

January 1986

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Recommended Citation

Marte J. Bassi, *Restricting the Miranda Presumption and Pruning the Poisonous Tree: Oregon v. Elstad*, 16 Golden Gate U. L. Rev. (1986).
<http://digitalcommons.law.ggu.edu/ggulrev/vol16/iss2/3>

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NOTES

RESTRICTING THE *MIRANDA* PRESUMPTION AND PRUNING THE POISONOUS TREE: *OREGON V. ELSTAD*

I. INTRODUCTION

In March, 1985, the U.S. Supreme Court decided *Oregon v. Elstad*.¹ The Supreme Court held that a second confession was admissible into evidence despite the fact that a first un-Mirandized custodial confession was obtained a short time earlier.² Although the initial unwarned confession was suppressed pursuant to *Miranda*,³ the Court refused to extend the *Miranda* presumption of coercion to the second confession.⁴ The second confession was admissible because the Court found that the defendant, after being advised of his rights, had voluntarily waived those rights.⁵ According to the Court, the initial violation of *Miranda* was technical or inadvertant;⁶ therefore, the violation did not taint the subsequent Mirandized confession.⁷ Furthermore, the Court established that the condition⁸ that was created by the technical violation of *Miranda* was cured⁹ when the police officers administered thorough *Miranda* warnings to the accused and he waived his rights.¹⁰

1. 105 S. Ct. 1285 (1985).

2. *Id.* at 1296.

3. *Id.* at 1293.

4. *Id.* at 1292.

5. *Id.* at 1293.

6. *Id.* at 1296-97.

7. *Id.* at 1298.

8. In *Elstad*, the technical violation of *Miranda* was deemed a condition as opposed to an illegality. *Id.* at 1296. Thorough *Miranda* warnings would ordinarily cure this condition. *Id.*

9. See *supra* note 8.

10. *Elstad*, 105 S. Ct. at 1294.

The *Elstad* decision is significant because the Court eliminated the fruit of the poisonous tree doctrine¹¹ with regard to *Miranda* violations, if the secondary evidence is a subsequent confession.¹² As a result of *Elstad*, before a court will apply the derivative evidence rule¹³ to the secondary evidence,¹⁴ a suspect

11. The fruit of the poisonous tree, or derivative evidence doctrine, was established in *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920). In *Silverthorne*, the Court ruled that evidence obtained through a constitutional violation could not be used in court, and moreover, the evidence obtained could not be used in any way. *Id.* at 392. The Court did not want the government to profit from its own wrongdoing. If the government were allowed to use evidence obtained as an exploitation of a constitutional violation, then the exclusionary rule would lose much, if not all, of its force and the fourth amendment would be reduced to a "form of words." *Id.* The crux of the fruit of the poisonous tree doctrine is the determination that a defendant's constitutional rights have been violated; this decision will allow suppression of evidence obtained through an exploitation of the violation. *Id.*

There are certain exceptions to the derivative evidence rule. One exception, the independent source doctrine, was established in *Silverthorne*. *Id.* If the government can obtain the secondary evidence independently of the primary violation of a defendant's rights, then the evidence may be admitted into evidence. *Id.* "If knowledge of [the secondary evidence] is gained from an independent source [the secondary evidence] may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*

Seventeen years later, the Court established the attenuation theory in *Nardone v. United States*, 308 U.S. 338 (1937). This theory was based upon the proximity of the secondary evidence, which the defendant sought to have excluded, to the primary violation of his fourth amendment rights. If the secondary evidence obtained through the primary violation does not have a causal connection to the primary violation of the rights of the defendant, then the taint of the primary violation is attenuated and the secondary evidence is admissible. *Id.* at 341. The issue was whether the secondary evidence had come by exploitation of the primary violation of a defendant's constitutional rights. *Id.* at 340-41. Over the years, the attenuation theory has been refined to a number of factors to be viewed in determining if the secondary evidence has a causal connection to the primary violation. *Brown v. Illinois*, 422 U.S. 590 (1975). These factors include: the temporal proximity between the original violation and the secondary evidence, the presence or absence of intervening events, and particularly, the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

Thirty-seven years after *Nardone*, the Court established the final exception to the derivative evidence rule—the inevitable discovery theory. *Nix v. Williams*, 104 S. Ct. 2501 (1984). In *Nix*, evidence that the police would have discovered anyway, as the result of an ongoing police investigation, was admissible despite the fact that a primary violation of the defendant's rights led to the secondary evidence. *Id.* at 2511-12. The idea was to put the parties in the same position that they would have been in without the primary illegality. This is accomplished by not setting aside convictions that would have been obtained even without police misconduct. *Id.* at 2509. "Suppression, in these circumstances, [inevitable discovery] would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of justice." *Id.* at 2511.

12. *Elstad*, 105 S. Ct. at 1295.

13. See *supra* note 11.

14. *Elstad*, 105 S. Ct. at 1294.

in custody must prove there was actual coercion¹⁵ by the police when they obtained the initial statement. This Note will discuss the *Elstad* decision and the impact it will have on criminal procedure.

II. BACKGROUND

In 1966, the U.S. Supreme Court decided the historic *Miranda* case.¹⁶ This decision afforded lower courts, struggling with the admission of confessions on a case-by-case, totality of the circumstances basis, a clear standard for determining if a confession was admissible.¹⁷ According to *Miranda*, if a defendant is in

15. *Id.* at 1296.

16. *Miranda v. Arizona*, 384 U.S. 436 (1966). At issue in *Miranda* was whether a confession, that the police obtained from a suspect in custody through interrogation techniques without advising the defendant of his rights, was voluntary. *Id.* On March 13, 1963, the petitioner, Ernest Miranda was arrested and taken into custody for kidnapping and rape. At trial, the police officers admitted that the petitioner was not advised of his rights. *Id.* at 491. The confession contained a statement that the confession was voluntary, and that the petitioner fully understood his legal rights. *Id.* at 492. The Supreme Court reversed the finding that Miranda had voluntarily confessed and that he had waived his rights. *Id.* The Court determined that the conduct of the police in obtaining the waiver and confession did not approach the constitutional standards necessary for a knowing and intelligent waiver. *Id.*

17. In the United States, the original rules of confession admissibility precluded the use of a confession as evidence if it was obtained through torture or other means of compulsory self-incrimination. O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 22-23 (1973). The rationale was that if such means were employed, the confession was not trustworthy. *Id.* Next, the courts utilized a voluntariness test that was the precursor to the modern voluntariness test. *Hopt v. Utah*, 110 U.S. 574, 584 (1884). Subsequently, confession analysis moved away from the voluntary test and courts began to view the police methods in obtaining the confession in question. *Brown v. Mississippi*, 297 U.S. 278 (1936); *White v. Texas*, 310 U.S. 530 (1940). The police methods test was instituted in response to flagrant police abuse while the police interrogated black men accused of rape in the South. *Id.* Then, confession analysis gradually started to turn back to the voluntary test. The Supreme Court started to utilize an "inherently coercive" test. If the circumstances surrounding the confession were inherently coercive, the confession was inadmissible. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). The basic idea was to preserve the integrity of the fact-finding system. *Id.*

In most cases, police interrogation techniques had developed from crude forms of physical abuse of the 1930's to subtle psychological questioning. *Miranda*, 384 U.S. at 448. A court faced with the question of admissibility of a confession was in a difficult position. How was a court to measure the psychological impact upon a defendant in determining whether a confession was coerced, and thus, not trustworthy? In response to this dilemma, the Supreme Court developed a two-prong analysis; the Court viewed the trustworthiness of the confession and the police methods in obtaining the confession to determine if the confession was admissible. *Spano v. New York*, 360 U.S. 315 (1959).

In 1963, the Court moved away from the two-prong test and again began to utilize a voluntary, due process test. *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washing-*

custody¹⁸ and interrogated,¹⁹ "the prosecution may not use statements . . . unless it demonstrate[s] the use of procedural safeguards effective to secure the privilege against self-incrimination."²⁰ The states must employ a fully effective means of apprising a defendant of his constitutional rights.²¹ Unless these rights are scrupulously honored, a defendant must be advised of his rights in the well-known *Miranda* warnings.²² A suspect in custody may not be interrogated unless he is advised of his *Miranda* rights; he must fully understand his rights,²³ and he must freely, knowingly, and voluntarily waive these rights. If the dictates of the *Miranda* warnings are violated by a suspect's interrogators, the statements obtained during the interrogation are irrebuttably presumed coerced; therefore, the statements are inadmissible into evidence because there has been a violation of

ton, 373 U.S. 503 (1963). A confession was admissible if it was deemed voluntary based upon the total facts of the case. *Id.* at 513. The problem with the voluntary test was that the courts were continually litigating the question of voluntariness, and the inevitable swearing contest with regard to the facts was usually resolved in favor of the police. O. STEPHENS, *supra*, at 10-11 (1973). Another problem with the voluntariness test was that coercion and involuntariness were state of the art terms. The normal dictionary meaning of the words did not apply. A defendant was required to show a greater level of coercion than was actually needed to show the confession was compelled within the meaning of the privilege against self-incrimination. Kamisar, *Heavy Blow Delivered By Miranda Decisions*, 7 NAT'L L.J. 51 (Sept. 2, 1985). Thus, there was a gap in confessions law. A defendant may have been coerced within the meaning of the fifth amendment but not within the meaning of the voluntary test. In response, the Court adopted the *Miranda* safeguard to ensure that a defendant's fifth amendment rights against self-incrimination were honored.

18. *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977). A defendant is in custody for purposes of *Miranda* if he is actually in police custody or if he is deprived of his freedom of action in any significant way. *Id.*

19. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). A defendant is interrogated for purposes of *Miranda* if he is subject to express questioning or its functional equivalent. *Id.* The functional equivalent of express questioning is words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from a defendant, within the meaning of *Miranda*. *Id.* at 301.

20. *Miranda*, 384 U.S. at 444.

21. *Id.* The Court did not require the police to use the *Miranda* warnings as set out in the opinion. *Id.* But the Court did mandate that the warnings should be used if the states could not devise a method of warning that would ensure that the right against self-incrimination would be fully honored. *Id.*

22. *Id.* The full set of warnings that the Supreme Court prescribed are: (1) a suspect in custody has the right to remain silent, (2) a suspect has the right to know that anything he says will be used against him, (3) a suspect has the right to an attorney before any questioning can take place, and (4) a suspect will be provided with a court-appointed attorney if the suspect cannot afford one. *Id.*

23. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

the suspect's fifth amendment right against self-incrimination.²⁴

The fundamental premise of *Miranda* is that a defendant does not have to prove actual coercion to take advantage of the exclusionary rule.²⁵ In contrast, the main point of *Elstad* is that a defendant must prove actual coercion before a court will apply the fruit of the poisonous tree doctrine to exclude any secondary evidence;²⁶ the *Miranda* presumption of coercion does not apply to the secondary evidence.²⁷

In *Elstad*, the petitioner, Michael Elstad, was implicated in a burglary of a neighbor's residence.²⁸ The police obtained a warrant for Elstad's arrest and proceeded to his house to arrest him.²⁹ The policemen were admitted into the house by Elstad's mother.³⁰ While one policeman sequestered the mother in the kitchen, the other officer questioned Elstad in the living room.³¹ Elstad was not given the requisite *Miranda* warnings.³² The officer told Elstad that he was implicated in the burglary of his neighbor's residence.³³ In response, Elstad made damaging admissions concerning his involvement in the crime.³⁴ The police then arrested³⁵ Elstad and transported him to the police station.³⁶ At the police station, approximately one hour after the initial questioning, the police thoroughly warned Elstad of his *Miranda* rights.³⁷ Elstad waived his rights and made a second confession shortly thereafter.³⁸ The trial court suppressed the initial unwarned statement pursuant to *Miranda*³⁹ but, based

24. *Miranda*, 384 U.S. at 444-45.

25. *Id.* at 478-79.

26. *Oregon v. Elstad*, 105 S. Ct. 1285, 1296 (1985).

27. *Id.* at 1293.

28. *Id.* at 1289.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* Elstad responded to the police officer's statement that he was involved in the robbery of his neighbor's house by saying, "Yes, I was there." *Id.*

35. For the purpose of this appeal, the state conceded the issue of custody even though Michael Elstad had not been placed under formal arrest at the time of his first statement. *Id.* at 1297.

36. *Id.* at 1289.

37. *Id.*

38. *Id.*

39. *Id.* at 1289-90.

upon the significance of the second confession, Elstad was convicted and sentenced to five years in prison for his participation in the burglary.⁴⁰

The Oregon Court of Appeals determined that the second confession was the fruit of the first unwarned confession, and therefore, could not have been a truly voluntary confession.⁴¹ The first confession let the "cat out of the bag,"⁴² and there no longer was any reason for Elstad to remain silent.⁴³ As a result, the court applied the derivative evidence rule, and excluded the second confession as a fruit of the first unwarned admission.⁴⁴ According to the court of appeals, the violation of *Miranda* was a constitutional violation against the fifth amendment's prohibition against self-incrimination.⁴⁵ Therefore, the court applied the derivative evidence rule and excluded the second confession from evidence.⁴⁶ The Oregon Supreme Court denied certiorari and the state appealed to the United States Supreme Court.⁴⁷

III. THE U.S. SUPREME COURT DECISION

In *Elstad*, the Supreme Court distinguished an actual violation of a defendant's fifth amendment right against self-incrimination from a violation of the prophylactic *Miranda* warnings designed to ensure that these rights are fully honored.⁴⁸ This distinction is the fundamental premise of *Elstad*.⁴⁹ "The prophylactic *Miranda* warnings are not themselves rights, protected

40. *Id.*

41. *State v. Elstad*, 61 Or. App. 673, 658 P.2d 552, *cert. denied*, 295 Or. 617, 670 P.2d 1033 (1983).

42. This metaphor was first used in *Bayer v. United States*, 331 U.S. 532 (1947). The Court held that a second confession is not per se inadmissible simply because a first confession was illegal. *Id.* at 540-41. The Court stated that a second confession will almost always be the product of the first, but in this factual setting the second confession was attenuated, and thus, admissible. *Id.* The second confession was admissible if it was attenuated, even though, in a literal sense, it would always be the product of the first confession. *Id.*

43. *State v. Elstad*, 61 Or. App. at 677, 658 P.2d at 555.

44. *Id.* at 676, 658 P.2d at 554. According to the Supreme Court, a violation of a defendant's constitutional rights is a prerequisite of the fruits doctrine. *Elstad*, 105 S. Ct. at 1291.

45. *State v. Elstad*, 61 Or. App. at 676, 658 P.2d at 554.

46. *Id.* at 677, 658 P.2d at 554.

47. *Oregon v. Elstad*, 104 S. Ct. 1437 (1984).

48. *Elstad*, 105 S. Ct. at 1291-92.

49. *Id.* at 1291.

by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.”⁵⁰

The Court provided several reasons for this distinction. First, the *Miranda* exclusionary rule is broader than the fifth amendment.⁵¹ A defendant may take advantage of the *Miranda* presumption even in the absence of actual coercion by the police in obtaining an unwarned statement;⁵² the unwarned statement is irrebuttably presumed coerced⁵³ and excluded from evidence without regard to the issue of voluntariness.⁵⁴ The *Miranda* rule was implemented to ensure that a defendant’s rights are protected from the inherently coercive atmosphere of custodial interrogation.⁵⁵

Second, the dual rationale of the fruits doctrine, trustworthiness and deterrence,⁵⁶ are not furthered by the extension of the *Miranda* presumption.⁵⁷ The police are not deterred; there is nothing to deter because the violation of *Miranda* was technical and inadvertent. Both statements were voluntary, and therefore, trustworthy; the first because there was no actual coercion, and the second because of the thorough *Miranda* warnings and subsequent waiver. Therefore, because the deterrent purpose of the fifth amendment will not be furthered by an extension of the *Miranda* presumption, the Court restricted the use of this presumption to the initial unwarned statement.⁵⁸

Third, the Court reasoned that it would be an “unwarranted and improvident” extension of *Miranda* to allow a person who is not the victim of actual coercion to take advantage of the broad fruits exclusionary rule.⁵⁹ The fact-finder should not be deprived of highly probative secondary evidence of a voluntary confession.⁶⁰ Moreover, the cost to legitimate law enforcement would

50. *Id.* (quoting *New York v. Quarles*, 104 S. Ct. 2626 (1984)).

51. *Elstad*, 105 S. Ct. at 1292.

52. *Id.*

53. *Id.* at 1293-94.

54. *Id.*

55. *Miranda v. Arizona*, 384 U.S. 436, 445-58 (1966).

56. *See supra* note 17.

57. *Elstad*, 105 S. Ct. at 1293.

58. *Id.* at 1298.

59. *Id.* at 1293-94.

60. *Id.* at 1295.

be too high, and would add little to a defendant's interest against self-incrimination.⁶¹ A defendant, in order to come within the reach of the exclusion of the fruits doctrine, cannot rely solely upon a violation of *Miranda* to trigger the rule.⁶² Rather, a defendant must show there was actual compulsion by the police in obtaining the initial statement under the due process voluntary test.⁶³ Whether the violation was technical or flagrant will be just one factor in a court's due process voluntary analysis.⁶⁴

Therefore, under this rationale, a prophylactic violation of the *Miranda* rules raises a presumption that only the initial unwarned custodial confession was coerced.⁶⁵ For purposes of the derivative evidence rule, the courts should look behind the procedural violation and determine if the initial statement was voluntary.⁶⁶ If the statement is deemed voluntary, then there was no primary illegality and the fruit of the poisonous tree doctrine is inapplicable.⁶⁷ Thorough *Miranda* warnings would ordinarily⁶⁸ be sufficient to cure⁶⁹ the condition⁷⁰ that was created through the inadvertant questioning of a defendant in custody.⁷¹ Thus, the only issues that remain are whether the suspect was advised of his *Miranda* rights, and whether he made a knowing and intelligent waiver of his rights before his second confession.⁷²

A court faced with a derivative evidence objection based upon a *Miranda* violation must analyze the case according to the test set forth in *Elstad*.⁷³ Initially, the court must determine if the violation of *Miranda* was technical or flagrant. Then, if the violation is deemed technical, unless the police deliberately co-

61. *Id.*

62. *Id.*

63. *Id.* at 1294. Due process is violated if a defendant involuntarily confesses. The courts have stressed the unfairness of interrogators overcoming the will of a defendant. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867 (1980-81).

64. *Elstad*, 105 S. Ct. at 1298.

65. *Id.* at 1292-93.

66. *Id.* at 1293-94.

67. *Id.*

68. See *supra* note 8.

69. *Id.*

70. *Id.*

71. *Elstad*, 105 S. Ct. at 1294.

72. *Id.* at 1296.

73. *Id.* at 1298.

erced the suspect or used improper tactics in obtaining the first confession, the court will consider the statement voluntary.⁷⁴ Since the initial statement was voluntary, there was no primary violation of the defendant's constitutional rights and the fruit of the poisonous tree doctrine will not apply.⁷⁵ The second statement will then be viewed strictly according to *Miranda*.⁷⁶ If the defendant was advised of his *Miranda* rights and he voluntarily waived those rights, then the second statement will be admissible.⁷⁷ However, if the initial violation of *Miranda* is deemed flagrant, the analysis will be different.⁷⁸ The flagrancy of the violation will weigh heavily in the determination of whether the initial statement was voluntary.⁷⁹ If the initial statement is deemed coerced, then the derivative evidence rule will be applied to the second warned statement.⁸⁰ Thus, the new test eliminates the use of the *Miranda* presumption of coercion if the issue is admission of secondary evidence obtained in violation of *Miranda*.

IV. ANALYSIS

In *Elstad*, the Court minimized the psychological impact of initial unwarned admissions upon subsequent confessions with regard to the issue of voluntariness.⁸¹ "[T]he causal connection between any psychological disadvantage created by [a suspect's] admission and his ultimate decision to cooperate is speculative and attenuated at best."⁸² In lightly dismissing the psychological effect of a first confession, the Court disregarded reality.⁸³ A person who confesses may feel that he has nothing to lose and continues to talk.⁸⁴ He may even feel that if he cooperates further, he will obtain favored treatment. Skillful interrogators are

74. *Id.*

75. *Id.* at 1293.

76. *Id.* at 1296.

77. *Id.* at 1294.

78. *Id.* at 1296.

79. *Id.*

80. *Id.* at 1293.

81. *Id.* at 1295-96.

82. *Id.* at 1296.

83. *Id.* at 1305 (Brennan, J., dissenting).

84. *Darwin v. Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring and dissenting).

trained to capitalize on this breakdown of a suspect's defenses.⁸⁵ In addition, the Court ignored precedent when it denied the effect of the first confession on the second confession.⁸⁶ Prior decisions have established that the second confession will always, in some manner, be the product of the first confession.⁸⁷

Additionally, the *Elstad* Court feared that if it recognized the psychological effect of a voluntary unwarned admission on a suspect, with regard to subsequent confessions, the police would be precluded from obtaining statements from that suspect.⁸⁸ "[E]ndowing 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."⁸⁹

The Court's fear was illusory. This disabling effect has never been the case, even for the most egregious fifth amendment violations of the right against self-incrimination.⁹⁰ The elements of attenuation⁹¹ can cure even the most blatant violation of a defendant's constitutional rights.⁹² The sliding scale of at-

85. *Elstad*, 105 S. Ct. at 1303-04 (Brennan, J., dissenting).

86. *United States v. Bayer*, 331 U.S. 532, 540 (1947). In *Bayer*, Bayer bribed an army officer to keep Bayer from being shipped overseas to combat duty. *Id.* at 534-35. The army officer was convicted solely upon his confession. Subsequently, the army officer's conviction was overturned because the confession was ruled inadmissible. *Id.* at 539-40. However, he was tried and convicted again based upon the strength of a second confession that was obtained six months after the first. *Id.* at 540. The court of appeals determined that the second confession was the fruit of the first, and therefore, was inadmissible. *Id.* The Supreme Court reversed and decided that although the first confession let the "cat out of the bag" and that the second confession would always in some way be the product of the first confession, sufficient time had passed and the army officer was not coerced. Therefore, the second confession was voluntary and admissible. *Id.* at 540-41.

87. *Id.*

88. *Elstad*, 105 S. Ct. at 1294-95.

89. *Id.* at 1294.

90. See *Lyons v. Oklahoma*, 322 U.S. 596 (1944). In *Lyons*, the police forced a murder suspect to confess during intensive interrogation. *Id.* at 599-600. The police interrogated the suspect for over eight consecutive hours. *Id.* There was evidence that the police beat the suspect and placed a pan containing the bones of the victim in front of the suspect. *Id.* The defendant's first confession was ruled inadmissible but the Court asserted that the coercive effects of the first confession would be dissipated with time. *Id.* at 603-04.

91. See *supra* note 11.

92. *Id.*

tenuation⁹³ is well adapted to deal with constitutional violations at either end of the spectrum, whether technical violations or flagrant violations.⁹⁴ Therefore, the *Elstad* decision should have been premised upon an attenuation analysis instead of upon a *Miranda* analysis.⁹⁵ The Court should have viewed the facts to determine if the second confession was attenuated. The Court could have analyzed the facts of *Elstad* as follows: (1) was the violation of *Miranda* technical or flagrant?, (2) how much time passed between the initial confession and the second confession?, (3) were the same officers involved?, (4) was the accused moved from one place to another?, (5) were thorough *Miranda* warnings given before the second confession?, and (6) did the defendant waive his rights?

Based upon these factors the Court could have decided the case strictly according to established precedent.⁹⁶ If the Court would have relied upon prior cases, it would not have had to disregard the real impact that first confessions have upon subsequent admissions.⁹⁷ The purpose of the *Miranda* presumption would have been preserved, and the deterrence and trustworthiness rationales of the derivative evidence rule would have been furthered.

Moreover, the Court's analysis was much different than a similar analysis for a fourth amendment violation.⁹⁸ The Court previously held that if the fruit of a fourth amendment violation was a confession, *Miranda* warnings alone do not remove the taint from the violation.⁹⁹ On the contrary, the *Miranda* warnings will be just one factor in the analysis of attenuation.¹⁰⁰ However, as established in *Elstad*, when the initial violation is a technical violation of *Miranda*, *Miranda* warnings have a greater ability to cure the taint on the investigatory process.¹⁰¹ Significantly, the very same warnings that were used to protect a defendant's rights against self-incrimination were used to ensure

93. *Id.*

94. *Elstad*, 105 S. Ct. at 1307-08 (Brennan, J., dissenting).

95. *Id.* at 1307.

96. *Id.*

97. *Id.* at 1305.

98. *Id.* at 1292.

99. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

100. *Id.*

101. *Elstad*, 105 S. Ct. at 1294.

that any subsequent statement would be used against him.¹⁰²

Unfortunately, the *Elstad* Court's analysis undermines the fifth amendment right against self-incrimination. The Court's decision disregards the fact that suspects often believe they will be convicted because of their initial confession,¹⁰³ and therefore, they are more likely to make subsequent damaging statements.¹⁰⁴ The Court's use of these additional incriminating statements effectively weakens a defendant's right against self-incrimination.¹⁰⁵ It is ironic that the Court has used the *Miranda* warnings, designed to ensure that fifth amendment rights are fully honored,¹⁰⁶ to limit a suspect's constitutional protection.

V. SIGNIFICANCE

The initial effect of the *Elstad* decision is the elimination of the derivative evidence rule with regard to *Miranda* violations when the secondary evidence is a subsequent warned confession.¹⁰⁷ *Elstad* and cases that have preceded it have paved the way for the total elimination of the fruits doctrine when there is a *Miranda* violation.¹⁰⁸ In *Michigan v. Tucker*,¹⁰⁹ the Court held that a technical violation of *Miranda* does not warrant application of the derivative evidence rule when the secondary evidence is a third party witness. After *Elstad*, the Court has one final step to eliminate the derivative evidence rule with regard to *Miranda* violations; that step is to determine that physical evidence is not tainted as a result of a technical *Miranda* violation.¹¹⁰ Since the *Elstad* Court applied the *Tucker* analysis,¹¹¹

102. *Id.*

103. See *supra* note 42 and accompanying text.

104. *Elstad*, 105 S. Ct. at 1302 (Brennan, J., dissenting).

105. *Id.* at 1313-15 (Brennan, J., dissenting).

106. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

107. *Elstad*, 105 S. Ct. at 1296.

108. *Id.* at 1313 (Brennan, J., dissenting).

109. 417 U.S. 433 (1974). In *Tucker*, a witness was discovered as a result of questioning that violated *Miranda*. The witness was not considered a fruit of the violation of the defendant's constitutional rights because the violation of *Miranda* was only a violation of the procedural safeguards of *Miranda*. *Tucker*, 417 U.S. at 444-45. Therefore, there was no constitutional violation, and the secondary evidence rule did not apply. *Id.*

110. The Court used a three step analysis when it developed the fruits doctrine for fourth amendment violations. In *Silverthorne*, the Court established the rule with regard to physical evidence. *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392

the Court, when faced with physical evidence as the fruit of a technical *Miranda* violation, will apply *Tucker*, and allow the physical evidence to be admitted.¹¹²

Justice Brennan dissented in *Elstad*, and voiced this concern.¹¹³ He was fearful that the Court would foreclose application of the derivative evidence rule in all instances of a technical violation of a *Miranda* warning.¹¹⁴ He attempted to distinguish the holdings of *Tucker* and *Elstad*.¹¹⁵ According to Justice Brennan, the majority in both decisions heavily relied upon the extent of a suspect's volition in successive confession cases and third party witness cases.¹¹⁶ If a suspect retains his individual volition, the second confession or testimony will be insulated from the taint of the unwanted admissions.¹¹⁷ The fact that a person can exercise his free will to testify or confess was an important factor to the *Elstad* and *Tucker* Courts.¹¹⁸ As noted by Justice Brennan, this insulating factor is absent in cases in which the fruit of the poisonous tree is physical evidence.¹¹⁹

Nevertheless, the *Elstad* majority asserted that a violation of the prophylactic rules of *Miranda*, alone, is never a constitutional violation.¹²⁰ This premise will be rigidly followed by the Court, and the fruit of the poisonous tree doctrine, with regard to violations of the procedural rules of *Miranda*, will be eliminated; all secondary evidence will be admissible.¹²¹ As a result, the courts will be forced to revert to the factual, case-by-case inquiry of voluntariness before they will apply the derivative evidence rule to a violation of *Miranda*.¹²²

(1920). In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court extended the doctrine to verbal evidence. *Id.* at 484-87. In *United States v. Ceccolini*, 435 U.S. 268 (1978), the Court ruled that a third party witness may be excluded as a fruit of a constitutional violation if the defendant can show there was a very direct link to the violation. *Id.* at 280.

111. *Elstad*, 105 S. Ct. at 1291.

112. *See supra* note 109 and accompanying text.

113. *Elstad*, 105 S. Ct. at 1299 n.2, 1313 n.29 (Brennan, J., dissenting).

114. *Id.*

115. *Id.* at 1313 n.29.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1294.

121. *See supra* note 109 and accompanying text.

122. *Elstad*, 105 S. Ct. at 1324 (Stevens, J., dissenting).

The majority's decisions in this area tend to preserve the status of *Miranda* but to restrict its expansion. The Court is still adhering to the guidelines of the *Miranda* presumption but it is refusing to extend the decision in any direction.¹²³ For example, in *New York v. Quarles*,¹²⁴ Justice O'Connor stated, "[W]here the accused *only* proves that the police failed to administer *Miranda* warnings, exclusion of the statement itself is all that will and should be required."¹²⁵

The ultimate impact of *Elstad*, is that it may lead to the eventual overruling of *Miranda*.¹²⁶ The Court took the first step in that direction when it distinguished between actual coercion and presumed coercion.¹²⁷ Under this distinction, the *Miranda* warnings are prophylactic rules, and are not constitutionally necessary;¹²⁸ the Constitution simply requires an absence of actual coercion in obtaining a confession.¹²⁹ Since the *Miranda* warnings only raise a presumption of coercion, they are not constitutionally mandated,¹³⁰ and therefore, can be eliminated. Statements obtained by the police in violation of *Miranda* will no longer be presumed coerced. *Miranda* warnings may still be required, but their presence or absence will be only one factor in determining if a confession has been obtained through actual co-

123. In *Harris v. New York*, 401 U.S. 222 (1971), the Supreme Court refused to extend the *Miranda* presumption to exclude evidence obtained in violation of *Miranda* that was used for impeachment purposes. *Id.* at 226. In addition, the *Quarles* Court fashioned the only real exception to the *Miranda* safeguards. 104 S. Ct. 2626 (1984). In *Quarles*, the Court allowed evidence obtained in violation of *Miranda* to be used in the case in chief against the defendant basing its decision on the compelling need of public and police safety. *Id.* at 2632-33.

124. *Quarles*, 104 S. Ct. 2626 (O'Connor, J., dissenting and concurring). In *Quarles*, the police apprehended a suspected rapist. The victim had informed the police that the suspect was carrying a gun. The police searched the suspect and found a shoulder holster but did not find a gun. The officers, before administering the required *Miranda* warnings, asked the suspect where the gun was; the suspect complied. The Court allowed the statement of the suspect into evidence based upon a public safety exception to *Miranda*. *Id.* at 2632. The Court held that if a police officer is motivated by a genuine concern for public safety then that need outweighs the requirement that the officer administer *Miranda* warnings before questioning the suspect. *Id.* at 2633.

125. *Id.* at 2641 (emphasis added).

126. See Kamisar, *supra* note 17, at S22.

127. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

128. *Elstad*, 105 S. Ct. at 1291 (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)).

129. *Elstad*, 105 S. Ct. at 1292.

130. *Id.*

ercion. The analysis will be similar to the analysis of *Elstad*,¹³¹ was there actual, not presumed, coercion in obtaining the initial statement. If there was no actual coercion, the statement will be admissible.

If the Court overrules *Miranda* and reverts to the voluntary test, a curious use of the *Miranda* warnings may occur. *Miranda* warnings may still be required, but the presumption of coercion will not apply. However, a different presumption may result. The presumption will not be of coercion, but of voluntariness. The courts will view *Miranda* warnings as an extra effort to ensure that any confession obtained was voluntary. A defendant will have to overcome this presumption and prove that a confession was obtained through actual coercion. This turn of events will be an interesting use of the presumption that was intended to ensure that a suspect's right against self-incrimination has been fully honored.

In light of the decision in *Elstad*, a significant question remains to be answered. What impact will the decision have on the deterrence rationale of the *Miranda* presumption and the fruits doctrine? The police may utilize the *Elstad* decision to authorize inadvertant questioning of a suspect, in violation of *Miranda*, with the hope of obtaining secondary information that may be more valuable than obtaining a conviction for the original violation. This is a real concern.¹³² One does not have to search far to find examples of police conduct designed to take advantage of a legal doctrine.

One example is the use of the plain view doctrine as a pretext for a general search.¹³³ In *Sanderson v. Superior Court of Stanislaus County*,¹³⁴ police officers attempted to manipulate the use of the doctrine by moving a defendant from room to room while they questioned him, with the hope of finding evidence in plain view.¹³⁵ It is not difficult to imagine a resourceful

131. *Id.* at 1296.

132. *Id.* at 1318-19 (Brennan, J., dissenting).

133. If the police are lawfully in a certain place and inadvertently view evidence of a crime, they may lawfully seize evidence that is in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Moreover, the Court asserted that the use of the plain view doctrine may not be used as a pretext for a general exploratory search. *Id.* at 466.

134. 105 Cal. App. 3d 264, 273, 164 Cal. Rptr. 290, 296 (1980).

135. *Id.*

police officer attempting to utilize the *Elstad* precedent in a similar manner. For example, a police officer, intent upon arresting a suspect, may "inadvertently" question him in the non-threatening environment of the suspect's home.¹³⁶ If the suspect answers, the reply will be inadmissible pursuant to *Miranda*, but any subsequent Mirandized admission due to the suspect's weakened state will be admissible.¹³⁷

The first admission is always the hardest admission for interrogators to obtain.¹³⁸ If the police are permitted to obtain the initial statement in violation of *Miranda* without fear of the fruits doctrine, then the deterrence rationale of the fifth amendment will be substantially impaired, and the decisions in *Elstad* and *Tucker* will not have served their purpose.

VI. ALTERNATIVES TO THE COURT'S HOLDING

There were two possible alternatives to the Court's solution to the procedural violation of the prophylactic rules designed to safeguard *Elstad*'s fifth amendment rights. The first alternative was to decide the case strictly according to the fruit of the poisonous tree doctrine by applying the doctrine of attenuation.¹³⁹ If *Miranda* was violated, there was a primary illegality and the courts should look to the factors of attenuation in determining the admissibility of any secondary evidence.¹⁴⁰ The deterrence rationale of the exclusionary rule would be preserved, and criminal procedure would remain relatively straight forward with regard to fifth amendment violations.¹⁴¹

The second alternative was to require the police officers to give supplemental information to *Elstad* explaining that his first statement was made without proper *Miranda* warnings, and therefore, might be inadmissible in court against him.¹⁴² In this

136. *Elstad*, 105 S. Ct. at 1289.

137. *Id.* at 1296.

138. *Id.* at 1303-04 (Brennan, J., dissenting).

139. *See supra* note 11.

140. *Id.*

141. Justice Stevens voiced this concern in his dissent. *Elstad*, 105 S. Ct. at 1324 (Stevens, J., dissenting). He was afraid that if the Court reverted to the use of the voluntary test, the Court would be forced into the factual inquiries of voluntariness that *Miranda* avoided. *Id.*

142. The defendant in *Elstad* advanced this argument which was expressly rejected

way, Elstad could have voluntarily waived his right to remain silent after receiving the proper warnings. He would have had all the essential information necessary to make a knowing, intelligent, and voluntary waiver.¹⁴³

The psychological impact in cases of consecutive confessions, when one confession closely follows the other confession, is magnified, so that the second confession can never be voluntary in the noncoercive sense.¹⁴⁴ The first confession is itself coercive in the mind of a suspect;¹⁴⁵ *Miranda* warnings alone cannot cure the coercive impact of the first confession. A simple additional warning to the thorough *Miranda* admonition that the previous statement may not be admissible, will cure this defect. Therefore, any additional statement will be a voluntary, knowing, and intelligent waiver of a defendant's constitutional rights.¹⁴⁶

The *Miranda* warnings are well known and relatively simple.¹⁴⁷ A supplemental warning will not detract from this simplicity. The rights of an accused will be scrupulously honored and the burden on law enforcement will be minimal. Anything less than supplemental warnings will not be sufficient, and will undermine the integrity of the fact finding system.

VII. CONCLUSION

The U.S. Supreme Court has created a new area of criminal procedure that will burden the courts with tedious fact-finding litigation whenever the police discover evidence as a result of a *Miranda* violation. A primary confession will be inadmissible, pursuant to *Miranda*, but any secondary statement will have to be examined according to the factors in *Elstad*. Was the initial confession voluntary according to the old due process voluntary test? If the answer is yes, then there has been no primary violation of the rights of the defendant and the derivative evidence doctrine is inapplicable; therefore, the second statement will

by the Court. *Id.* at 1297.

143. *Id.* at 1308-09 (Brennan, J., dissenting).

144. See *supra* note 42 and accompanying text.

145. *Id.*

146. *Id.*

147. *Id.*

have to be examined to determine if it is admissible. Have proper *Miranda* warnings been given to the defendant? If the answer is yes, ordinarily this will be sufficient to cure the condition that was created by an inadvertent violation of *Miranda*, and the defendant can make a knowing and intelligent waiver of his constitutional rights.

The Court's decision ignored the psychological impact of a first confession upon a defendant. By allowing the courts to use a confession that has been obtained when a defendant is in a compromised psychological state, the Supreme Court has undermined the fifth amendment right against self-incrimination. In addition, the fifth amendment has been further weakened by employing the *Miranda* warnings to ensure that any subsequent confession is used against a defendant; the *Miranda* warnings were designed to ensure that fifth amendment rights are honored. The Court should have used the analysis of attenuation, or alternatively, mandated that police officers give a supplemental warning that a first confession may be inadmissible whenever *Miranda* is violated. This additional safeguard would have guaranteed that a defendant's fifth amendment rights would be scrupulously honored.

The result of this watering down of the fifth amendment privilege against self-incrimination may lead to the eventual overruling of *Miranda*. But, at the very least, the *Elstad* decision will lead to an increase in the complexity of criminal procedure. In the words of Justice O'Connor, there will be "a finespun new doctrine on [fifth amendment litigation] complete with hair splitting distinctions that currently plague our Fourth Amendment jurisprudence."¹⁴⁸

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148. *New York v. Quarles*, 104 S. Ct. 2626, 2636 (1984) (O'Connor, J., concurring and dissenting).

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