10-1984

Oregon v. Elstad

Lewis F. Powell Jr.

LD

LD not join in Sum/Reversal - may not be wrong

This case turns on a factual determination that Reid's confession was coerced.

Case has no precedential force.

PRELIMINARY MEMORANDUM

January 6, 1983 Conference
List 5, Sheet 3

No. 83-773

Oregon	Cert to Ct. App. Ore. (Warden, Young, Gillette, concurring)	
v.		
Elstad	State/Criminal	Timely

1. SUMMARY: Petr contends that the Fifth Amendment should not require suppression of a confession made after proper warnings and a valid waiver of rights solely because the police had earlier obtained an admission without advising defendant of these rights.

Deny

This case is appropriate neither for plenary review

2. FACTS AND DECISIONS BELOW: On Dec. 17, 1981, police officers Burke and McAllister went to the residence of respondent's parents with a warrant for respondent's arrest. Respondent's mother permitted them to enter and showed them to respondent's room, where respondent was lying on his bed, partially dressed, listening to the stereo. At the officers' request, respondent dressed and went into the living room. McAllister stepped into the kitchen with respondent's mother while Burke remained with respondent.

Burke then asked respondent if he knew why the officers were there. Respondent answered in the negative. The officer inquired whether respondent knew Mr. Gross or the Gross family. Respondent said he did. Respondent also said that he knew the Gross family recently had been burglarized. Burke said that the police believed respondent was involved. Respondent replied that, "I was there." Burke did not ask any further questions nor did he attempt to clarify the nature or extent of respondent's participation in the alleged crime.

Respondent was placed in the patrol car and transported back to the station. Approximately 45 to 60 minutes later, McAllister first read respondent his Miranda rights. McAllister asked respondent if he understood the rights, and respondent answered affirmatively. McAllister thought respondent understood the rights. Both McAllister and respondent signed the Miranda card.

Respondent then gave a full statement of the burglary. McAllister typed as respondent talked; respondent reviewed it, corrected it, and signed it. No threats or promises were made.

At trial, the State introduced the oral and written confessions made at the station (though not the statement made at the house). Respondent moved to suppress them. The trial court addressed the statement made at the house only to determine if Miranda had been violated. It concluded, and the State did not challenge, that the police should have given the Miranda warning at the house when respondent's movement was first significantly restrained. Nevertheless, the trial court refused to suppress the statements made at the station because it found they were voluntary in nature and untainted by the earlier statement.

The Oregon Ct. App. reversed. It concluded that the police action in obtaining an admission at the house in violation of Miranda exerted a coercive impact on the later confession that had not been overcome by the 45 minute lapse in time or the change in original surroundings. It also concluded that the nature of the earlier disclosure, though not literally admitting complicity, had enough inculpatory significance to exert a coercive impact on the later confession.

Judge Gillette concurred. He did not agree that an earlier confession should be considered, as a matter of law, to have an impermissible coercive impact on a subsequent confession. However, he thought the law was such that a dissent would serve no purpose. Judge Gillette also pointed out that the present state of the law immunized defendants who manage to confess before Miranda warnings are given from ever being prosecuted with admissions they later make.

The Oregon Supreme Court denied discretionary review.

3. CONTENTIONS: Petitioner contends that the Oregon Ct. App.'s reasoning cannot be squared with this Court's decision in United States v. Bayer, 331 U.S. 532 (1947), where the Court that it had "never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one, after those conditions have been removed. Id., at 540-541. Petr suggests that the taint to be dissipated is the coercive circumstances surrounding the first confession, not the impact of the first confession itself. If the first confession itself must be dissipated, a criminal defendant's subsequent confessions will never be admissible against him. The cases respondent relies on, Westover v. United States, 384 U.S. 436 (1966), and Clewis v. Texas, 386 U.S. 707 (1967), all involved initial statements made under coercive circumstances and the lapse of time and change of place had not yet dissipated the coercion in those cases. In this case, there was no initial coercion and the Miranda warnings and knowing waiver should be enought to remove the taint of the initial violation of the Miranda safeguards. This is especially true when the initial statement, though possibly inculpatory, was as minimal as "I was there." Petr cites several decisions of the federal courts of appeals that conclude the taint of noncoercive pre-Miranda warning statements dissipates after proper Miranda warnings and a knowing waiver. Pet. at 14-15.

4. DISCUSSION: I recommend CFR and then summary reversal. The trial court made the requisite voluntariness find-

ings as required by Zerbst and Miranda. The subsequent confession should have been admissible. The Fifth Amendment prohibits compulsory self-incrimination, not a knowing, voluntary, and intelligent out-of-court confession of the type made here. The Ore. Ct. App.'s rule excludes highly probative and trustworthy evidence at a significant cost to society; I think it is an unwarranted and unapproved use of the Fifth Amendment exclusionary rule.

There is no response.

December 15, 1983 Nager opn in petn

nor for summary reversal The decision below rests upon a factual determination that resp was coerced into confessing by the initial interrogation prior to Miranda warnings. This conclusion seems far-fetched, but is of no consequence for other cases. This Court should ~~not~~ purely review factual findings of the state courts; and the degree to which the state appellate court may disregard the trial court's findings is a question of state, not federal, law.

David

February 17, 1984

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 83-773

OREGON

vs.

ELSTAD

Also motion for leave to proceed ifp.

Lower Ore. Ct
case in wrong but
not a case for this court

Relist for
5 D'C to
write.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓	&	Rev									
Brennan, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.		Join											
Powell, J.			✓										
Rehnquist, J.		✓	&	Rev									
Stevens, J.			✓										
O'Connor, J.		✓	vr	Grant & Rev									

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1984

Re: 83-773 - Oregon v. Elstad

Dear Sandra:

I am still ready to grant and reverse this case and I'll ponder on a straight grant. Your dissent made a strong case for summary disposition.

Regards,

WEB

Justice O'Connor

Copies to the Conference

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 21 1984

Recirculated: _____

Still Deny
- though there is a persuasive opinion.

1st DRAFT

There may well be 4 votes to Grant - CJ, HAB & WHR + 500

SUPREME COURT OF THE UNITED STATES

OREGON *v.* MICHAEL JAMES ELSTAD

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 83–773. Decided February ——, 1984

JUSTICE O'CONNOR, dissenting.

I would grant the petition of Oregon for certiorari to resolve the confusion of the lower courts concerning the circumstances in which a suspect's voluntary confession to police, obtained after proper administration of *Miranda* warnings, is admissible at trial despite the taking of a prior admission by police without the required warnings.

I'm not inclined to Reverse Summarily

I

On December 17, 1981, police officers went to the home of respondent, Michael James Elstad, with a warrant for his arrest. Respondent's mother admitted the officers into the home and led them to respondent. The officers asked respondent to get dressed, but did not inform him that he was under arrest. Respondent said that he did not know why the police were there. One officer inquired whether respondent knew of a Mr. Gross. Respondent indicated that he did and that he knew Mr. Gross' house had been burglarized. When the officer indicated that he thought respondent was involved, respondent replied, "Yes, I was there."

The officers did not ask any further questions of respondent or attempt to clarify the nature or extent of his participation in the crime. Rather, they placed him in a patrol car and had another officer transport respondent to the county jail. These officers met with respondent at the jail some 45–60 minutes later. At that time, they informed him, for the first time, of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and asked him if he was willing to talk. Respondent said that he understood his rights but indicated

that he was willing to talk without the assistance of an attorney. He then gave the officers a detailed account of the burglary. The officers transcribed the statement, and respondent reviewed, corrected, and signed the transcript. No threats or promises were made.

At trial, respondent moved to suppress the oral and written statements made at the station. He claimed that the statement made at his house, which the State had not attempted to use as evidence, "let the cat out of the bag," citing *United States* v. *Bayer*, 331 U. S. 532 (1947), and tainted the subsequent confession as "fruit of the poisonous tree," citing *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The trial court concluded, without contest by the State, that the police should have read respondent his *Miranda* rights at the house. Nevertheless, the trial court refused to order suppression, finding that the statements made at the station were knowingly, intelligently, and voluntarily given. Respondent was convicted of burglary in the first degree.

On appeal, the Court of Appeals of the State of Oregon reversed. The court identified the crucial constitutional inquiry as "whether there was a sufficient break in the stream of events between [the] inadmissible statement and the written confession to insulate the latter statement from the effect of what went before." 61 Ore. App. 673, 676, 658 P. 2d 552, 554 (1983). The court rejected the State's contention that, because the initial statement did not admit complicity and was elicited without compulsion, the later administration of *Miranda* warnings was sufficient to cleanse the condition that made the initial statement unusable. The court concluded that, "regardless of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, [and] it is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from original surroundings are the most important considerations." *Id.*, at 677, 658 P. 2d, at 554. Because only

45–60 minutes had passed before the same officers conducted their subsequent interrogation, the court concluded that the "cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions." *Id.*, at 678, 658 P. 2d, at 555.

II

I am troubled by the Oregon court's conclusion that the subsequent statements must be suppressed because the impact of the initial confession was not sufficiently dissipated. The law is clear that a confession may be admitted into evidence whenever it is voluntary. *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Chambers* v. *Florida*, 309 U. S. 227 (1940). And it is of course true that the voluntariness of one confession may depend on the continuing effect of coercive practices that surrounded a prior confession. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–603 (1944). Thus, when a prior confession is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of interrogators all bear on whether that coercion has carried over into the second confession. See *Westover* v. *United States*, 384 U. S. 494 (1966); *Clewis* v. *Texas*, 386 U. S. 707 (1967). But where there is no allegation that the first statement was actually compelled, there is little reason to analyze its continuing impact on the second. The admissibility of the later confession should always turn exclusively on whether it was voluntarily given. See *Lyons* v. *Oklahoma*, *supra*, at 603.

To be sure, once an accused has confessed, he is "never thereafter free of the psychological and practical disadvantages of having confessed . . . The secret is out for good." *United States* v. *Bayer*, *supra*, at 540. But the cat can be let out of the bag for many reasons—as, for example, when the accused voluntarily confesses to a third-party who, in turn, relays the information to the police. The relevant inquiry, under such circumstances, is still whether the second confession is itself free of actual coercion. If the police are

not to be perpetually disabled from seeking the suspect's aid in resolving crimes, as our cases hold, the focus of analysis must be on the official compulsion present in the second confession, not the mere psychological impact of the first one.

The prophylactic safeguards required by *Miranda* necessarily encompass situations in which the accused is not subjected to actual coercion. *Johnson* v. *United States*, 384 U. S. 719, 729–730 (1966); see also *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). The failure of police to administer *Miranda* warnings does not mean that statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See *Johnson* v. *United States*, *supra*, at 729–730. Once the statement of rights contained in the *Miranda* warnings is provided, however, the relevant knowledge is conveyed and the privilege can be intelligently exercised. Thus, the voluntariness inquiry can proceed as if there was never a prior illegality. Again, the mere fact that the secret is out is itself irrelevant to deciding whether the second confession is compelled.

The effect of assuming otherwise—that the rendering of *Miranda* warnings cannot cure the prior illegality for purposes of future questioning—will have mischievous consequences for society's interest in effective law enforcement. Questioning of witnesses and suspects is "an essential tool of effective law enforcement," *Haynes* v. *Washington*, *supra*, at 515, and "the admissions or confessions of [a suspect], when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker*, 161 U. S. 591, 596 (1896). *Miranda* warnings ensure that admissions and confessions are knowingly, intelligently, and voluntarily made. But because *Miranda* warnings may discourage individuals from talking, this Court has emphasized that they need be administered only after a person is taken into "custody" or his freedom is otherwise significantly restrained. *Miranda* v. *Arizona*, *supra*, 384 U. S., at 478.

Unfortunately, the task of defining "custody" has proven to be a difficult and slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] mak[e] no errors whatsoever." *Michigan* v. *Tucker*, *supra*, 417 U. S., at 446. Police therefore need assurance that, even if their initial judgments not to administer *Miranda* warnings are erroneous, answers they later receive, after properly administering the warnings, will be admissible as evidence against the accused. Yet by suggesting that, once an initial *Miranda* violation has occurred, an *informed* waiver cannot voluntarily be made for some indeterminate period of time, the Oregon court's approach fails to provide this assurance. Indeed, the Oregon court's approach effectively immunizes a suspect who responds to pre-*Miranda* warning questioning from later waiving his privilege of remaining silent. See 61 Ore. App., at 679, 658 P. 2d, at 555 (Gillette, P.J., concurring). In my view, this immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. Cf. *Michigan* v. *Mosley*, 423 U. S. 96, 107–111 (1975) (WHITE, J., concurring in the result).

III

Although this Court has not squarely addressed the issue, it has suggested that, where the prior illegality does not implicate Fourth Amendment concerns or involve actual compulsion, the giving of proper *Miranda* warnings may adequately insulate a subsequent confession for Fifth Amendment purposes. See *Michigan* v. *Tucker*, *supra*, at 448–450; *Brown* v. *Illinois*, 422 U. S. 590, 601–603 (1975); *Dunaway* v. *New York*, 442 U. S. 200, 216–217 (1979). Several of the Federal courts of appeals have expressly adopted such a rule. See, *e. g.*, *United States* v. *Toral*, 536 F. 2d 893, 896–897 (CA9 1976); *United States* v. *Knight*, 395 F. 2d 971, 973–975 (CA2 1968). But other courts have followed the Oregon court's path and excluded properly obtained con-

fessions because earlier *Miranda* violations let "the cat out of the bag." See, *e. g.*, *New York* v. *Quarles*, 58 N. Y.2d 664, 444 N. E. 2d 984 (1982), cert. granted, —— U. S. —— (1983). I would therefore grant the petition for certiorari to clarify the measures police must take to resume permissible questioning after an initial *Miranda* violation has occurred.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1984

Re: No. 83-773 - Oregon v. Elstad

Dear Sandra:

My vote in this case was to join three. That is still my vote, although, if necessary, I could change it to a straight grant.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Still Deny
2/22

Oregon v. Elstad, No. 83-773

Deny (50'c dissent from denial of cert) (See her op. & my notes on it.)

It is well established that a illegally obtained confession may exert a coercive impact during subsequent interrogation and that, as Justice O'Connor states, "the giving of proper Miranda warnings may adequately insulate a subsequent confession for Fifth Amendment purposes." Op. at 5. Whether the warnings do so depends upon all the circumstances of the second interrogation. This is the rule applied by the Court of Appeals cases cited in Justice O'Connor's opinion and by the Oregon court in the present case. The Oregon court did not presume that the failure to give Miranda warnings at an interrogation tainted any subsequent confession; it found that in the circumstances of the second interrogation, the initial confession continued to exert some coercive effect. And it seems indisputable that the two factors to which the court gave greatest weight --"lapse of time and change of place" -- are indeed important. There is no reason for this Court to review the essentially factual determinations of an intermediate state appellate court, and I doubt that these determinations are so clearly erroneous as to justify reversal.

David

No. 83-773, Oregon v. Elstad

Memorandum to File

This is a summary memorandum on the basis of a preliminary reading of the briefs and the opinion below. The memo describes the case, without analysis, as a memory refresher.

This is another criminal case that probably we should not have taken, as it turns primarily on the facts. Possibly taking the case may be justified as affording a basis for clarifying the "fruit" doctrine of Wong Sun v. U.S., 371 U.S. 471 - though the parties argue the case primarily as a Miranda question.

The facts are simple. Two police officers, with an arrest warrant, went to respondent's residence during the afternoon. His mother admitted them, and was told that they had a warrant to arrest respondent on a buglary charge. The mother directed the officers to a bedroom where respondent was resting. After he dressed, he returned to the living room with the officers. One went to the kitchen with the mother, while the other (Burke) remained in the living room. The following facts are undisputed. See Pet. for Cert., App. 2. Also see the Jt. App. pp. 17-23. Burke asked respondent if he knew why the officers were there. Respondent said he had no idea. When asked whether he knew a person named Gross, respondent said he did and added that he had heard there was a robbery at Gross's house. At that point Officer Burke told respondent that "I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"

Following this conversation defendant was taken to the County Jail - after a delay of 45 minutes to an hour while the officers checked out another reported robbery. At the jail, Miranda warnings were given for the first time; respondent cooperated fully; signed the confession after it was type-written, and did not deny that no promises were made nor were there any threats.

I should have said above that respondent was not told about the warrant; nor was he placed under arrest prior to his first confession.

The trial court, addressing the Wong Sun question, found that the evidence "shows that there was no taint between the first statement and the second. ... There was a break in the events ... there is no showing of any taint whatsoever. There is a showing by the state that the statements were made freely and voluntarily" See SG's Brief, p. 3; Jt. App. 37-38.

The Oregon Court of Appeals reversed, relying on the "fruit of the poisonous tree" doctrine of Wong Sun. One judge dissented.

The SG's brief is a stronger one than the state's, although it also is persuasive. The SG notes that even the first confession was not coerced, and could have been viewed as voluntary. The state, however, conceded that it may have been unlawful in the absence of Miranda warnings. But as the case comes to us, we must assume that respondent was "in custody" and that his first statement violated Miranda.

The SG's argument, made repetitively, is that the purpose of the self-incrimination clause is to prevent the compelling of testimony against one's self. In this case, there is no evidence of compulsion of any kind beyond the mere presence of the police at the time of the first confession. It is argued that at the Jail House, respondent was in a room alone with the two police officers. Yet, their testimony is not contradicted that respondent freely confessed with no promises or threats having been made. The trial courts finding is explicit that the second confession was "made freely and voluntarily."

The public defender's brief for respondent also is well written. It argues the "fruit" doctrine of Wong Sun. The failure to give Miranda warnings at the time of the conversation in respondent's residence is said to be a "flagrant violation" of Fifth Amendment rights against cumpulsory self-incrimination, and that the "second confession is presumptively tainted by the initial unconstitutionally obtained confession."

* * *

On the facts of this case, a reversal seems clearly indicated. My problem is whether any general principle can be articulated by our Court. At least we could say that a

violation of Miranda at the time of an initial confession does not necessarily make a subsequent confession involuntary. But this is rather obvious. I think the case could be reversed in a brief per curiam.

L.F.P.

March 2, 1984

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 83-773

OREGON

vs.

ELSTAD

Also motion to proceed ifp.

Granted
on
5 0'C

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

aml 09/10/84

Reviewed 9/10 - Adequate & well reasoned. I agree with Annmarie that we should Reverse.

BENCH MEMORANDUM

To: Justice Powell September 10, 1984

From: Annmarie

Re: Oregon v. Elstad, No. 83-773

Question Presented

Did the Oregon Court of Appeals err in suppressing a confession obtained after proper Miranda warnings and a waiver of rights, on the ground that an earlier statement obtained by police without Miranda warnings tainted the defendant's later confession?

I. Background

Two police officers went to resp's parents' home with an arrest warrant for resp. They were admitted by his mother, who directed them to the bedroom where resp was resting. At the officers' direction, resp dressed and went with them to the living room. Without giving him Miranda warnings or telling him

that he was under arrest, Officer Burke asked resp if he knew why they were there. He answered that he did not. The officer then asked if he knew the Gross family, and resp said that he did. He also ~~said~~ volunteered that he heard that there had been a robbery at the Gross' home. The officer responded that he thought the resp was involved in the crime and asked him what he knew about it. Resp replied: "Yes, I was there." He was not questioned further, but was taken to the patrol car.

On the way to police station the officers were called to the scene of a possible crime. A third officer met them there and transported resp to the station. Approximately one hour later, the officers originally involved met resp at the station. They advised him of his Miranda rights. Resp indicated that he was willing to talk to the officers, and gave a statement which detailed who was involved in the burglary and his role in it. This statement was typed, and resp signed it.

Resp was charged with first degree burglary. At trial, he moved to suppress the written confession. The state conceded the inadmissibility of the oral statement given at his parents' home and did not attempt to introduce it. The TC ruled that the first statement was inadmissible, but that "there was no taint between the first statement 'I was there' and the second statement . . . ." The court found that resp's "statements were made freely and voluntarily." It also found that there had been a "break" in the stream of events and that "there's no showing of any taint whatsoever." Resp's written confession was admitted and he was convicted. On appeal the Oregon Court of Appeals

reversed the conviction and remanded for a new trial. The CA thought that resp's second statement was the product of his first, illegally obtained statement and thus should be suppressed. The Oregon Supreme Court denied discretionary review.

II. Discussion

The Question of Taint. Although its opinion is somewhat unclear, the Oregon CA seemed to rely on two theories in finding that resp's second statement was tainted by his first. On the one hand, the court referred to Miranda's concern with "the compulsion inherent in custodial surroundings," 384 U.S. at 458. The court seemed to suggest that this was the coercion which had to be dissipated to make the second statement admissible. On the other hand, the court stated that resp's first statement "let the cat out of the bag" and as a result, resp's first statement exerted a coercive impact on his second. Ultimately, I do not believe that either theory is consistent with this Court's decisions or supports the conclusion that resp's second statement was the fruit of his first.

Although the Court in Miranda spoke of the pressure inherent in all custodial interrogation, 384 U.S. 436, 458 (1966), the failure to give the required Miranda warnings, without more, does not mean that a suspect's statement is actually coerced or involuntary in the sense implicated by the 5th Amendment privilege against self-incrimination. See Johnson v. United States, 384 U.S. 719, 729-730 (1966). The Court has distinguished between conduct which "directly infringes on [the]

right against compulsory self-incrimination" and conduct which "violate[s] only the prophylactic rules developed to protect that right." Michigan v. Tucker, 417 U.S. 433 (1974). In this case, the TC made a finding that both of resp's statements to police were given "freely and voluntarily." Although the CA referred to the "coercive impact" of resp's first statement on his second, it did not question the TC's finding about the voluntary nature of resp's statements. Indeed, there is no evidence that either of his statements involved coerced self-incrimination as such. Thus, I would conclude that the conduct violated only the prophylactic rules of Miranda and that neither of resp's statements were involuntary in 5th Amendment terms.

Given that the absence of Miranda warnings alone is not sufficient to render a confession involuntary, it is not clear what kind of taint the court thought could carry over to the second statement simply by virtue of the "compulsion inherent" in the first custodial questioning. Although the absence of Miranda warnings was sufficient to render resp's first statement inadmissible, once he was apprised fully of his Miranda rights, I do not see what continuing impact their absence in the first instance could have.

The CA's second ground for suppressing resp's confession, that his first statement "let the cat out of the bag," also seems unpersuasive. In United States v. Bayer, 392 U.S. 532 (1947), the Court rejected the idea that the psychological disadvantage a defendant feels because he has confessed automatically renders any subsequent confession

inadmissible. Referring to the psychological impact of "letting the cat out of the bag," the Court stated:

> In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Id. at 540-41.

Yet other than this psychological disadvantage, the Oregon court did not specify how the "cat's being out of the bag" tainted resp's second statement. The factors the court considered -- lapse of time and change of place -- seem relevant to the voluntariness of a subsequent confession. See e.g., Westover v. United States, 384 U.S. 494 (1966) (confession obtained by FBI immediately following lengthy, improper state interrogation in same compelling surroundings not admissible even though FBI interrogation was preceded by warnings); Wong Sun v. United States, 371 U.S. 471 (1963) (confession obtained when defendant voluntarily returned to police station several days after his unlawful arrest is admissible). These factors do not suggest any independent grounds for finding the second statement to be the fruit of the first. Since there is no serious question about the voluntariness of either of resp's statements, the fact that they took place within a short time and were given to the same officers do not seem to me to be relevant.

Thus, even if the fruit of the poisonous tree doctrine is applied to this case, it is difficult to see exactly what taint carries over from the first statement to the second. I do

not think the two theories of taint offered by the Oregon CA are consistent with the decisions of this Court. Accordingly, I think the case could be reversed on the ground that as a matter of law, the second statement was not tainted by the first. (The TC found that there was no taint as a matter of fact.)

The General Applicability of the "Fruit" Doctrine. There is a question, however, whether the fruit of the poisonous tree doctrine should be applied at all in the context of Fifth Amendment violations. The SG has taken the general position that the Miranda exclusionary rule should apply only to the improperly obtained statements and not to the fruits of such statements. The SG concedes, however, that this case may be reversed on narrower grounds. I think a reversal on these narrower grounds is the better approach to this case and consistent with the Court's other decisions in this area.

Resp urges to the contrary that the Oregon court's decision is supported by this Court's holding in Brown v. Illinois, 422 U.S. 590 (1975). In Brown the petr was arrested without probable cause or a warrant. The Court held that two inculpatory statements that he made while in custody had to be suppressed as the fruit of the unlawful arrest, even though the statements were made after full Miranda warnings had been given. As your concurrence pointed out, however, Brown involved the proper application of Fourth Amendment policies, not whether suppression was required on Fifth Amendment or Miranda grounds. 422 U.S. at 606.

SG argues that the "fruit" rule applies only to 4th Amend violations - not to 5th Amend

SG says Miranda ex. rule applies only to ~~to~~ to 5th Amend confessions

Michigan v. Tucker, 417 U.S. 433 (1977), involved the application of the fruit of the poisonous tree doctrine to a Fifth Amendment case. In Tucker, the Court refused to suppress testimony by a witness whose identity was learned by the police during interrogation which was not preceded by complete Miranda warnings. The interrogation in Tucker actually preceded the Miranda decision, and the warnings were incomplete only in their failure to tell the accused that counsel would be appointed for him. The Court upheld the admission of the testimony, focusing on the fact that the defendant's statement was voluntary. The Court noted, however, that in "a proper case" the deterrent rationale for Fourth Amendment exclusion "would seem applicable to the Fifth Amendment context as well." Id. at 447.

I am troubled that in this case the officers did not immediately inform resp that he was under arrest and read him his rights. Although there is some discussion in the briefs about whether resp was actually in custody for Miranda purposes at the time the first statement was elicited, it seems to me that given the warrant, there was no justification for the officers' delay in making a formal arrest. Indeed their trial testimony suggests that they thought resp was in custody at the time of the initial interrogation. Nevertheless, I think Tucker supports the view that the decision below should be reversed. It does not appear that their delay in informing resp his rights was the result of bad faith, and suppression of the first statement seems sufficient to deter police from deliberate delays designed to elicit statements. Thus, as in Tucker, I do not think the need

to deter official misconduct justifies suppression of resp's second statement.

In some circumstances, however, the application of the fruit of the poisonous tree doctrine to Fifth Amendment violations may serve to deter misconduct. In Harrison v. New York, 392 U.S. 219 (1968), for example, the prosecutor introduced three unlawfully obtained confessions at petr's trial. In these statements, petr admitted participation in a murder that occurred while he and two others were robbing a pawnbroker. At trial, petr testified that the victim was shot accidentally while he was showing him a gun for possible purchase. The Court of Appeals subsequently reversed his conviction on the ground that the confessions were inadmissible. At petr's second trial, the prosecutor read the petr's testimony at his first trial to the jury over the defendant's objection that the testimony was the fruit of the illegally procured confessions. The CA upheld the admissibility of the testimony, and this Court granted cert and reversed. Finding it "beside the point" that the defendant's decision to testify was a deliberate tactical decision on his part, the Court stated:

> The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.

Id. at 223.

It seems to me that the kind of "fruit" at issue in Harrison is different from that at issue here. In Harrison, the

prosecutor's improper action after the initial Miranda violations, i.e., introducing inadmissible confessions at the first trial, directly produced the defendant's testimony as its fruit. In this case as in Tucker, the only wrongdoing was the initial failure to give Miranda warnings. There was no attempt here to capitalize on that mistake in obtaining resp's second confession. Thus, I think the Harrison case is distinguishable from this one and a reversal of the decision below would not be inconsistent with its principle.

Harrison also suggests, I think, the importance of making the fruit of the poisonous tree doctrine applicable to Fifth Amendment violations in at least some circumstances. The application of the doctrine in cases like Harrison deters prosecutorial misconduct, or at least removes the temptation to try to introduce illegally obtained evidence in the hope of inducing the defendant's testimony. Accordingly, I think the Court should avoid a blanket rule that the fruit of the poisonous tree doctrine does not apply to Fifth Amendment cases.

III. SUMMARY

I think the decision of the Oregon Appellate Court should be reversed. As a matter of law I do not think resp's second statement was tainted by his first. Under this Court's decisions both of his statements were voluntary. Thus I do not think that the inherent pressure of the first custodial interrogation, without more, supports the conclusion that the second statement was tainted. In addition, this Court has rejected the idea that the psychological disadvantage incurred by

a defendant who already has confessed necessarily taints any subsequent statement he makes. Thus, given that the TC found no taint as a matter of fact, neither the initial Miranda violation nor the "cat's being out of the bag" justify finding the second statement tainted as a matter of law.

I think the Court should reaffirm the suggestion in Tucker that in proper cases, the deterrent rationale for the exclusionary rule should be applied to the fruit of Miranda violations. In this case, however, there was no secondary misconduct as there was in Harrison. Accordingly, suppression of resp's first statement would seem sufficient to deter future violations.

83-773 OREGON v. ELSTAD Argued 10/3/84

A 5th amend Miranda case
Reverse. (a case we should
not have taken)

Frohmayer (A.G. of Ore. – Ret.)

BRW repeatedly asked whether if 2nd confession is found to be voluntary, ~~the~~ then must be excluded because a prior confession was involuntary because of absence of warnings.

Curiously, the A.G. answered equivocally — even when both B.R.W. & T.M. suggested that in such circumstances the second confession should be admissible.

Babcock (for Resp – no Δ)
(Not helpful)

J.P.S. thinks Miranda is a Const. violation – then no difference between his case & one in which Δ had been beaten to compel a confession.

?.?.

Rev 6-3

No. 83-773, Oregon v. Elstad Conf. 10/5/84

The Chief Justice Rev.

There was an arrest in the home. But the statement in home was short of a confession except to his presence.

Second confession was voluntary. Not a "fruit" in a constitutional sense. On facts of this case "no causal connection". Also "fruits" of Miranda are not applicable because the relationship between the two statements was too remote

No need here to modify Miranda. 9 to keep it applicable to second confession

Justice Brennan Affirm

Miranda is Constitutional - not procedural. The case itself makes this clear. Miranda not a mere prophylactic rule.

The "cat out of bag" analysis is application. The Govt had burden to prove the first confession had no effect on second.

No ~~attenuation~~ attenuation here - no intervening circumstances

Justice White Rev.

No per se rule that second confession was coerced because first was.

There should be proof that the first influenced the second.

"Cat out of bag" rationale is over simplified.

2nd not compelled.

Justice Marshall Aff in (tentatively)
Lyons case is relevant.
Law not clear.

Justice Blackmun Rev.
TC found. 2nd statement not covered

Justice Powell Reverse
("fruits" doctrine should not extend (automatically) to a second confession that is clearly voluntary.
~~Re~~ State conceded first confession was not admissible as Δ was "in custody" & no Miranda warnings.
TC expressly found second confession, ~~of Stein~~ made after warnings, was voluntary and not "tainted" by first confession
One Ct. appeals did not ~~agree~~ disagree with TC as to 2nd confession. That court

Justice Rehnquist Rev.

Harlan's op. re 2d "cat out of bag" has never adopted by the Court.

Miranda in a Const. rule (9 agree)

Justice Stevens Aff in

Exclusion Rule does tend to make police diligent.

Fruits doctrine not applicable.

The Q is whether 2nd confession was voluntary

A violation occurred ~~in~~ here in the home. Burden was on state to prove 2nd confession was voluntary.

Justice O'Connor Rev.

Wrote dissent from Denial of Cert.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: OCT 31

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Reversed 11/1

No. 83–773

OREGON, PETITIONER *v.* MICHAEL JAMES ELSTAD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

Join

[October ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. Respondent, Michael James Elstad, was convicted of burglary by an Oregon trial court. The Oregon Court of Appeals reversed, holding that respondent's signed confession, although voluntary, was rendered inadmissible by a prior remark made in response to questioning without benefit of *Miranda* warnings. We granted certiorari, 456 U. S. —— (1984), and we now reverse.

I

In December, 1981, the home of Mr. and Mrs. Gilbert Gross, in the town of Salem, Polk County, Oregon, was burglarized. Missing were art objects and furnishings valued at $150,000. A witness to the burglary contacted the Polk County Sheriff's Office, implicating respondent Michael Elstad, an 18-year-old neighbor and friend of the Gross's teenage son. Thereupon, Officers Burke and McAllister went to the home of respondent Elstad, with a warrant for his arrest. Elstad's mother answered the door. She led the officers to her son's room where he lay on his bed, clad in shorts and listening to his stereo. The officers asked him to get dressed and to accompany them into the living room.

Officer McAllister asked respondent's mother to step into the kitchen, where he explained that they had a warrant for her son's arrest for the burglary of a neighbor's residence. Officer Burke remained with Elstad in the living room. He later testified:

> "I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"

Tr. 74–75. The officers then escorted Elstad to the back of the patrol car. As they were about to leave for the Polk County Sheriff's office, Elstad's father arrived home and came to the rear of the patrol car. The officers advised him that his son was a suspect in the burglary. Officer Burke testified that Mr. Elstad became quite agitated, opened the rear door of the car and admonished his son: "I told you that you were going to get into trouble. You wouldn't listen to me. You never learn." Tr. 76.

Elstad was transported to the Sheriff's headquarters and approximately one hour later, Officers Burke and McAllister joined him in McAllister's office. McAllister then advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and, having these rights in mind, wished to speak with the officers. Elstad gave a full statement, explaining that he had known that the Gross family was out of town and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent, read back to him for correction, initialed and signed by Elstad and both officers. As an afterthought,

Elstad added and initialed the sentence, "After leaving the house Robby and I went back to [the] van and Robby handed me a small bag of grass." App. 42. Respondent concedes that the officers made no threats or promises either at his residence or at the Sheriff's office.

Respondent was charged with first degree burglary. He was represented at trial by retained counsel. Elstad waived his right to a jury and his case was tried by a Circuit Court judge. Respondent moved at once to suppress his oral statement and signed confession. He contended that the statement he made in response to questioning at his house "let the cat out of the bag," citing *United States* v. *Bayer*, 331 U. S. 532 (1947), and tainted the subsequent confession as "fruit of the poisonous tree," citing *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The judge ruled that the statement, "I was there," had to be excluded because the defendant had not been advised of his *Miranda* rights. The written confession taken after Elstad's arrival at the Sheriff's office, however, was admitted in evidence. The court found:

> "[H]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. [It] was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him."

App. 45. Elstad was found guilty of burglary in the first degree. He received a five-year sentence and was ordered to pay $18,000 in restitution.

Following his conviction, respondent appealed to the Oregon Court of Appeals, relying on *Wong Sun* and *Bayer*. The State conceded that Elstad had been in custody when he made his statement, "I was there," and accordingly agreed that this statement was inadmissable as having been given without the prescribed *Miranda* warning. But the State maintained that any conceivable "taint" had been dissipated

prior to the respondent's written confession by McAllister's careful administration of the requisite warnings. The Court of Appeals reversed respondent's conviction, identifying the crucial constitutional inquiry as "whether there was a sufficient break in the stream of events between [the] inadmissible statement and the written confession to insulate the latter statement from the effect of what went before." 61 Ore. App. 673, 676, 658 P. 2d 552, 554 (1983). The Oregon court concluded:

> "[R]egardless of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time, and change of place from original surroundings are the most important considerations."

Id., at 677, 658 P. 2d, at 554. Because of the brief period separating the two incidents, the "cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions." *Id.*, at 678, 658 P. 2d, at 555.

The State of Oregon petitioned the Oregon Supreme Court for review and review was declined. This Court granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

II

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the

Miranda violation. A second metaphor questions whether a confession can be truly voluntary once the "cat is out of the bag." Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a core constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them.

A

Prior to *Miranda*, the admissibility of an accused's in custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Chambers* v. *Florida*, 309 U. S. 227 (1940). If a suspect's statements had been obtained by unreasonable means or under circumstances in which the suspect clearly had no opportunity to make a rational and intelligent choice, the statements would not be admitted. The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment. The Fifth Amendment, of course, is not concerned with nontestimonial evidence. See *Schmerber* v. *California*, 384 U. S. 757, 764 (1966) (defendant may be compelled to supply blood samples). Nor is it concerned with moral and psychological pressures to confess emanating from sources

other than official coercion. See, *e. g.*, *California* v. *Beheler*, —— U. S. ——, ——, and n. 3 (1983) (per curiam); *Rhode Island* v. *Innis*, 446 U. S. 291, 303, and n. 10 (1979); *Oregon* v. *Mathiason*, 429 U. S. 492, 495–496 (1977). Voluntary statements "remain a proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S., at 478. "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 privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U. S. 181, 187 (1977). As the Court noted last term in *New York* v. *Quarles*, —— U. S. ——, —— (1984):

> "The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974); see *Edwards* v. *Arizona*, 451 U. S. 477, 492 (1981) (POWELL, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Respondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation. This figure of speech is drawn from *Wong Sun* v. *United States*, 371 U. S. 471 (1963), in which the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence. The *Wong Sun* doctrine applies as well when the fruit of the

Fourth Amendment violation is a confession. It is settled law that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession 'is sufficiently an act of free will to purge the primary taint.'" *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982) (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)).

But as we explained in *Quarles* and *Tucker*, a procedural *Miranda* violation differs in significant respects from those violations of core constitutional rights that have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. *Dunaway* v. *New York*, 442 U. S. 200, 216–217 (1979); *Brown* v. *Illinois*, 422 U. S. 590, 600–602 (1975). "The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." *Id.*, at 601. 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 in evidence. *Taylor* v. *Alabama*, *supra*, at 690. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

The sweep of the *Miranda* exclusionary rule, however, is broader than that of the Fifth Amendment, which it serves. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence

under *Miranda*. But the *Miranda* presumption, though irrebutable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Thus, despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. *Harris* v. *New York*, 401 U. S. 222 (1971). The Court in *Harris* rejected as an "extravagant extension of the Constitution," the theory that a defendant who had confessed under circumstances that made the confession inadmissible, could thereby enjoy the freedom to "deny every fact disclosed or discovered as a 'fruit' of his confession, free from confrontation with his prior statements" and that the voluntariness of his confession would be totally irrelevant. *Id.*, at 225, and n. 2. Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test." Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1979).

In *Michigan* v. *Tucker*, 417 U. S. 433 (1974), the Court was asked to extend the *Wong Sun* fruits doctrine to suppress the testimony of a witness for the prosecution whose identity was discovered as the result of a statement taken from the accused without benefit of full *Miranda* warnings. As in respondent's case, the breach of the *Miranda* procedures in *Tucker* involved no actual compulsion. The Court concluded that the unwarned questioning "did not abridge respondent's constitutional privilege . . . but departed from the prophylactic standards laid down in *Miranda* to safeguard that privilege." *Id.*, at 446. Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. In deciding "how sweeping the judicially imposed consequences"

of a failure to administer *Miranda* warnings should be, *id.*, at 445, 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's testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness's testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a non-coercive *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 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 that "a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give." *United States* v. *Ceccolini*, 435 U. S. 268, 277 (1978) (emphasis added) (quoting from *Smith* v. *United States*, 117 U. S. App. D. C. 1, 3–4, 324 F. 2d 879, 881–882 (1963) (Burger, J.) (footnotes omitted), cert. denied, 377 U. S. 954 (1964)).

Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. *Miranda* v. *Arizona*, 384 U. S., at 478. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating crimes [cannot realistically be expected to] mak[e] no errors whatsoever." *Michigan* v. *Tucker*, 417 U. S., at 446. If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures,

they should not breed the same irremediable consequences as police infringement of a core constitutional right. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion, 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.

B

The Oregon court, however, believed that the unwarned remark compromised the voluntariness of respondent's later confession. It was the court's view that the prior *answer* and not the unwarned questioning impaired respondent's ability to give a valid waiver and that only lapse of time and change of place could dissipate what it termed the "coercive impact" of the inadmissible statement. When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession. See *Westover* v. *United States*, 384 U. S. 494 (1966); *Clewis* v. *Texas*, 386 U. S. 707 (1967). The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See *New York* v. *Quarles*, —— U. S., at ——, and n. 5; *Miranda* v. *Arizona*, 384 U. S., at 457. As the Circuit Courts that have addressed this question have recognized, absent coercion in the initial violation, a careful and thorough administration of *Miranda* warnings conveys the relevant information and thereafter the privilege can be intelligently exercised. See, *e. g.*, *United States* v. *Bowler*, 561 F. 2d 1323, 1326 (CA9

1977); *United States* v. *Toral*, 536 F. 2d 893, 896–897 (CA9 1976); *United States* v. *Knight*, 395 F. 2d 971, 975 (CA2 1968).

The Oregon court nevertheless identified a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate. But endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions. As the Court remarked in *Bayer*:

> "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

331 U. S., at 540–541. Even in such extreme cases as *Lyons* v. *Oklahoma*, 322 U. S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated. See also *Westover* v. *United States*, *supra*, at 496.

This Court has never held that the psychological impact of disclosure of a guilty secret qualifies as compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the

consequences of his subsequent informed waiver of the privilege of remaining silent. See 61 Ore. App., at 679, 658 P. 2d, at 555 (Gillette, P. J., concurring). This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. Cf. *Michigan* v. *Mosely*, 432 U. S. 96, 107–111 (1975) (WHITE, J., concurring in the result). 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 fact-finder.

Certainly, in respondent's case, the causal connection between some speculative psychological disadvantage flowing from his admission and his ultimate decision to cooperate is attenuated at best. It is impossible to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister," *Dunaway* v. *New York*, 442 U. S., at 220 (STEVENS, J., concurring), or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent actual coercion, a subsequent administration of *Miranda* warnings to a suspect removes the conditions that precluded admission of an earlier unwarned statement and enables the suspect to intelligently choose between waiving or invoking his rights.

III

Though belated, the reading of respondent's rights was undeniably complete. McAllister testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses.* There is no question that respondent

*The *Miranda* advice on the card was clear and comprehensive, incorporating the warning that any statements could be used in a court of law; the rights to remain silent, consult an attorney at state expense, and interrupt the conversation at any time; and the reminder that any statements must be voluntary. The reverse side of the card carried three questions in bold face and recorded Elstad's responses:

knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary. It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest. 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 his arrest. Tr. 64.

Burke undeniably breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room. This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation" or it may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother. Whatever the reason for Burke's oversight, the incident had none of the earmarks of coercion. See *Rawlings* v. *Kentucky*, 448 U. S. 98, 109–110 (1979). Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

Respondent, however, has argued that he was unable to give a fully *informed* waiver of his rights because he was un-

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DO YOU UNDERSTAND THESE RIGHTS? "Yeh"
DO YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS? "No"
HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW? "Yeh I do!"

The card is dated and signed by respondent and by Deputy McAllister. A recent high school graduate, Elstad was fully capable of understanding this careful administration of *Miranda* warnings.

aware that his prior statement could not be used against him. Respondent suggests that Deputy McAllister, to cure this deficiency, should have added an additional warning to those given him at the Sheriff's office. Such a requirement is neither practicable nor constitutionally necessary. In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained. See, *e. g.*, *United States* v. *Bowler*, 561 F. 2d, at 1324–1325 (certain statements ruled inadmissible by trial court); *United States* v. *Toral*, 536 F. 2d, at 896; *United States* v. *Knight*, 395 F. 2d, at 974–975 (custody unclear). The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. Police officers are ill equipped to pinch hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held admissible.

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. See *California* v. *Beheler*, —— U. S., at ——, n. 3; *McMann* v. *Richardson*, 397 U. S. 759, 769 (1970). If the prosecution has introduced an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* v. *United States* precludes use of that testimony on retrial. 392 U. S. 219 (1968). But the Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned state's evidence, does so involuntarily. *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969). The Court has also rejected the argument that a defendant's ignorance that a prior coerced confession could not be admitted in evidence compromised the voluntariness of his guilty plea. *McMann* v. *Richardson*, *supra*, at 769. Likewise, in *California* v. *Beheler*, *supra*, the Court declined to accept defendant's contention that, because he was unaware of the potential adverse consequences of statements he made to the police, his participation

in the interview was involuntary. Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

IV

When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the state's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. See *New York* v. *Quarles*, —— U. S., at ——. The Court today in no way retreats from the bright line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings, nor do we condone inherently coercive tactics by police that undermine the suspect's will to invoke his rights once they are read to him. But the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a 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 the requisite *Miranda* warnings.

The judgment of the Court of Appeals of Oregon is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 31, 1984

Re: No. 83-773 - Oregon v. Elstad

Dear Sandra:

I join.

Regards,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 31, 1984

Re: No. 84-773 Oregon v. Elstad

Dear Sandra,

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

November 1, 1984

83-773 Oregon v. Elstad

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 1, 1984

No. 83-773

Oregon v. Elstad

Dear Sandra,

I will be circulating a dissent in the above. It may take me a little while.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1985

Re: No. 83-773-Oregon v. Elstad

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A BLACKMUN

February 28, 1985

Re: No. 83-773, Oregon v. Elstad

Dear Sandra:

I join your latest draft.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

83-773 Oregon v. Elstad (Annmarie)

SOC for the Court 10/5/84
1st draft 10/31/84
2nd draft 11/28/84
3rd draft 1/25/85
4th draft 2/15/85
Joined by WEB 10/31/84
Joined by WHR 10/31/84
Joined by LFP 11/1/84
Joined by BRW 11/21/84
HAB 2/28/85
WJB dissenting
1st draft 1/2/85
2nd draft 1/11/85
3rd draft 2/7/85
Joined by TM 1/3/85
JPS dissenting
1st draft 2/12/85
2nd draft 2/21/85
WJB will dissent 11/1/84
TM will await dissent 11/1/84
JPS awaiting dissent 11/1/84
HAB awaiting other writings, with SOC in result 11/19/84