for speeding, suspected that the four passengers possessed marijuana, arrested them, and searched a jacket in the car before removing the suspects from the scene in his automobile. If ever there were an exigent circumstance search, this was it. The officer was removing four suspects from the scene, had probable cause to believe the car contained drugs, and could not reasonably be expected to leave the car unprotected without first looking for the drugs. But the Supreme Court did not uphold the search on this ground. Instead, it maintained that there was a need for a bright line rule that police could search the passenger compartment of a car including any containers found therein, incident to any arrest of an auto occupant.

The Court suggested that there was some need for this rule, and Justice Stewart, who wrote Chimel, authored the majority opinion in Belton. But Belton lacked principle. In any case in which an officer orders someone out of a car and arrests that person, if the person cannot reach into the car there is no reason why the car should be subject to search. The only reason offered in Belton is that the Supreme Court says so. As a result, if a lawyer has confidential files in a locked briefcase in the backseat of a car and the lawyer is arrested for not coming to a complete stop at a stop sign, an officer may handcuff the lawyer, place the lawyer in the officer's car, and then break open the briefcase and search it (which presumably means reading privileged correspondence). Why? Again, the answer is because the Supreme Court said so.

When the officer arrests someone on a bus, as in Bostick and Drayton, what is the scope of search incident to arrest? Is it the passenger compartment of the bus? No one can answer this question confidently after Belton because a bright line rule that is not based on principle is arbitrary and cannot provide an answer to even a slight change of facts. What about the arrest of a taxi driver for speeding? Does the passenger compartment of the car, including the passenger's belongings, get searched? There is no answer in Belton because the decision is arbitrary and unprincipled. It is a bright line rule without a reason.

If an officer arrests someone about to enter a car, does Belton apply? Suppose an officer stops a car, the driver gets out, and thereafter the officer makes an arrest? Does Belton apply? If an officer arrests someone who has just driven a car, does Belton apply? Under Chimel, the answer to all these questions should be easy: the officer may search if he or she reasonably believes that the arrestee could reach into an area for a weapon or to destroy evidence. Because of Belton, we must await the announcement of another bright line rule.

B. Automobile Searches

Belton involved a search of an automobile, but the search was incident to arrest. Bright-line rules seem particularly attractive when applied to cars generally, as the automobile exception demonstrates. That exception was articulated in Carroll v. United States\footnote{46 267 U.S. 132 (1925).} and involved a prohibition-era stop of an automobile and a search for liquor. At the time, Terry v. Ohio was not decided, and the Court did not therefore have occasion to address whether a seizure of a car while a warrant was obtained might have been required (although there might well have been exigent circumstances similar to Belton). When it did confront the question in
Chambers v. Maroney, the Court held that an automobile could be searched with probable cause and without a warrant even though it was in police custody and was no longer mobile. Justice Harlan pointed out in dissent that the Court was authorizing a seizure first and a search second without justifying the warrantless search. The majority maintained that the mobility of the vehicle remained even at the station house, which is a remarkable assertion in light of the complete control of the police over the vehicle.

The Court has zealously safeguarded the automobile exception, reaching out for cases that cast doubt on the proposition that automobiles are always mobile even when they clearly are not. If a car is in police custody and cannot be moved (police can remove parts of the engine to assure this), why should the car be different from any other property? Well, the Supreme Court says it is. There is no principle underlying the automobile exception other than mobility, and when mobility disappears, so does the principle.

What happens then when there is probable cause to believe that a motor home has evidence? Is a motor home a car or a house? In any sensible world, it would not matter, because the rule would be it could be seized while a warrant is sought absent exigent circumstances. People who live in motor homes believe their home is their castle as well as their car, but the Supreme Court concludes that if people live on wheels, they have a car and not a home. Such is the holding of California v. Carney.

By the time it decided Carney, the Court had articulated a reason other than mobility for treating automobiles as deserving lesser protection than other property--namely, that there is a diminished expectation of privacy regarding their automobiles. This may be the single best example of a rationale that fails to recognize the way in which most Americans think of their cars, as symbols of freedom of movement. It is almost incredible to think that the Supreme Court believes that people have a greater expectation of privacy in the luggage they put on a bus or in a footlocker than in a car. Teenagers in the United States regard the right to drive as one of the passages toward adulthood. The car is not a symbol of freedom only to the young. It is a pathway to incredible mobility for all. The car enables Americans to travel where they want, when they want, as they want.

Although the Justices may not realize it, many very intimate encounters occur in vehicles. People have private conversations in automobiles. People who are not driving read private messages in automobiles. People make love in automobiles. They rarely do these things in luggage or footlockers. Indeed, most people who move


See, e.g., Texas v. White, 423 U.S. 67 (1975) (per curiam) (citing Chambers to uphold a search of an automobile at a station house); Florida v. Meyers, 466 U.S. 380, 382 (1984) (per curiam) (upholding a "warrantless search of an automobile even though the automobile was in police custody" notwithstanding a prior inventory search because "the justification to conduct such warrantless search does not vanish once the car has been immobilized" (internal citations omitted)).


their luggage and their footlockers do it with an automobile, and to pretend that the automobile is not a private place so that a bright line rule can be employed means that a rule without a principle or rationale is created to enable law enforcement to act in a world that is unreal.

The emptiness of a bright-line rule without an underlying principle is demonstrated by California v. Acevedo. The Court found itself facing a difficulty it alone had created. Law enforcement and lower courts were confused as to whether probable cause justified a search of an automobile if the probable cause focused on a container like a footlocker or a bag that was located in an automobile. In short, the question was whether a footlocker in an automobile is entitled to the same protection as a footlocker outside an automobile. One thing is clear: a footlocker is a footlocker whether it is in or out of a car. But the Supreme Court held that a footlocker or a bag in a car could be searched with probable cause without a warrant simply because it fell within the automobile exception. Why? Because the Court said so. It needed another bright line rule.

Well, there was readily available a handy bright line rule based upon principle. A principled rule would permit the seizure of property, including a car, based upon probable cause while a warrant is sought. This is the rule the Court has adopted for property other than cars in cases like United States v. Van Leeuwen, Segura v. United States, and Illinois v. McArthur. A rule based on principle is easy to apply and avoids arbitrariness. Such a rule would require rejection of the automobile exception and recognition of what the Court said in Delaware v. Prouse:

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

Prouse described the world as it really was and still is. The automobile exception is a bright line rule without any justification. It is a rule invented by the Court and one that ignores the real world so well described by the Court in Prouse.

from an apartment that police had secured prior to warrant was admissible despite the “administrative delay” in getting the warrants).


57 397 U.S. 249, 251 (1970) (holding First Class mail may be seized if there is probable cause while a warrant is sought).


59 531 U.S. 326, 331-34 (2001) (holding that when police had probable cause to get a warrant, refusing to allow defendant to enter his own apartment until warrant arrived was not impermissible seizure of apartment).


61 Id. at 662 (footnote omitted).
Discretionary Warrantless Searches and Seizures and the Fourth Amendment: A Need for Clearer Guidelines

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Jennifer Ison Cooke

[Excerpt; some footnotes omitted]

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A. Fourth Amendment

The Fourth Amendment grants individuals a general constitutional right to privacy and protects against inappropriate government intrusion. The Fourth Amendment states as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The test most frequently cited to determine whether an individual’s Fourth Amendment rights have been violated originated in Justice Harlan’s concurring opinion in Katz v. United States. The test requires "first

that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Cases following Katz have used this test to determine if the Fourth Amendment was violated.11

B. Exceptions to the Rule

1. Automobile Exception

Cases interpreting the Fourth Amendment state that a government search or seizure of a person, a person’s home, or a person’s effects without a warrant is unreasonable unless it falls within one of the exceptions to the Fourth Amendment. The United States Supreme Court has recognized a distinction between a person’s reasonable expectation of

11 See, e.g., Oliver v. United States, 466 U.S. 170, 184 (1984) (holding that a person does not have a reasonable expectation of privacy in an open field); Smith v. Maryland, 442 U.S. 735, 745 (1979) (holding that an individual does not have a reasonable expectation of privacy regarding information given to a third person); United States v. White, 401 U.S. 745, 752-54 (1971) (holding that an individual does not have a reasonable expectation of privacy when revealing information to someone with whom he is speaking).
privacy in his home and in his automobile. According to the Court in Carroll v. United States, [there is] a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.  

In Chambers v. Maroney, the Court interpreted Carroll to hold that "a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained."  

The Chambers Court followed Carroll and held that a warrantless police search of a vehicle at the police station following the arrest of four men suspected of armed robbery was reasonable under the Fourth Amendment. Based on the constitutional difference between houses and cars, the Court held that a warrantless search of an automobile was reasonable whenever the police had probable cause to search the vehicle. Carroll and Chambers established this now well-settled automobile exception to the Fourth Amendment's warrant requirement based on automobiles' mobility, the lessened expectation of privacy to which they are entitled, and the pervasive government regulation to which they are subject.

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3. Search Incident to a Lawful Warrantless Arrest

A search and seizure conducted incident to a lawful warrantless arrest is another exception to the Fourth Amendment's general warrant requirement. Following a lawful warrantless arrest, an officer may search the person arrested and the area within the arrestee's reach based on the need to seize weapons and to prevent the destruction of evidence. In Chimel v. California, the Supreme Court held that a warrantless search incident to an arrest was unreasonable because after the suspect had been arrested, the officers searched his entire home, including the attic and garage, and eventually seized numerous items. The Court concluded that the search "went far beyond the [arrestee's] person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area."

A movement toward a bright-line approach to warrantless searches incident to arrests has emerged in cases where the arrest is made in conjunction with a traffic violation. In United States v. Robinson, the Supreme Court upheld the reasonableness of a police officer's search of a driver following the driver's arrest for operating a motor vehicle without a license. The police officer searched the driver's pocket, found a cigarette package, and unwrapped an object found inside the cigarette package which turned out to be heroin. In his dissenting

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58 Robinson, 414 U.S. at 222-23.
opinion, Justice Marshall questioned whether the officer had reason to believe that the cigarette package could have contained any weapons and argued that the search constituted an abuse of police discretion. However, the majority reasoned that police officers needed a bright-line rule to follow and concluded that "[a] police officer's determination as to how and where to search the person of a suspect whom he ha[d] arrested [was] necessarily a quick ad hoc judgment which the Fourth Amendment [did] not require to be broken down in each instance into an analysis of each step in the search.”

In New York v. Belton, the Supreme Court held that the police may search not only one's person following a warrantless arrest related to a traffic violation, but also the passenger compartment of the automobile.61 Based on the reasoning in Chimel, the Court explained that the passenger compartment of an automobile would be "within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'” Therefore, the Belton Court held that a police officer's search of the automobile's passenger compartment did not violate the Fourth Amendment. According to the Court, the searches were lawful because the driver's traffic violation justified the stop. Additionally, once the officer smelled marijuana, he had probable cause to arrest the men for narcotics possession.

A police officer’s discretion to search a person and the passenger compartment of an automobile incident to a warrantless arrest does not change based on the officer's motivations for the arrest.66 Justice Scalia, writing the opinion for a unanimous Court in Whren v. United States, reasoned that the Court "described Robinson as having established that 'the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'"

The events described in Whren occurred in a "high drug area" of the District of Columbia. The police officer passed a truck with a temporary license plate which was being driven by a young man who was looking down into the lap of the passenger in the front seat. When the officer made a U-turn to drive toward the truck, the driver quickly turned to the right and "sped off." After catching up with the young men, the officer approached the vehicle and spotted two bags of crack cocaine in the passenger's lap. The officer arrested the two men and seized various illegal drugs from the vehicle.

At a pretrial suppression hearing, the petitioners argued that the drugs should be inadmissible because the police officer had made a "pretextual" stop unsupported by probable cause. The petitioners further claimed that the test of reasonableness should be "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given." The Court refused to apply this test due to its subjective nature (notwithstanding its objective language) and instead stated that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." Therefore, the Court held that since

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the officer had probable cause to search the petitioners for a traffic violation, the stop was reasonable under the Fourth Amendment. Furthermore, when the officer viewed the illegal drugs in the passenger's lap, the Court held that he acted appropriately in arresting the young men and in seizing the evidence.

The Court applied the Whren holding to a minor, fine-only offense in Atwater v. City of Lago Vista. In Atwater, decided on April 24, 2001, Gail Atwater and her husband filed suit against the City of Lago Vista under 42 U.S.C. § 1983. The Atwaters claimed that Gail's warrantless arrest for the misdemeanor charges of driving without her seatbelt, failing to secure her children in seatbelts, and driving without a license and proof of insurance was unreasonable under the Fourth Amendment. A majority of the Court affirmed the decision of the Fifth Circuit Court of Appeals and held that Atwater's arrest was "not so extraordinary as to violate the Fourth Amendment."

In Atwater, Officer Turek pulled Atwater over for seatbelt violations. Officer Turek asked to see Atwater's license and registration, as required by state law, and Atwater replied that she did not have the paperwork because her purse had been stolen the day before. The officer placed Atwater under arrest, prevented her from taking her children anywhere, and took her into police custody, where she remained in a jail cell for about one hour.

Atwater argued that her warrantless arrest for a fine-only misdemeanor was an unreasonable seizure because the police officer did not encounter a threat of violence and she had not committed a felony. After examining a lengthy history of the common law concerning an officer's arrest authority pursuant to a misdemeanor not amounting to a "breach of the peace," Justice Souter, writing for the majority, stated:

Atwater has cited no particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers' warrantless misdemeanor arrest authority to instances of actual breach of the peace, and our own review of the recent and respected compilations of framing-era documentary history has likewise failed to reveal any such design.

In addition, the Court rejected Atwater's proposal for a modern test that would forbid a warrantless arrest "when conviction could not ultimately carry any jail time and when the government show[ed] no compelling need for immediate detention." Justice Souter explained that the Fourth Amendment was not well-served by a case-by-case approach to determining reasonableness. Souter further stated that

the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

In short, the Court held that the arrest of Gail Atwater was not unreasonable and did not violate her Fourth Amendment rights because Officer Turek had probable cause to believe Atwater had committed a traffic violation, he was authorized to make a custodial arrest, and he made the arrest in an ordinary manner.

02-809 Maryland v. Pringle

Ruling Below: (Md., 370 Md. 525, 805 A.2d 1016)

Discovery, during concededly valid search of vehicle driven by its owner, of money in closed glove compartment and drugs in backseat armrest does not provide probable cause to believe that defendant, who was passenger in front seat, knew about those items or had possession or control of them, and, therefore, arrest of defendant violated Fourth Amendment; invalid arrest tainted defendant's confession.

Question Presented: In case in which drugs and roll of cash are found in passenger compartment of car with multiple occupants, and all deny ownership, does Fourth Amendment prohibit police officer from arresting occupants of car?

Joseph Jermaine PRINGLE

v.

STATE of Maryland.

Court of Appeals of Maryland

Decided August 27, 2002.

[Excerpt; some footnotes and citations omitted.]

CATHELL, J.

On April 11, 2000, Joseph Jermaine Pringle, petitioner, was convicted by a jury in the Circuit Court for Baltimore County of possession with intent to distribute cocaine and possession of cocaine. On May 9, 2000, petitioner was sentenced to a term of ten years incarceration without the possibility of parole.

Petitioner appealed this conviction to the Court of Special Appeals. On appeal, petitioner asserted, inter alia, that there was no probable cause to support his arrest which led to his conviction. On November 28, 2001, the intermediate appellate court held that there was probable cause to arrest petitioner and affirmed his conviction. Pringle v. State, 141 Md.App. 292, 785 A.2d 790 (2001).

On March 6, 2002, we granted petitioner's Petition for Writ of Certiorari. Pringle v. State, 368 Md. 239, 792 A.2d 1177 (2002). Petitioner presents one question for our review:

"Did the police have probable cause to arrest the petitioner where he was a front seat passenger in a vehicle also occupied by the driver/owner and a rear seat passenger, and in which a sum of money was found inside the closed glove compartment and a quantity of drugs was found hidden behind a rear armrest, and where there was neither the odor of drugs within the vehicle nor any other indicia of drug activity?"

We reverse. We hold that there was not probable cause to support the arrest of petitioner in the car when he had not
admitted ownership of the drugs. Specifically, we hold that there was not probable cause to arrest petitioner, who was not the owner of the vehicle, when petitioner was merely the front seat passenger and the only evidence supporting the arrest was a sum of money in the closed front glove compartment and drugs that were hidden from view in the armrest in the backseat of the vehicle.

I. Facts

Officer Jeffrey Snyder of the Baltimore County Police Department testified that at 3:16 a.m. on the morning of August 7, 1999 he conducted a traffic stop. Officer Snyder asked the driver for his license and registration. The driver/registered owner of the car was Donte Carlos Partlow (Partlow). Also in the vehicle were petitioner, the front seat passenger, and Otis Calvin Smith (Smith), the back seat passenger.

When Partlow opened the glove compartment for the vehicle registration, Officer Snyder saw a large amount of rolled up money in the glove compartment. At this time, Officer Snyder did not ask about the money, but went back to his patrol car with Partlow's license and registration to check the Maryland Motor Vehicle Administration computer system for outstanding violations. The computer check did not reveal any violations and Officer Snyder returned to the car, had Partlow exit the vehicle, and issued him an oral warning.

At this time, a second patrol car arrived and Officer Snyder then "asked him [Partlow] if he had anything in the vehicle, any drugs, weapons, narcotics in the vehicle?" Partlow responded that he did not. Officer Snyder then asked for and received permission from Partlow to search the vehicle. Prior to doing so, Officer Snyder asked the other two men in the vehicle, petitioner and Smith, to exit the vehicle and he patted them down. All three men were asked to sit on the curb while he searched the vehicle.

During the search, Officer Snyder seized $763.00 from the glove compartment and five plastic glassine baggies containing suspected cocaine from inside an armrest in the backseat. Officer Snyder questioned all three men about the ownership of the drugs and money, and told the three men that if no one admitted to ownership of the drugs he was going to arrest them all. None of the men offered any information regarding the ownership of the drugs and/or money, and all three were placed under arrest and transported to the police station.

Sometime between 4:00 and 5:00 a.m., Officer Snyder met with petitioner and, following a waiver of his Miranda rights, obtained an oral and written confession in which petitioner acknowledged that the cocaine belonged to him, that he and his friends were going to a party in Westminster, and that he intended to sell it or "Use it for sex." Petitioner maintained that neither Partlow nor Smith knew of the drugs. Partlow and Smith were released.

At trial, during a suppression hearing, petitioner's counsel argued that petitioner's arrest was unlawful because it was not supported by probable cause and that his confession should be suppressed as the unlawful fruit of an illegal arrest. The trial court judge agreed with the State that Officer Snyder "had probable cause to make the arrest." After a jury trial, petitioner was found guilty and sentenced to ten years incarceration without the possibility of parole. The Court of Special Appeals affirmed the conviction.

II. Discussion

a. Probable Cause

In the case sub judice, petitioner is not contending that the vehicle was stopped, or that the vehicle was searched, in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures. Petitioner's only contention is that the police officer did not have probable cause to arrest him; therefore, his confession was the fruit of an illegal arrest.

In order for a warrantless arrest to be legal it must be based upon probable cause. We have held that a police officer can arrest an accused without a warrant if the officer has probable cause to believe that a felony has been or is being committed by an alleged offender in the officer's presence. Woods v. State, 315 Md. 591, 611-12, 556 A.2d 236, 246 (1989); Nilson v. State, 272 Md. 179, 184, 321 A.2d 301, 304 (1974). Maryland Code (1957, 1996 Repl.Vol.), Article 27, section 594B, then stated, in relevant part:

"§ 594B. Arrestrs without warrants generally.
(a) Arrest for crime committed in presence of officer. – A police officer may arrest without a warrant any person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer.
(b) Arrest for crime apparently committed in presence of officer. – A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the officer's presence or within the officer's view, may arrest without a warrant any person whom the officer may reasonably believe to have committed such offense.
(c) Arrest for crime committed generally. – A police officer may arrest a person without a warrant if the officer has probable cause to believe that a felony has been committed or attempted and that such person has committed or attempted to commit a felony whether or not in the officer's presence or view."

Petitioner was charged and eventually convicted of violating sections 286 - possession of cocaine with intent to
distribute and 287 – possession of cocaine. In order for petitioner’s arrest to be valid, the officer must have had probable cause at the time of the arrest to believe that petitioner was in possession of cocaine. Possession is defined in Maryland Code (1957, 1996 Repl.Vol., 2001 Supp.), Article 27, section 277(s) as "the exercise of actual or constructive dominion or control over a thing by one or more persons." This statute recognizes, as we have held, that possession may be constructive or actual, exclusive or joint. State v. Leach, 296 Md. 591, 596, 463 A.2d 872, 874 (1983).

While the quantum of evidence is different, we have discussed possession issues in several sufficiency of the evidence cases, which are instructive in respect to the definition of possession. [In Garrison v. State, 272 Md. 123, 321 A.2d 767 (1974), the court held “that the State had not met the standard of legal sufficiency because there was no evidence which directly or inferentially demonstrated that the defendant had exercised actual or constructive dominion or control, solely or jointly, over the narcotics.”]

In State v. Leach, 296 Md. 591, 463 A.2d 872 (1983), Stephen Leach and his brother, Michael Leach, were convicted of possession of a controlled dangerous substance. On appeal, Stephen Leach challenged the sufficiency of the evidence in his conviction for possession. [On appeal, the court found the evidence to be legally insufficient because it could not be “reasonably inferred that he exercised restraining or directing influence over” drugs and drug paraphernalia in the bedroom of his brother’s apartment. Id. at 596, 463 A.2d at 874.]

[In Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988), the court held that knowledge was an element of possession. Judge Eldridge, writing for the Court, stated: "Knowledge of the presence of an object is normally a prerequisite to exercising dominion and control." Id. at 649, 547 A.2d at 1046.]

Therefore, in order to prove "possession," the State must prove the elements of "dominion or control" and "knowledge." These elements were applied in two other, more recent, sufficiency of the evidence cases, White v. State, 363 Md. 150, 767 A.2d 855 (2001) and Taylor v. State, 346 Md. 452, 697 A.2d 462 (1997). In White, the court held that the evidence was insufficient to support the conviction of a passenger for possession of cocaine that was in a sealed box in the trunk. The court said that the passenger “did not have a possessory right in, or control over, the vehicle,” and even if he had the requisite knowledge, “we conclude nonetheless that there was not sufficient evidence establishing that [White] exercised dominion and control over the cocaine.” White, 363 Md. at 164-65, 767 A.2d at 863.]

[In Taylor, police discovered drugs and paraphernalia in the bags and wallet of occupants of a motel room, but arrested only the occupant who was present during the search. The court held that the evidence was insufficient to establish possession. Judge Raker, writing for the court, stated:

"... In sum, the evidence presented in this case was insufficient to establish that Taylor was in possession of the marijuana seized from Myers’s carrying bags. Taylor’s presence in a room in which marijuana had been smoked, and his awareness that marijuana had been smoked, cannot permit a rational trier of fact to infer that Taylor exercised a restraining or directing influence over
marijuana that was concealed in personal carrying bags of another occupant of the room. Because Petitioner was in joint rather than exclusive possession of the hotel room, his mere proximity to the contraband found concealed in a travel bag and his presence in a room containing marijuana smoke were insufficient to convict him."

Taylor, 346 Md. at 459-63, 697 A.2d at 465-68 (footnote omitted) (alteration in original).]

While the cases we have discussed above involve the sufficiency of the evidence, they, nonetheless, establish the law for determining some possession issues, even at the probable cause to arrest stage. Moreover, we have also had occasion to apply the elements of possession to cases, like the case at bar, where the probable cause to make an arrest for possession is being challenged. In Livingston v. State, 317 Md. 408, 564 A.2d 414 (1989), Wesley Livingston was one of three people in a vehicle that was stopped for speeding. Livingston, who was not the owner of the vehicle, was sitting in the backseat. During the stop for speeding, the state trooper saw two marijuana seeds on the floor of the front passenger's side. The state trooper arrested all three occupants of the car and upon searching Livingston pursuant to the arrest, the state trooper discovered cocaine and marijuana in Livingston's pocket. Livingston was charged with possession of cocaine with intent to distribute, possession of cocaine, and possession of marijuana. He moved to suppress the evidence as the product of an illegal arrest but the motion was denied by the trial court. Livingston was convicted on all three counts and he appealed.

We further examined when a police officer has probable cause to make a warrantless arrest in Collins v. State, 322 Md. 675, 589 A.2d 479 (1991). On September 20, 1988, at 3:00 a.m., Officer Holmes of the Salisbury Police Department noticed five men standing about five feet from a Mustang that was parked in the entrance to a car dealership. The Mustang was not owned by Collins. Officer Holmes approached the men and asked what they were doing. The driver of the Mustang, Steven Lewis, stated that they were looking at the BMWs. Officer Ewing arrived on the scene to assist Officer Holmes. Officer Ewing saw a 35 mm film canister on the rear seat of the Mustang and
he asked one of the men to retrieve the canister for him. Inside the canister, Officer Ewing found over twenty cellophane wrapped packets containing cocaine. Officers Ewing and Holmes then arrested all five men for possession of cocaine. Collins alleged at a suppression hearing that there was not probable cause for his arrest. The trial court denied his suppression motion and Collins was convicted of possession of cocaine.

Before this Court, Collins once again asserted that there was not probable cause for his arrest. Specifically, relying on Livingston, supra, he asserted that his mere proximity to incriminating evidence, or to an offender, is not enough for a finding of probable cause for arrest. Furthermore, Collins asserted that there was no further factual basis to connect him to the drugs or to having committed any crime. We first discussed the United States Supreme Court case of United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), in which the Supreme Court had examined the arrest of Di Re, who was seated in the passenger seat of a vehicle from which an informant had purchased counterfeit gasoline ration coupons from the driver and the backseat passenger was seen holding gasoline ration coupons. The police arrested and searched all three men. The Supreme Court held that Di Re's mere presence in a vehicle involved in criminal activity, without more, did not cause him to lose his right to be free from a search of his person. We then discussed our holding in Livingston, supra, and we held that there was not probable cause to arrest Collins for possession. We stated:

"Considering the totality of the circumstances, we conclude that the mere presence of a closed film canister in a car found to contain cocaine was legally insufficient to support the requisite probable cause to arrest Collins as he stood outside of the vehicle. No testimony suggested that he arrived at the lot in the car, that he had even been in the vehicle, or that he knew the suspected cocaine was in the back seat of the car. Even if the police had probable cause to arrest Lewis or Parker for unlawful possession, there was no probable cause to arrest Collins. As there was no evidence which criminally linked Collins to either the car, or to the film canister, there was no probable cause to believe that he committed or attempted to commit a felony as required by Art. 27, § 594B."

Collins, 322 Md. at 682-83, 589 A.2d at 482.

As stated, supra, to determine whether a police officer had probable cause to make a warrantless arrest, we evaluate the totality of the circumstances as to whether the facts and circumstances, with rational inferences derived therefrom, would lead a reasonable person to believe that a felony has been or is being committed. In a specific case, we apply the elements of the alleged offense to the facts and circumstances of that case to determine whether the police officer had probable cause to make a warrantless arrest of a particular individual for that specific offense.

In the case sub judice, applying the facts and circumstances of this case to the elements of possession requiring "knowledge" of the controlled dangerous substance and "dominion or control" over the substance, and relying on the holdings of our previous cases, specifically our holding in Livingston, we find that the police did not have probable cause to arrest petitioner. Similar to the situation in Livingston, where the defendant was sitting in the backseat and two marijuana seeds were in open view on the
floor in the front seat, petitioner in this case was sitting in the front seat and the cocaine was found hidden from view in the armrest in the back seat of the car. Without additional facts available to the officer at that time that would tend to establish petitioner's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when petitioner was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession. As we stated in Livingston:

"Merely sitting in the backseat of the vehicle, Livingston did not demonstrate to the officer that he possessed any knowledge of, and hence, any restraining or directing influence over two marijuana seeds located on the floor in the front of the car.

"Without more than the mere existence of two marijuana seeds located in the front of the car, we hold that the police officer lacked probable cause to arrest Livingston, a rear seat passenger, for possession of marijuana."

Livingston, 317 Md. at 415-16, 564 A.2d at 418 (footnote omitted).

The State points to the additional fact that the police officer saw a large amount of rolled up money in the glove compartment located in front of petitioner. Money, without more, is innocuous. In Leach, we held that there was insufficient evidence to convict Stephen Leach, the brother of Michael Leach, when the drugs were found in Michael Leach's bedroom. In that case, the police had also discovered a large table scale and a magnifier in plain view on the kitchen table. We held that the table scale and magnifier were intrinsically innocuous and that they only became significant when associated with drugs. The money in the case at bar was not in the plain view of the police officer or petitioner; rather it was located in a closed glove compartment and only came into view when the glove compartment was opened by the car's owner/driver in response to the officer's request for the car's registration. There are insufficient facts that would lead a reasonable person to believe that petitioner, at the time of his arrest, had prior knowledge of the money or had exercised any dominion or control over it. We hold that a police officer's discovery of money in a closed glove compartment and cocaine concealed behind the rear armrest of a car is insufficient to establish probable cause for an arrest of a front seat passenger, who is not the owner or person in control of the vehicle, for possession of the cocaine.

As noted, supra, we hold that there was not probable cause to arrest petitioner at the time of the routine traffic stop. Under the "fruit of the poisonous tree doctrine," evidence tainted by Fourth Amendment violations may not be used directly or indirectly against the accused. See Miles v. State, 365 Md. 488, 781 A.2d 787 (2001). The exclusionary rule "applies to any 'fruits' of a constitutional violation — whether such evidence be tangible ... or confessions or statements of the accused obtained during an illegal arrest and detention." United States v. Crews, 445 U.S. 463, 470, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537, 545 (1980) (footnote omitted).

2 Under respondent's reasoning, if contraband was found in a twelve-passenger van, or perhaps a bus or other kind of vehicle, or even a place, i.e., a movie theater, the police would be permitted to place everyone in such a vehicle or place under arrest until some person confessed to being in possession of the contraband. Simply stated, a policy of arresting everyone until somebody confesses is constitutionally unacceptable.
b. Attenuation

The State has not argued that the confession was admissible as a result of attenuation. We do not believe that the parties have properly presented that issue to this Court. Even if properly presented, the concept would not be applicable under the circumstances here present.

[The court then turns “to whether, if attenuation had been properly presented, the taint of the illegal arrest was sufficiently attenuated to permit the admission into evidence of petitioner's confession, which would otherwise be barred as the fruit of a poisonous tree because the arrest was effectuated without probable cause. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).”]

III. Conclusion

In order for the warrantless arrest of petitioner for possession to be legal, there must be probable cause as applicable to the elements of the offense of possession. Looking at the totality of the circumstances, and after examining our case law, we conclude that there was not probable cause to arrest petitioner for possession.

The totality of the circumstances of the facts of this case, as interpreted under the Brown factors and the further consideration of voluntariness, clearly show that the necessary severing of the relationship between the primary illegality and the evidence derived therefrom to satisfy attenuation, even if the issue had been properly presented to this Court, does not exist. While petitioner was given his Miranda warnings, an application of the remaining Brown factors and a consideration of voluntariness, in light of the continuing inducement and the confession's proximity in time to the illegal arrest and the coercion, makes clear that the temporal proximity between the illegal arrest and the confession, the lack of intervening circumstances and the purposefulness of the illegal police conduct all indicate a direct causal nexus between the illegal arrest for lack of probable cause and petitioner's confession used by the State at trial.

Therefore, we hold that the arrest of petitioner was illegal and that there were insufficient facts and circumstances to prove petitioner's confession was adequately attenuated from the point of his illegal arrest to the giving of the confession.

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BATTAGLIA, J. in which WILNER and HARRELL, JJ., join.

I respectfully dissent.

The majority's holding that the police officers lacked probable cause to arrest the petitioner for possession of cocaine is based primarily upon an erroneous blending of the probable cause standard for an arrest and the sufficiency of evidence standard for a conviction. While the majority hastily acknowledges the differences between these standards, it devotes most of its attention to citing and discussing legal authority for issues involving the standard of legal sufficiency and gives only brief consideration to two (more applicable, albeit distinguishable) opinions concerning the requisite probable cause for a valid warrantless arrest. For these reasons, and the reasons articulated herein, I respectfully dissent.

 Arrests without warrants are constitutionally and statutorily permitted pursuant to Article 27, Section 594B of the Maryland Code as
long as the officer has probable cause to believe that a crime has been committed and the officer reasonably believes the arrestee committed that crime. Determining whether probable cause exists to support a warrantless arrest requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation "in light of the facts and circumstances found to be credible by the trial judge." See State v. Lemmon, 318 Md. 365, 379, 568 A.2d 48, 55 (1990). ***

In the present case, the information known to the officer at the time of the arrest was that three men were traveling in a vehicle (a Nissan Maxima) around 3:00am with a large stash of cash in the glove compartment and several plastic baggies of cocaine in the rear armrest. None of the men claimed ownership of the drugs or money, yet the location of the drugs and money in the Nissan Maxima would lead a reasonable officer in similar circumstances to believe that the three men had joint constructive possession over the contraband. In my view, this establishes probable cause for the arrest of each of the three individuals, including the petitioner.

What more would the majority require to justify an arrest? From the emphasis in its opinion, the majority would seemingly require police officers to consider whether the evidence gathered would be legally sufficient for a possession conviction prior to making the arrest. The majority asserts that "[w]hile the cases we have discussed above involve the sufficiency of the evidence, they, nonetheless, establish the law for determining some possession issues, even at the probable cause to arrest stage;" yet cites no authority for this proposition. Granted, the arresting officer must comprehend that which "possession of a controlled dangerous substance" entails. The officer should not, however, be required to base a determination to arrest on the ability of the State to meet the standard of legal sufficiency for a conviction; nor should the reviewing courts measure the propriety of the arrest by such a standard.

Let me be clear on this point: I agree that the legal sufficiency of evidence in possession of narcotics cases requires the State to produce evidence of dominion or control over the narcotic allegedly possessed, and knowledge therewith, beyond a reasonable doubt. I disagree, however, that the degree of evidence required for a conviction on the charge of possession of narcotics can be equated to that which is required of police officers when making probable cause determinations for warrantless arrests. Courts reviewing such determinations must not confuse or blend the two standards: probable cause for an arrest (a lower standard than legal sufficiency for a conviction) requires the reasonable belief that the person arrested had committed or was committing the felony crime of possession of narcotics. As we have oft explained, "probable cause is a nontechnical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify a conviction, but more evidence than that which would arouse a mere suspicion." Woods v. State, 315 Md. 591, 611, 556 A.2d 236, 246 (1989)(quoting Nilson v. State, 272 Md. 179, 184, 321 A.2d 301, 304 (1974)). A police officer who discovers (at 3 a.m.) three passengers in a vehicle which contained several baggies of cocaine in the rear armrest and a large wad of money (arguably, "drug money") in the front glove compartment could reasonably believe that those persons were exercising joint and constructive possession of the contraband in the vehicle, were engaging in drug trafficking, or conspiring to engage in drug trafficking, thus establishing probable
cause for the arrest of each individual. Whether the State's Attorney can produce sufficient evidence to demonstrate, beyond a reasonable doubt, actual or constructive dominion or control over the narcotics and knowledge therein to warrant a conviction is another question – one that is properly left to the prosecutor, initially, and the trier of fact, subsequently.

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Instead of focusing on the factual scenario presented to the Court, and more apposite, to the police officer, the majority chooses to jump to hypothetical extremes in an attempt to justify its operative heightening of the probable cause standard. In note [3], the majority erroneously asserts that if the Court were to adopt the position proffered by the appellant, then so long as some contraband was found, probable cause would exist, per se, and the police could arrest everyone, whether in a twelve-passenger van or movie theater. Such an assertion is specious in that the totality of the circumstances test, itself, precludes these sweeping generalizations; instead, it requires a review of the specific facts and circumstances presented to the officer at the scene of the purported crime, and if questioned, a ruling regarding the officer's determination based upon these specific facts and circumstances. A court should not, and quite simply cannot, conjecture upon whether probable cause exists in factual situations not before it. Should I choose to entertain the majority's hypotheticals, however, I would unequivocally assert that baggies of cocaine found in one area of a packed movie theater, without more, would not constitute probable cause to arrest everyone in the theater; I believe that the totality of circumstances test, itself, would preclude a finding of validity in such circumstances.

The majority's attempt, however discrete, to incorporate a higher standard – that of the sufficiency of evidence – into the properly-applied probable cause standard will only serve to burden the law enforcement community.***

For the aforementioned reasons, I respectfully dissent.

Judge WILNER and Judge HARRELL have authorized me to state that they join in the views expressed herein.
High Court to Review Traffic Stop Arrests

AP Online

March 24, 2003

Anne Gearan

WASHINGTON (AP) The Supreme Court said Monday it will consider the scope of police power to arrest all occupants of a car during a traffic stop, agreeing to look at a case in which everyone in a car denied knowledge of drugs and a roll of cash found inside.

The case from Maryland continues a line of Supreme Court cases clarifying when officers have probable cause and can apprehend someone without a warrant. In this case, the court will consider whether it was an unconstitutional stretch for the officer to link the front-seat passenger to drugs found in a back armrest, and then to arrest all three people in the car.

Twenty states had urged the court to hear the case, involving a 1999 early morning traffic stop in Baltimore County that yielded $763 in the glove compartment and five baggies of cocaine in an armrest in the backseat.

"Countless times each day, officers make traffic stops and uncover contraband in multi-passenger situations. Police need the clarity of authority to know who may be arrested in such cases," Maryland Attorney General Joseph Curran argued in a court filing.

Joseph Jermaine Pringle, the front seat passenger, was convicted of drug charges and sentenced to 10 years in prison.

He later told police the drugs were his ***.

An appeals court threw out Pringle's conviction on grounds that his arrest was unconstitutional and the confession was tainted.

The Constitution's Fourth Amendment prohibits unreasonable searches or seizures. That means police almost always need a warrant to search someone's house without permission, but the Supreme Court has interpreted the protection more narrowly when it comes to automobiles and public transportation.

Lower courts have differed on the correct standard for determining probable cause to arrest a car's occupants, and the Supreme Court has never squarely ruled on the question, Maryland and the other states argued.

"The uncertainty generated by conflicting court decisions does not make the officers' already-difficult job any easier," Ohio Attorney General Jim Petro wrote on behalf of the 20 states siding with Maryland.

The case is Maryland v. Pringle, 02-809.
WITHOUT A WARRANT, PROBABLE CAUSE, OR REASONABLE SUSPICION: IS THERE ANY MEANING TO THE FOURTH AMENDMENT WHILE DRIVING A CAR?

Houston Law Review

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Chris K. Visser

[Excerpt; some footnotes and citations omitted.]

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The Range of Permissible Police Activity After a Stop

Although inconvenient for the motorist, a traffic stop is a reasonable response to an observed traffic violation because generally a stop is minimally intrusive, of short duration, and takes place in public. After the initial stop, the driver expects, at a minimum, that he or she will be questioned about the observed infraction, have to submit his or her license and registration to the officer, and will possibly be cited for the traffic offense. What the driver may not expect, however, is the extent to which the police officer may expand the scope of the search after the initial traffic stop.

In analyzing the validity of a traffic stop, the second prong of the Terry test requires that any subsequent search or seizure be reasonably related in scope to the original reason for the stop. Subsequent to Terry, however, the Court has diluted this prong of the test and now specifically allows police to conduct protective searches of the driver and automobile, seize items that are in plain view, search the motorist incident to an arrest, run background checks, conduct a consensual search of the automobile, and use drug-sniffing dogs to search for illegal drugs. Using any of these techniques, the police can legally conduct a comprehensive search of the automobile and its occupants, provided that the basis of the initial stop was reasonable (i.e., based on an observed traffic violation).

1. Protective Search of the Driver and the Car. As noted, the stop-and-frisk principles in Terry are applicable to traffic stops because traffic stops are analogous to Terry stops. Terry allows for a frisk to protect the officer—an intrusion that is more limited (or, at least, is more justifiable) than a full-fledged search because it is designed to search for weapons that could harm the stopping officer.

In Michigan v. Long,1 the Court extended the use of the protective search to include a limited search of the automobile's interior. The rationale for this decision was that the officer could be threatened by weapons within the motorist's reach inside the car. This search of the automobile interior includes areas inside the passenger compartment itself, as well as all closed containers in that area. If, during this search for weapons, the officer discovers

drugs or other contraband, the Fourth Amendment does not require that the officer ignore the contraband. Within constitutional limits, therefore, the officer may search for drugs while performing a protective search of the automobile.

After a legitimate stop, the officer may also conduct a protective search of the driver. In *Pennsylvania v. Mimms*, the Court found that a protective search of the driver after a traffic stop was reasonable. As with protective searches of the automobile interior, the justification for the driver search is to protect the officer. In general, though, contraband evidence will be admissible only if the incriminating nature of the contraband was "immediately apparent" to the officer.

2. Seizure of Items in Plain View. In addition to protective searches, the officer may also seize, without a warrant, items that are in "plain view" after stopping the car. The "plain view" doctrine applies to the traffic stop context if the officer has probable cause to believe that a traffic violation occurred, and if the officer can immediately recognize that the item in plain view is contraband or evidence of a crime.

The rationale for the "plain view" doctrine is that police should not have to obtain a warrant for evidence that they have lawfully discovered. While the police may not rummage through the car to "discover" evidence, the "plain view" doctrine gives police a powerful motive to stop motorists for observed traffic violations as a pretext, in hope of finding contraband in plain view.

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[3.] Conducting a Consensual Search. Another powerful weapon in the police officer's arsenal to turn routine traffic stops into full-scale searches is the consensual search. Subsequent to a legitimate traffic stop, a police officer may ask for consent to search the automobile. Officers often ask for consent in order to get around the traditional requirement of a warrant. More importantly, the officer usually asks for consent because there is no other legitimate basis for conducting the search.

The Supreme Court has held that the burden of a consensual search is that it is voluntary. The inquiry into whether consent was voluntary is factual and depends on the totality of the circumstances. Some of the factors that are relevant, but not dispositive, in determining if consent was voluntary include the following: knowledge of the right to refuse consent; presence of coercive surroundings, including the location of the request and the number of police officers present; [and] whether the officers displayed their weapons ***.

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3 See *Coolidge v. New Hampshire*, 403 U.S. 443, 468-69 (1971) (holding that police may seize evidence in plain view as long as the discovery of that evidence is inadvertent).
4 See *Schneckloth v. Bustamonte*, 412 U.S. 218, (1973) (noting that a search authorized by consent is constitutionally permissible if the prosecutor can show that the consent was freely and voluntarily given).
Search warrant that did not list objects to be seized and did not incorporate, by reference or attachment, affidavit listing those objects violated Fourth Amendment; officers could not cure violation by orally informing person at target premises of objects to be seized; officer who led search without fulfilling his obligation to read warrant is not entitled to qualified immunity from 42 U.S.C. § 1983 action.

Question Presented: (1) Did Ninth Circuit err in ruling that law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at time he acted there was no decision by U.S. Supreme Court or any other court so holding, and only lower court decisions addressing issue had found same conduct did not violate law? (2) Did law enforcement officers violate particularity requirement of Fourth Amendment when they executed search warrant already approved by magistrate judge, based on attached application and affidavit properly describing with particularity items to be searched and seized, but warrant itself did not include same level of detail?
KOZINSKI, Circuit Judge.

We consider whether and under what circumstances law enforcement officers who execute a search pursuant to a defective warrant enjoy qualified immunity.

I

Agent Jeff Groh of the Bureau of Alcohol, Tobacco and Firearms ("BATF") received two reports that the Ramirezes kept an automatic rifle, a rocket launcher, a grenade launcher and grenades on their ranch in western Montana. Groh prepared an application for a search warrant and supporting affidavit, and presented them to a magistrate judge who issued the warrant. The application properly described both the place to be searched and the objects sought. However, the warrant itself omitted the latter information entirely: In the space provided to list the items to be seized, Groh mistakenly typed a description of the Ramirez home.

Groh led BATF agents and members of the county sheriff's department, including Sheriff John McPherson and Undersheriff Joe Lee, in the execution of the warrant. When the officers entered the Ramirez home, only Mrs. Ramirez was present. Groh told her they had a search warrant and were there "because somebody called and said you have an explosive device in a box." The officers found no illegal weapons or explosives, but photographed the home's interior and recorded the serial numbers of the Ramirezes' legal firearms. Mrs. Ramirez tried to call her attorney during the search but could not reach him. As Groh left, he gave Mrs. Ramirez a copy of the defective search warrant; neither the application nor the affidavit were attached. Nothing was seized, and no charges were subsequently filed against the Ramirezes.

The next day, Mrs. Ramirez reached her attorney and faxed him the warrant. The attorney then called Groh and questioned the warrant's validity because of the omitted information. He also demanded a copy of the warrant application and supporting affidavit. Groh replied that the documents were under court seal, but faxed him the page of the application that contained the list of items to be seized.

The Ramirezes sued the officers under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and 42 U.S.C. § 1983, for violation of their Fourth Amendment rights. The district court granted summary judgment to defendants, holding that there was no constitutional violation and defendants enjoyed qualified immunity in any case. The Ramirezes also brought two other Bivens and section 1983 claims, see Parts III & IV infra, but the district court ruled against them on those as well. The Ramirezes appeal.

II

A. Was there a Fourth Amendment violation?

To satisfy the Fourth Amendment, a search warrant must describe with particularity the place to be searched and the items to be seized. U.S. Const. amend. IV; United States v. Sayakhom, 186 F.3d 928, 934 (9th Cir.1999). The particularity requirement protects the individual from a "general, exploratory rummaging in [his] belongings." United States v. Lacy, 119 F.3d 742, 746 n. 7 (9th Cir.1997) (quoting Coolidge v. New
It does so both by "limit[ing] the officer's discretion" and by "inform[ing] the person subject to the search what items the officers executing the warrant can seize." United States v. McGrew, 122 F.3d 847, 850 (9th Cir.1997) (emphasis removed).

We addressed the particularity requirement in McGrew, where federal agents searched the home of a suspected drug trafficker. The warrant itself did not specify the evidence sought. Rather, in the space provided for that information, it referred to the "attached affidavit which is incorporated herein." Id. at 848. However, agents never served McGrew with a copy of the affidavit, either during or after the search. Id. at 849.

According to the "well settled law of this circuit," a warrant "may be construed with reference to the affidavit ... if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit." Id. (quoting United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir.1982) (internal quotation marks omitted)). When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their discretion nor gives the homeowner the required information. Id. at 850.

Appellees concede that the warrant here was facially defective because it provided no description of the evidence sought. It also didn't refer to or incorporate the application or affidavit. Groh attached no documents to the warrant when he served it on Mrs. Ramirez. Nonetheless, appellees argue that McGrew does not control and that the search was lawful because Groh's words remedied the defect. According to Groh, he spoke at length with the Ramirezes during the search – Mrs. Ramirez in person, Mr. Ramirez on the telephone – and listed all of the items sought. However, the Ramirezes claim that Groh spoke only to Mrs. Ramirez, and told her simply that the officers sought "an explosive device in a box."

This factual dispute is immaterial: Groh could not have cured the flaw because he lacked the authority to amend the warrant. As a law enforcement officer, Groh was empowered only to execute the warrant. Therefore, he could no more have supplemented it verbally than he could have amended it by crossing out the terms approved by the magistrate and scribbling new ones in the margins. The only way Groh could have remedied the defect in the warrant was to ask a magistrate to issue a corrected version. McGrew therefore controls and the warrant failed to comply with the Fourth Amendment.

Our holding is consistent with the goals of the particularity requirement, which went unfulfilled here despite Groh's alleged oral statements. First, the absence of a sufficiently particular warrant increased the likelihood and degree of confrontation between the Ramirezes and the police. The presence of a comprehensive and valid warrant "greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (internal quotation marks omitted).

Second, the invalid warrant deprived the Ramirezes of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate. "Citizens deserve the
opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence. United States v. Gantt, 194 F.3d 987, 991 (9th Cir.1999). Such a dialogue is impossible if citizens must rely on officers' verbal representations of the scope of their authority. To stand a real chance of policing the officers' conduct, individuals must be able to read and point to the language of a proper warrant.

Third, permitting officers to expand the scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent litigation. The parties' disagreement over exactly what Groh said during the search, and to whom he said it, is immaterial because the warrant must contain all authorizations and limitations in writing.

B. Are Defendants Protected by Qualified Immunity?

Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions result in a constitutional violation. Wilson v. Layne, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); Marks v. Clarke, 102 F.3d 1012, 1026 (9th Cir.1996). What's reasonable for a particular officer depends on his role in the search. Because searches often require cooperation and division of labor, Guerra v. Sutton, 783 F.2d 1371, 1375 (9th Cir.1986), officers' roles can vary widely. Typically, only one or a few officers plan and lead a search, but more — perhaps many more — help execute it. The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way. See United States v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (search pursuant to a warrant is invalid if no reasonable officer could have believed the warrant was valid). The leaders of the search team must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search, and that such copy has no missing pages or other obvious defects.

Line officers, on the other hand, are required to do much less. They do not have to actually read or even see the warrant; they may accept the word of their superiors that they have a warrant and that it is valid. Guerra, 783 F.2d at 1375; Marks, 102 F.3d at 1029-30. So long as they make inquiry as to the nature and scope of [the] warrant, Guerra, 783 F.2d at 1375, their reliance on leaders' representations about it is reasonable. Id.; Marks, 102 F.3d at 1029-30. The line officers here acted reasonably: They were told that a warrant had been obtained and learned through an advance briefing what items could be seized. Guerra, 783 F.2d at 1375; Marks, 102 F.3d at 1030. Because they were not required to read the warrant, the line officers conducting this

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1 While the Ramirez sued the federal officers under Bivens and the county officers under section 1983, "the qualified immunity analysis is identical under either." Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

2 We note that in this case Agent Groh did not serve a copy of the warrant on Mrs. Ramirez until after the search was completed. Of course, this was much too late. See Gantt, 194 F.3d at 1000-01.
search cannot reasonably have been expected to know that it was defective.

The Ramirezes argue that none of the officers enjoy qualified immunity because, under McGrew, all of them – leaders and line officers alike – should have known that the defective warrant made the search illegal. McGrew, 122 F.3d at 850 n. 5. But McGrew said nothing about the different duties of leaders and line officers. We held only that "[i]t is the government's duty," not the duty of any particular officer, to serve a sufficiently particular warrant. Id. at 850 (emphasis added). Because we were reviewing the denial of a motion to suppress, we had no occasion to address the allocation of responsibilities between leaders and the rank and file.

The record identifies only Groh as the leader of the search. He received two reports of illegal weapons, obtained and served the warrant, conducted the pre-search briefing and supervised the search itself. However, he neglected to check the warrant for errors. The presence of errors in a warrant does not automatically deprive search leaders of immunity. The question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it. Cf. Arnsberg v. United States, 757 F.2d 971, 981 (9th Cir.1985) (holding that a search conducted pursuant to a facially flawed warrant did not violate the Fourth Amendment because "the discrepancy [was] not a serious one"). Even the most careful proofreaders let mistakes slip by, especially when checking their own work.

Nevertheless, Groh is not entitled to qualified immunity. According to his own affidavit, he did not read the warrant after the magistrate issued it and before he began the search. Had he done so, he would surely have realized that it did not contain a list of items to be seized and was therefore facially defective. He would then have been able to correct the error before going forward with the search. In most cases, "an officer cannot be expected to question the magistrate's ... judgment that the form of the warrant is technically sufficient." Leon, 468 U.S. at 921. But "the officer's reliance on [that judgment] must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." Id. at 922-23 (citation omitted). No reasonable grounds exist here: The warrant was "so facially deficient ... in failing to particularize the place to be searched or the things to be seized" that, had Groh read it, he could not "reasonably [have] presume[d] it to be valid." Id. at 923.

It is possible that Groh shared authority over the search with other officers, such as Sheriff McPherson and Undersheriff Lee. However, nothing in the record indicates this was the case. Therefore, all officers except Groh are protected by qualified immunity.

III

The Ramirezes also appeal the dismissal of their claim that the officers violated their right to privacy as protected by the Fifth and Ninth Amendments. This claim has two parts. First, the Ramirezes argue that the officers violated their right to privacy by notifying the media of the search immediately before it was executed. They claim that the resulting publicity damaged their standing in the community. Although the Ramirezes present this claim as one for invasion of privacy, the circumstances of the search show that it is actually a defamation claim. Nothing in the record suggests that the media gained access
to the Ramirez property. Whatever information the media obtained during the raid was gathered from the road adjacent to the ranch, where any member of the public could have observed the goings on. *Cf. Hanlon v. Berger*, 526 U.S. 808, 809-10, 119 S.Ct. 1706, 143 L.Ed.2d 978 (1999) (holding that police violated the Fourth Amendment by allowing a media crew to accompany them onto the premises and observe a search); *Wilson*, 526 U.S. at 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 ("[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant...."). Therefore, the only harm that the Ramirezzes can show they have suffered is reputational injury, from which the Constitution offers no protection. *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

The Ramirezzes also argue that the search itself violated not only their right to be free from unreasonable searches and seizures, but also their right to privacy. "[C]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir.1996). However, the Supreme Court has held that plaintiffs cannot "double up" constitutional claims in this way: Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution offers no protection. *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

IV

Finally, the Ramirezzes appeal the dismissal of their claim that each of the officers is liable as a bystander for failing to intercede and prevent his co-defendants' constitutional violations. *See United States v. Koon*, 34 F.3d 1416, 1424-25 (9th Cir.1994), rev'd on other grounds, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). The district court dismissed this claim on the basis of its holding that no constitutional violation existed.

As to the line officers, this claim is foreclosed by our ruling that they had no duty to read the warrant and therefore could not have known that the warrant was defective. They cannot therefore reasonably be held liable for failing to intercede. As to Groh, it is clear from the record that he was not aware that the warrant was defective until long after the search was completed, when he spoke to the Ramirezzes' attorney. Groh cannot be held liable for failing to stop a search he did not know was illegal.

AFFIRMED in part and REVERSED in part. No costs.
WASHINGTON -- The Supreme Court said Monday it would reconsider another ruling from the U.S. 9th Circuit Court of Appeals, this one saying police officers can be held personally liable if they carry out a search with a warrant that is missing key facts.

Officers have a duty to proofread warrants, even after they have been approved by a judge, the appeals court said. And officers who slip up can be forced to pay damages to those who were subjected to the search, the 9th Circuit held last year.

A lawyer for a federal agent in Montana called this strict rule "radical" and "intolerable" in an appeal.

The justices said they would hear the case, Groh vs. Ramirez, in the fall.

Jeff Groh, an agent for the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, received two reports that a ranch in western Montana owned by the Ramirez family had illegal weapons, including grenades and a rocket launcher.

He presented the evidence to a magistrate. But on the warrant, he mistakenly omitted the description of the items sought and instead typed a description of the Ramirez home. The magistrate approved the warrant, and Groh led a team of federal agents and county sheriffs to the ranch.

But the agents found nothing, and no charges were filed. Groh left a copy of the warrant with Julia Ramirez.

Afterward, a lawyer for the family noted the warrant was defective, and he sued Groh and the other agents for conducting an unreasonable search in violation of the 4th Amendment. A federal judge threw out the claim, but the 9th Circuit revived it. "The well-settled law of this circuit," the appeals court said, is that a search warrant must list all the items that are sought.

Because Groh failed in that duty, he can be held liable, the 9th Circuit said. But Groh's lawyer said no other appeals court has adopted such a rigid rule.
When law enforcement officers seeking to enter premises to execute search warrant do not face exigent circumstances and, absent cooperation from persons inside, would have to make forcible entry entailing destruction of property, they may not do so unless, after knocking and announcing pursuant to 18 U.S.C. § 3109, they receive explicit refusal of admittance or wait amount of time that is significant and longer than they would be required to wait if nonforcible entry were possible; police in this case who had no knowledge suggesting that drug suspect posed special risk and, upon knocking on apartment door, heard no sound suggesting that he was moving away from door violated Fourth Amendment and knock-and-announce statute by waiting only 15-20 seconds before making forcible entry.

**Question Presented:** Did law enforcement officers executing warrant to search for illegal drugs violate Fourth Amendment and 18 U.S.C. § 3109, thereby requiring suppression of evidence, when they forcibly entered small apartment in middle of afternoon 15-20 seconds after knocking and announcing their presence?

**BACKGROUND**

Lashawn Lowell Banks appeals his guilty plea conviction for possession of a controlled substance with intent to distribute, and for being a drug user in possession of a firearm. His plea followed the district court's denial of his motion to suppress certain evidence. Banks reserved his right to appeal. A close review of the record, counsel's arguments, and guiding principles, persuades us that a reversal and remand is in order.

The present action concerns the execution of a search warrant on Banks' apartment by North Las Vegas Police Department officers and FBI agents. The officers positioned themselves at the front and rear of the apartment and followed the statutory "knock and announce" procedure by knocking loudly on the apartment door and announcing "police search warrant." See 18 U.S.C. § 3109. After fifteen to twenty seconds without a response, armed SWAT
officers made a forced entry into Banks' apartment.

Once inside, the officers found Banks in the hallway outside his bathroom. Banks, who obviously had just emerged from his shower, was forced to the floor and handcuffed. He then was seated at his kitchen table for questioning and shortly thereafter was provided underwear with which to cover himself. Two agents questioned Banks while other officers searched his apartment. Banks maintains that he was under the influence of drugs and alcohol during the interrogation. Both agents, however, testified that they perceived no indications that Banks was under the influence. Banks also asserts that he was nervous and intimidated by a "good-cop versus bad-cop" routine utilized by the interrogating agents and the hooded SWAT officers searching the apartment. The interrogating agents maintain that Banks appeared calm and was able to reason throughout the interview.

The agents questioned Banks for approximately forty-five minutes, and about midway thereof asked Banks to reveal his suppliers. Banks stated that he would not reveal his suppliers before talking to an attorney. The agents continued the questioning.

Prior to trial Banks moved to suppress the statements he made during the interrogation. He contends that the statements should have been suppressed on the grounds that they were obtained: (a) in violation of 18 U.S.C. § 3109 because the officers failed to wait a reasonable period of time before forcefully entering his residence when executing the search warrant; (b) in violation of the fifth amendment because he did not make a knowing and voluntary waiver of his rights during the interrogation; and (c) in violation of the fifth amendment because the interrogation continued after he made an unequivocal request for an attorney. The district court denied the suppression motion. Following this denial, Banks pled guilty to possession of a controlled substance with intent to distribute and to being a drug user in possession of a firearm.

Banks expressly reserved his right to appeal the court's denial of his Motion to Suppress. This appeal followed.

ANALYSIS

I. 18 U.S.C. § 3109

We review a trial court's legal conclusions de novo, reviewing findings of fact underlying those conclusions for clear error.

Title 18 U.S.C. § 3109, commonly referred to as the "knock and announce" statute, establishes guidelines for federal law enforcement officers when executing a search warrant. The statute directs that:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.


Under the facts at bar this statute raises two critical issues: (a) whether the officers provided notice of their authority and purpose; and (b) whether they were refused admittance. There is no dispute that proper notice of authority and purpose was given herein. Before us is the second issue, refusal of admittance.
Banks contends that the officers executing the search warrant entered his apartment illegally because they failed to wait a reasonable time, after receiving no response, before forcefully entering his quarters. Banks further contends that because the entry was in violation of his fourth amendment rights and 18 U.S.C. § 3109, all evidence, including his statements, constitute fruits of an illegal search and should be suppressed. We find this contention persuasive.

A literal application of the statute would allow entry only after both announcement and specific denial of admittance. Our precedents, however, dictate that an affirmative refusal of entry is not required by the statute, and that refusal may be implied in some instances. See, e.g., United States v. Allende, 486 F.2d 1351, 1353 (9th Cir.1973). "A failure to answer a knock and announcement has long been equated with a refusal to admit the search party and a justification for forcible entry." United States v. Ramos, 923 F.2d 1346, 1356 (9th Cir.1991) overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir.2001) (citations omitted). Furthermore, "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case."

Section 3109 serves the following interests: (a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and (c) symbolizing respect for individual privacy summarized in the adage that "a man's house is his castle." United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir.1973) (quoting Miller v. United States, 357 U.S. 301, 307. 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958)).

Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. § 3109: (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time. Id. at 12. The action at bar falls into the final category because no exigent circumstances existed and the entry required destruction of property – i.e., the door to Banks' apartment.

Consideration of the foregoing categories aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances. In addressing that inquiry, we categorize entries as either forced or non-forced. The reasonableness must then be determined in light of the totality of the circumstances surrounding the execution of the warrant, particularly considering the duration of the officers' pause before making a forced entry after the required knock and announcement.

Our task is to determine what constitutes a reasonable waiting period before officers may infer that they have been denied admittance. In assessing the reasonableness of the duration of the officers' wait, we review all factors that an officer reasonably should consider in making the decision to enter without an affirmative denial. Those
factors include, but are not limited to: (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record that sounds were transmitted relatively easily, for Officer Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.

Because the officers were not affirmatively granted or denied permission, they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet, and soapy from his shower. Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

II. Banks' Fifth and Sixth Amendment Claims

As noted above, we review a trial court's legal conclusions de novo, and our review of findings of fact underlying those conclusions is for clear error. However, "[w]e review the district court's determination that the defendant knowingly and voluntarily waived his Miranda rights under the clearly erroneous standard." United States v. Fouche, 833 F.2d 1284, 1286 (9th Cir.1987).

1. The Voluntariness of Banks' Statements

The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself." Under the teachings of Miranda v. Arizona,\(^1\) to assure the meaningful protection of this fifth amendment right, a defendant subject to custodial interrogation must be advised of his "right to remain silent, that any statement he does make may be used ... against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. at 444, 86 S.Ct. 1602. A knowing and voluntary waiver of these rights is

\(^1\) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Banks contends that his statements were obtained involuntarily and through coercion in violation of his fifth amendment rights. He complains that because he was under the influence of alcohol and narcotics at the time of the interrogation, he was unable to make a knowing and voluntary waiver of his rights. He further asserts that his statements were coerced because he was terrorized by the entry of the police into his home, intimidated by officers employing the "good-cop versus bad-cop" routine, and in fear of being paraded naked around the neighborhood. Our review of the record, however, persuades us that the district court did not err in its determination that he made a knowing and voluntary waiver of these rights.

A confession made in a drug or alcohol induced state, or one that is the product of physical or psychological pressure, may be deemed voluntary if it remains "the product of a rational intellect and a free will...." *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir.1989) (citations omitted). The interrogating agents testified about Banks' demeanor during the interrogation. Neither detected any indication that Banks was under the claimed adverse influence, and both described him as calm and able to reason. Similarly, the record demonstrates that Banks was able to understand the circumstances, follow instructions, and answer questions. From the record, Banks does not appear to have been "incapacitated" by his use of drugs and alcohol. During the interrogation, he answered some of the agent's questions while refusing to answer those regarding his suppliers and was able to provide officers with the combination to his safe. Prior to being taken to the police station, he requested that his girlfriend be contacted so she could secure his apartment. Because the evidence supports the district court's conclusion that Banks' statements were the product of rational intellect and a free will, we hold that the district court did not err in finding a knowing and voluntary waiver.

2. Banks' Right to Counsel Under Miranda

Banks also contends that his statements were obtained in violation of his right to counsel under *Miranda*. No further questioning of a suspect may occur after he expresses the desire to consult with counsel, and police must clarify an ambiguous or equivocal request for an attorney. *Miranda*, 384 U.S. at 474, 86 S.Ct. 1602; see also *United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir.1985). Notwithstanding, "a defendant may selectively waive his *Miranda* rights, deciding to respond to some questions but not others," *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir.1988) (citations omitted).

In support of his claim that his right to counsel under *Miranda* was violated, Banks asserts that during the latter part of his questioning he told the agents that he wanted to consult with a lawyer about the possibility of making a "deal" in exchange for divulging information about his suppliers. The record reflects that when the agents asked Banks a question regarding his suppliers, he responded that he wanted to speak to an attorney before revealing his suppliers to see if he could secure some consideration, what one might deem a *quid pro quo*, for his cooperation with the officers. The agents reasonably understood Banks' statement to mean he was willing to answer some questions but not others. That conclusion is fully supported by the record.
The judgment is AFFIRMED in part, REVERSED in part and the matter is REMANDED for further proceedings consistent herewith.

FISHER, Circuit Judge, dissenting in part, concurring in part.

The majority rules the entry in this case unconstitutional and in violation of § 3109 because the officers delayed only 15 to 20 seconds after knocking loudly on Banks' apartment door and announcing "police search warrant." Simply put, the police should have waited longer – how much longer is not specified – before they could lawfully assume that their knock and announcement had been heard, that Banks was not going to open the door voluntarily and that they were justified in forcing the door open with a battering ram. I share my colleagues' concerns that officers not peremptorily and forcibly invade the privacy of a suspect's home, and it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door. *** Nonetheless, although this case admittedly is a close call, I cannot agree that the officers here acted outside the limits of established case law or – more to the point – even the criteria the majority articulates. I therefore respectfully dissent from the § 3109 portion of the majority opinion (Part I). Otherwise, I concur in Part II of the opinion.

I do not think the outcome of this case can turn simply on the amount of time the officers waited after knocking. Banks did not hear the knock or announcement in the first place; thus it would have made no practical difference if the officers waited substantially longer than 15 or 20 seconds. If there was a problem of procedural or constitutional dimension, it had to be that the officers did not knock twice or engage in some other effort to determine whether Banks was home and had heard the first knock. Although hinting that was the real problem here, the majority nevertheless holds that the officers:

were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance.... Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

In assessing whether there was a reasonable delay, the majority acknowledges that "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case." McClure v. United States, 332 F.2d 19, 22 (9th Cir.1964); see also United States v. Bustamante-Gamez, 488 F.2d 4, 9(9th Cir.1973) ("In short, 'a claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the [entry].'") (quoting Jones v. United States, 362 U.S. 257, 272, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

Nonetheless, the majority then extrapolates from Bustamante-Gamez four basic categories of entry, placing this case in category 4: "entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time" – that is, substantially more than the "significant amount of time"
required under category 3. Refining its analysis further, the majority sets forth a nonexclusive list of factors "an officer reasonably should consider in making the decision to enter [forcibly] without an affirmative denial." The source of this list is not identified, but I have no quarrel with its substance - so long as it is not read as substituting a checklist approach to what our case law recognizes is a circumstance-specific evaluation.

Where I do disagree with the majority, however, is its application of these factors - or more to the point, its disregard or discounting of key factors present here. Among the listed factors are "(a) size of the residence"; "(c) location of the officers in relation to the main living or sleeping areas of the residence"; and "(e) nature of the suspected offense." Banks lived in a small, two-bedroom, one-bathroom apartment. The bathroom was located in the middle part of the apartment. Banks testified that, "It's not a very big apartment." And, "2 steps from the shower is - you can look left, see the door." Arriving at Banks' apartment at about 2:00 p.m., the officers positioned themselves at the front and back doors. There is no dispute that the officers gave proper notice of their authority and purpose. Officer Crespo knocked loudly on the front door and announced "police search warrant." Officer Tomasso, at the rear, testified he heard Crespo's loud knock. (The record is silent as to Tomasso's also having heard the announcement, or whether anyone heard water running or other sounds of someone taking a shower.) On these facts, the officers could reasonably have assumed Banks had heard at least the loud knock and probably the announcement.

Moreover, Banks' suspected offense was drug dealing; the warrant to search his apartment was predicated upon information, corroborated by a controlled buy, that Banks was selling cocaine at his apartment. Thus there was some basis for concern that Banks' delay in responding might be related to attempts to dispose of evidence. See United States v. Spikes, 158 F.3d 913, 926 (6th Cir.1998), where the court noted that "where drug traffickers may easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry." Spikes also cautioned that "[t]his reality, however, must be balanced against the fact that the simple presence of drugs alone does not justify abandoning the 'knock and announce' rule or so diluting its requirements that it becomes a meaningless gesture... Thus the presence of drugs in the place to be searched, while not a conclusive factor, lessens the length of time law enforcement must ordinarily wait outside before entering a residence." Id. (citation omitted). See also United States v. Jones, 133 F.3d 358, 361-62 (5th Cir.1998) (reviewing cases, and upholding wait of 15 to 20 seconds after knock "given the possibility that a longer wait might well have resulted in the destruction of evidence[illegal drugs]"); United States v. Garcia, 983 F.2d 1160, 1168 (1st Cir.1993) (holding wait of 10 seconds after knock reasonable where occupants of apartment were believed to possess cocaine, "a substance that is easily and quickly hidden or destroyed"). But cf. Becker, 23 F.3d at 1541 ("[W]hile peril to officers or the possibility of destruction of evidence or escape may well demonstrate an exigency [justifying immediate entry], mere unspecific fears about those possibilities will not."); United States v. Moreno, 701 F.2d 815, 818 (9th Cir.1983), vacated on other grounds by 469 U.S. 913, 105 S.Ct. 286, 83 L.Ed.2d 223 (1984) ("In order to justify forced entry without an announcement of
authority and refusal of admittance, there must be some evidence to support the suspicion that contraband will be destroyed."); United States v. Fluker, 543 F.2d 709, 717 (9th Cir.1976) (no evidence the defendants were destroying narcotics to justify officers entering without any knock or announcement).

The majority acknowledges some of these factors in passing, but gives them little or no weight. With respect, I fail to see what guidance law enforcement should draw from such a holding that disregards some of the very factors the majority identifies as relevant. Nor do I think the majority's conclusion is warranted under these circumstances, or in light of decisions involving comparable situations where a 15 to 20 second delay has been held sufficient.

First, 15 to 20 seconds is not an insignificant amount of time to wait after a loud knock and announcement. Knock, then count out the time to see for yourself.

Second, Banks was in the shower and did not hear the knock and announcement, so even if the wait had been longer, absent another knock or announcement, he still would not have responded.

Third, although there is no Ninth Circuit precedent directly on point, our case law – albeit cautionary – and that of other circuits tends to support the entry here. We previously have held that a five second wait after three loud knocks and an announcement was not a reasonably significant amount of time to permit the defendant to determine who was at the door and to respond to the request for admittance, where the warrant was executed early in the morning and the occupants of the apartment were likely to be asleep. United States v. Granville, 222 F.3d 1214, 1218-19 (9th Cir.2000). Here, however, the warrant was executed in the middle of the afternoon and there was ample time for Banks to respond to the request for admittance. The Sixth Circuit has held that "when officers execute a warrant in the middle of the day ... the length of time the officers must tarry outside diminishes." Spikes, 158 F.3d at 927. Furthermore, given the small size of Banks' apartment, there was no reason for the officers to assume Banks had not had sufficient time to hear and respond to the knock and announcement in the 15 to 20 second interval. The Eighth Circuit specifically addressed such a circumstance in United States v. Lucht, 18 F.3d 541 (8th Cir.1994). There, the court concluded a 20 second wait after a knock and announcement was reasonable where the defendants' houses were small, the defendants were awake at the time and there was probable cause to believe they possessed narcotics. Id. at 549. "In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so." Id. The Tenth Circuit has upheld an entry after a 10 to 12 second wait. United States v. Knapp, 1 F.3d 1026 (10th Cir.1993). Because the defendant, whose presence was assumed given the illuminated lights in the house, gave no indication he intended to allow the officers into his home voluntarily, the court held, "[i]t was plausible for the officers to conclude that they were affirmatively refused entry after a ten to twelve second interval without a verbal or physical response." Id. at 1031.

In a case quite similar to this, the District of Columbia Circuit held that a 15 to 20 second wait after a single knock and announcement was sufficient, and that a second knock was not required. United States v. Spriggs, 996 F.2d 320 (D.C.Cir.1993).
Clearly the agents did not act unreasonably in entering the apartment after knocking and announcing themselves only a single time.... One need seek admittance only once in order to be refused.... With respect to the delay before entering, under our case law the agents were justified in concluding that they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announcement.

Id. at 322-23. On the other hand, in United States v. Phelps, 490 F.2d 644, 646 (9th Cir. 1974), in upholding a forced entry, we gave weight to the fact that agents had knocked and announced twice, waiting 5 to 10 seconds after each before forcing entry. But, noting the circumstance-specific nature of the inquiry, Phelps emphasized that "it matters not that the record reveals ten, fifteen, or twenty seconds, for the true rule rejects time alone, even 'an exceedingly short time,' such as ten seconds, as the decisive factor." Id. at 647(citing Jackson v. United States, 354 F.2d 980 (1st Cir. 1965)); see also United States v. Ramos, 923 F.2d 1346, 1355-56 (9th Cir. 1991), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001) (en banc) (upholding entry after two knocks and announcements followed by 45 second delay). Thus, I do not read Phelps as requiring a second knock here, although – given the circumstances – that might have been a more effective way to assure that Banks heard the demand for entry and had an opportunity to respond.

I do not know what the majority makes of Phelps or Spriggs, because they are not discussed. Indeed, the majority neglects most of the authority I discuss above. Such authority at the very least provides guidance for determining the reasonableness of the 15 to 20 second wait considering the specific circumstances of Banks' situation – he resided in a small apartment, there was a loud knock and announcement, he was suspected of possessing illegal narcotics and the warrant was executed in the middle of the day. On these facts, I believe it was not unreasonable for the officers to conclude that Banks had heard and constructively denied their request for entry. Accordingly, I respectfully dissent from Part I of the majority opinion.
WASHINGTON (AP) - The Supreme Court agreed Monday to consider how long police with a search warrant must wait before breaking down a door, using as a test case the arrest of a drug suspect who was in the shower when the SWAT team stormed in.

An appeals court ruled that authorities acted unreasonably in using a battering ram to knock down Lashawn Lowell Banks' door just 15 to 20 seconds after demanding entrance.

The commotion interrupted Banks' shower and also violated the constitutional ban on unreasonable searches and seizures, the San Francisco-based 9th U.S. Circuit Court of Appeals ruled.

The Supreme Court will consider this fall whether narcotics found during the search of Banks' Las Vegas apartment could have been used as evidence.

In 1997 the Supreme Court ruled that police armed with court warrants to search for drugs must knock and announce themselves unless they can show they had reason to believe a suspect would be dangerous or would destroy evidence if alerted to the raid. The Banks case is a follow-up to that decision.

The Bush administration urged the justices to use the case to clarify how long officers must wait during raids like the one on Banks' small apartment in 1998.

The appeals court decision "creates significant uncertainty - and needless and potentially dangerous delays in a recurring aspect of police practice," justices were told in a filing by Solicitor General Theodore Olson, the administration's top Supreme Court lawyer.

Olson said Banks could have flushed drugs down the toilet while officers waited outside during the afternoon raid.

Banks' attorney, Randall Roske, said if officers had waited just a few more seconds, "it might have afforded (Banks) the chance to have met the intruders with the small dignity of a towel. It is just this sort of privacy interest which is at the very core of the Fourth Amendment."

He also said in filings that the Supreme Court should not set rigid rules that a 20-second delay during a police raid is constitutional. Courts should handle questionable searches on a case-by-case basis, Roske told the court.

Banks was sentenced to 11 years in prison for possession of drugs with
intent to distribute and possession of a gun.

Officers were told by an informant that a drug dealer known as "Shakes" lived in the apartment. They knocked down the door after knocking and announcing that they had a search warrant. They forced Banks to the floor and handcuffed him, then moved him to a kitchen chair for questioning. Officers gave him some underwear, court records show.

"They only knocked once, that could become an issue. Should they have knocked twice?" said John Wesley Hall Jr., a specialist in search and seizure cases who sits on the board of the National Association of Criminal Defense Lawyers. "The poor guy was naked coming out of the shower. Fifteen seconds is not enough time."

James Tomkovicz, a criminal law professor at the University of Iowa, said it would be hard for the court to tell law officers how many seconds, or minutes, they have to wait before entering a home.

"There's no way they'll put a stopwatch on this," Tomkovicz said.

The case is United States of America v. Banks, 02-473.

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In the Ninth we trust
Two recent opinions by the Ninth Circuit should be celebrated, while they last.

Champion
May, 2003

Milton Hirsch & David Oscar Markus

United States v. Banks

First up is United States v. Banks. Lashawn Lowell Banks' life changed one recent afternoon as he was showering in his small two-bedroom/one-bathroom apartment. North Las Vegas Police Department officers and FBI agents, attempting to execute a search warrant on that apartment, positioned themselves at the front and rear of the apartment. They "knock[ed] loudly on the apartment door and announc[ed] 'police search warrant.'" No one answered their calls. So after 15 to 20 seconds without a response, armed SWAT officers huffed and puffed and knocked Banks' door down. Banks, hearing the officers rumble into his apartment, emerged from his shower, "naked, wet and soapy." He was forced to the floor and handcuffed, without being given any clothes or an opportunity to dry off. After being questioned by agents for some time, he was provided "underwear with which to cover himself."

During questioning, Banks made incriminating statements. He moved to suppress those statements, arguing that the officers violated 18 U.S.C. § 3109 "because the officers failed to wait a reasonable period of time before forcefully entering his residence when executing the search warrant." The district court denied that motion, and Banks, a Las Vegas resident, decided to take his chances with the Ninth Circuit. Good bet, Banks.

The Ninth Circuit reversed. Fifth Circuit Senior Judge Henry Politz wrote the opinion for the majority, which also included Judge Fletcher. Judge Fisher dissented. Judge Politz started by examining the plain wording of Title 18 U.S.C. § 3109, commonly referred to as the "knock and announce" statute. It provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The court pointed out that the officers "provided notice of their authority and purpose." Accordingly, the issue was "whether they were refused admittance." Of course, "[a] literal application of the statute would allow entry after both announcement and specific denial of admittance." But just about every court,
including the Ninth, has ruled that an affirmative refusal of entry is not required by the statute, and that refusal may be implied in some instances.

In determining what was reasonable in this case, the court explained that the knock and announce rule served the following interests: reducing risk of harm to both law enforcement and occupants of the house; helping to prevent unnecessary destruction or property; and symbolizing respect for individual privacy summarized in the adage that "a man's house is his castle." The court concluded that taking these principles into account, combined with the fact that in this entry, no exigent circumstances existed and force had to be used to enter the home, an explicit refusal of admittance or a lapse of a substantial amount of time was necessary before breaking into Mr. Banks' home.

The court made this determination examining the chameleon we call the totality of the circumstances, i.e., "size of the residence, location of the residence, location of the officers in relation to the main living or sleeping areas of the residence, time of day, nature of the suspected offense, evidence demonstrating the suspect's guilty suspect's prior convictions, ... and any other observations triggering the senses of officers that reasonably would lead one to believe that immediate entry was necessary."

Here "there was nothing ... that triggered the officers' sense, and there were not exigent circumstances warranting a waiver of the reasonable delay" and "the officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence." And because they were never denied permission to enter the residence, the officers "were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance." Fifteen to twenty seconds after a single knock didn't cut it under these circumstances because there was no affirmative denial of admission or other exigent circumstances.

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2. The Knock-and-Announce Rule

The knock-and-announce rule has its roots in English common law. The first judicial ruling came in 1603 in *Semayne’s Case*, which held that a sheriff must announce his presence and purpose and request entrance before breaking into a home. The holding in *Semayne’s Case* relies on a statute that can be traced back to 1275, which was enacted as a declaration of the common law.

In the United States, individual states adopted this rule either by statute or judicial decision. The federal government enacted the federal knock-and-announce statute in 1917. ***

Important policy considerations underlie the knock-and-announce rule. The protection of both officers and homeowners is a primary reason for the rule. Police are required to announce their presence in order to avoid being mistaken for a burglar. A homeowner’s and an occupant’s privacy interests are also protected by the knock-and-announce rule. The requirement of waiting before entering gives the homeowner a chance to ready himself before the police enter his house. The homeowner’s property interest is protected by giving him an opportunity to open a door before a forcible entry is attempted, therefore preventing unnecessary property damage. The knock-and-announce rule protects the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."

Three exceptions to the knock-and-announce requirement have arisen due to exigent circumstances: peril, useless gesture, and destruction of evidence. Police are permitted to forgo the knock-and-announce requirement if they have a reasonable basis to suspect that they are in physical danger from the homeowner or occupant. The useless gesture exception is permitted when the occupants of the house already have knowledge of the police presence and purpose prior to their entrance. The police may also enter without waiting if they can establish that there is a danger evidence will be destroyed between the time the police knock and enter. A violation of the knock-and-announce statute will be excused if any of these exigent circumstances are proven. These exceptions are limited; the United States
Supreme Court has refused to allow a per se blanket exception to the knock-and-announce rule.

3. Knock-and-Announce Within the Constitutional Framework

Prior to 1993, the United States Supreme Court had not directly addressed whether the knock-and-announce rule had a Fourth Amendment basis. In Wilson v. Arkansas, the Court granted certiorari to resolve lower court conflicts over whether the knock-and-announce principle was a part of the Fourth Amendment reasonableness determination. After examining the common law protections against unreasonable searches and seizures at the time the Constitution was written, the Court held that there was "no doubt" that the reasonableness of a search depends on the manner of entry.

The Court did not abolish the established exceptions to the knock-and-announce rule, however. Officers may still legally violate the knock-and-announce rule if exigent circumstances exist. Further, the Court left the question of what would constitute reasonable unannounced entry to the lower courts. The Wilson Court did not address the issue of whether the independent source or inevitable discovery doctrines should apply to prevent exclusion of evidence after a knock-and-announce violation because the issue was not raised in the lower court and the Court had not granted certiorari on the issue.

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Sixth Amendment's confrontation clause was not violated by admission of pretrial, tape-recorded statement of defendant's wife who, because defendant invoked marital privilege, was not available to testify, who was present during defendant's assault of third party, was arrested, and arguably has motive to shift blame from herself, and whose self-inculpatory statement was admissible hearsay because its failure to state clearly that defendant acted in self-defense was virtually identical to defendant's pretrial statement and thus "interlocks" with it, rendering wife's statement reliable.

**Question Presented:** (1) Does Sixth Amendment's confrontation clause permit admission against criminal defendant of custodial statement of potential accomplice on ground that parts of statement "interlock" with defendant's custodial statement? (2) Should this court re-evaluate confrontation clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that clause unequivocally prohibits admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements?

**STATE of Washington, Petitioner,**

v.

**Michael D. CRAWFORD, Respondent.**

Supreme Court of Washington,
En Banc

Decided September 26, 2002.

[Excerpt; some footnotes and citations omitted.]

**BRIDGE, J.**

This case presents two issues: (1) whether a defendant waives an objection under the confrontation clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

**FACTS**

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the assault. *Id.* The first statements contained roughly the same account of the
attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee may have had something in his hand when Crawford stabbed Lee, while Sylvia implied that Lee may have grabbed for something after Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. Crawford, 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

WAIVER OF RIGHT TO CONFRONTATION

Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in Washington states in relevant part:

A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. See RP at 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.

The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on State v. Salazar, 59 Wash.App. 202, 796 P.2d 773
and In re Personal Restraint of Sauve, 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both Salazar and Sauve contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In Salazar, the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." Salazar, 59 Wash.App. at 217, 796 P.2d 773 (citing State v. Borland, 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." Id.

In Sauve, the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. Sauve, 103 Wash.2d at 330, 692 P.2d 818 (citing State v. Murphy, 35 Wash.App. 658, 669 P.2d 891 (1983); State v. Whittington, 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights. Id.

In both Salazar and Sauve the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same – Sylvia was unavailable to testify, unlike the witnesses in Salazar and Sauve. Therefore, the situation before us is distinct from Salazar and Sauve and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. See State v. Burden, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In Burden, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony
or allow the testimony without cross examination. We have previously rejected this argument." Id. (citing State v. Kosanke, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay statements and, furthermore, that the defendant does not have to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination.

Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. See generally John R. Kroger, The Confrontation Waiver Rule, 76 B.U. L.REV. 835 (1996). "There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Id. at 840 (quoting Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. Id. at 844. Thus, "a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial." Id. at 842 (quoting United States v. Potamitis, 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. See United States v. Barlow, 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met adequate guarantees of trustworthiness). In the case before us, Crawford invoked a recognized statutory privilege.1

As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. Crawford, 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." Id. (citing State v. Michielli, 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both Michielli and Price present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he

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1 Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, supra, at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." Id. at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.
invoked the marital privilege.

ADMISSIBILITY OF HEARSAY

If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded that hearsay statements may be admissible under certain circumstances. Burden, 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In Burden, this court determined that the policy purposes — fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage — supported this distinction. Id. at 375, 841 P.2d 758 (citing State v. Thorne, 43 Wash.2d 47, 55, 260 P.2d 331 (1953); State v. Wood, 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications, 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. Burden, 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. State v. Rice, 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards "to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility—a function traditionally performed by cross examination." Id. at 566, 844 P.2d 416 (quoting State v. Anderson, 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

First, the statements must be admissible under the rules of evidence. Rice, 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. Id. A firmly rooted exception to the hearsay rule will satisfy this requirement. State v. Davis, 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements.2 Rice, 120 Wash.2d at 565-66,
Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter asserted.\(^3\) ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford*, 2001 WL 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris*, 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

Sylvia's second statement is hearsay: The declarant is unavailable at trial—because Crawford invoked the marital privilege—and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against interest, or self-inculpatory statement, is defined as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's

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\text{inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability.} \quad \text{*State v. St. Pierre*, 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson*, 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado*, 102 Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).}
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Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts*, 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's

\[\text{state's}
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\[\text{argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See RP at 7-21, 37.}\]
position would not have made the statement unless the person believed it to be true.

ER 804(b)(3) (emphasis added).

Crawford objected to the admission of Sylvia's statements that he was "infuriated," "past tipsy," and that he said Lee "deserves a ass whoopin." Crawford, 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice, therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. See RCW 9A.08.020(3)(a). Likewise, Sylvia's assertion that Lee may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

Because a codefendant's confession is presumed unreliable, the statement must either meet a firmly rooted exception to the hearsay rule or provide some indicia of reliability, such as interlocking with the defendant's own confession. St. Pierre, 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. See generally Rice, 120 Wash.2d 549, 844 P.2d 416 (adopting Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in Rice, "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." Id. at 570, 844 P.2d 416 (citing Lee, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. Id.

The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding

4 Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the Rice interlocking confession analysis by analogy.

5 As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.
whether Lee was armed when Michael stabbed him. *Crawford*, 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:

Q: did Kenny do anything to fight back from this assault
A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what
Q: after he was stabbed
A: he saw Michael coming up. He lifted his hand ... his chest open, he might of went to go strike his hand out or something and then (inaudible)
Q: okay, you, you gotta speak up
A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant)
Q: okay, when he's standing there with his open hands you're talking about Kenny, correct
A: yeah, after, after the fact, yes
Q: did you see anything in his hands at that point
A: (pausing) um um (no)

Ex. 42, at 6-7.

Michael's statement:

Q: okay. Did you ever see anything in [Lee's] hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just just doesn't, don't make sense to me later.

Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford*, 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him...." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements
indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice*, 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, 2001 WL 850119, at *7 (Armstrong, C.J., dissenting). Because Sylvia's and Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.

CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self-inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.
Also This Term:

02-6683 Castro v. United States

Ruling Below: (11th Cir., 290 F.3d 1270, 71 Crim. L. Rep. 249)

When district court sua sponte recharacterizes federal prisoner's post-conviction motion as petition under 28 U.S.C. § 2255, as amended by Antiterrorism and Effective Death Penalty Act, prisoner's subsequent filing of self-styled Section 2255 petition, raising claim that had been available when prisoner filed initial motion, is "second or successive petition" within purview of AEDPA amendments that, absent compliance with such amendments, is not entitled to consideration; in future cases, district court should warn prisoner of consequences of recharacterization and provide him with opportunity to amend or dismiss his initial filing.

Question Presented: When district court recharacterizes pro se federal prisoner's first post-conviction motion as habeas petition under 28 U.S.C. § 2255, does such recharacterization render prisoner's subsequent attempt to file first titled Section 2255 petition "second or successive petition" within purview of AEDPA? (2) Does U.S. Supreme Court have jurisdiction to review 11th Circuit's decision affirming dismissal of Section 2255 petition for writ of habeas corpus as second or successive?

02-8286 Banks v. Cockrell

Ruling Below: (5th Cir., 8/20/02, unpublished)

In federal habeas corpus proceeding held prior to effective date of Antiterrorism and Effective Death Penalty Act, district court erroneously granted relief under Brady v. Maryland, 373 U.S. 83 (1963), with respect to sentencing phase for state's failure to disclose that penalty phase witness was paid police informant, because petitioner, by limiting his request for investigative assistance to different witness and by failing to even attempt to speak with alleged informant, unjustifiably failed to develop this issue factually in state court and, therefore, was not entitled to evidentiary hearing at which evidence on which his Brady claim relies was adduced; even though alleged paid informant admitted his status as such in affidavits presented to federal district court and deputy sheriff's testimony confirmed that status, such evidence was not exhausted in state court, petitioner having merely alleged in his third state habeas proceeding that witness was paid informant without having attempted to locate witness and ascertain his true status, and without having attempted to interview investigating officers, and thus petitioner cannot establish Brady claim; assuming that merits of Brady claim are before court, that state withheld evidence that witness was paid police informant, and that evidence would have been favorable to petitioner in attacking witness's testimony, witness's status as paid informant was not material to jury's penalty phase finding because, given that much of witness's penalty phase testimony was corroborated, even by petitioner, and that witness had already been impeached on three other bases, there is no reasonable probability that jury, had it been informed of informant's paid status, would not have imposed death penalty; petitioner's claim that during penalty phase he received ineffective assistance of counsel is also meritless because, even assuming that counsel's
performance was deficient, petitioner has not shown prejudice from any aspect of such performance: federal evidentiary hearing is not trial for purposes of Fed.R.Civ.P. 15(b), which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings," and thus district court properly refused to consider petitioner's contention that his Brady claim encompassed transcript that was not raised in his habeas petition and that petitioner never sought to add to his petition by amendment but that had been introduced at federal hearing to establish Brady claim.

Question Presented: (1) Did Fifth Circuit commit legal error in rejecting petitioner's claim under Brady v. Maryland, 373 U.S. 83 (1963)—that prosecution suppressed material witness impeachment evidence that prejudiced him in penalty phase of trial—on grounds that (a) evidence supporting claim was procedurally defaulted, notwithstanding fact that, as in Strickler v. Greene, 527 U.S. 263, 67 U.S.L.W. 4477 (1999), there was no reasonable basis for concluding that counsel for petitioner could have discovered suppressed evidence prior to or during trial or state post-conviction proceedings, and (b) suppressed evidence was immaterial to petitioner's death sentence, when panel neglected to consider that trial prosecutors viewed evidence to be of "utmost importance" to showing that capital sentence was appropriate? (2) Did Fifth Circuit act contrary to Strickland v. Washington, 466 U.S. 668 (1984), and Williams v. Taylor, 529 U.S. 362, 68 U.S.L.W. 4263 (2000), when it weighed each item of mitigating evidence separately and concluded that no single category would have brought about different result at sentencing without weighing impact of evidence collectively? (3) Did Fifth Circuit act contrary to Harris v. Nelson, 394 U.S. 286 (1969), and Withrow v. Williams, 507 U.S. 680 (1993), in holding that Fed.R.Civ.P. 15(b) does not apply to habeas corpus proceedings because "evidentiary hearings" in those proceedings are not similar to civil "trials"?

02-964 Baldwin v. Reese

Ruling Below: (9th Cir., 282 F.3d 1184, 71 Crim. L. Rep. 12)

Even though habeas corpus petitioner's petition for discretionary review by state's highest court did not specify federal nature of claim he now seeks to assert in federal court, claim was "fairly presented" to state court, within meaning of U.S. Supreme Court precedents on exhaustion of remedies, by way of decision of state intermediate court, which, when read by state supreme court, would have alerted it that claim of ineffective assistance of appellate counsel was decided on basis of federal law.

Question Presented: Does state prisoner "alert" state's highest court that he is raising federal claim, as required by doctrine of exhaustion of remedies, when—in that court—he neither cites specific provision of federal constitution nor cites at least one authority that has decided claim on federal basis?