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MIRANDA'S POISONED FRUIT TREE: THE ADMISSIBILITY OF PHYSICAL EVIDENCE DERIVED FROM AN UNWARNED STATEMENT

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Abstract: *Miranda v. Arizona* created an exclusionary rule that prohibits using, as part of the prosecution's case in chief, evidence that is obtained as the result of unwarned custodial interrogation. In *Michigan v. Tucker* and *Oregon v. Elstad*, the United States Supreme Court narrowed the scope of this rule in relation to the "fruit of the poisonous tree" doctrine that excludes all evidence derived from constitutional violations. The *Tucker* Court held that the testimony of a witness identified from an unwarned statement should be admitted, and the *Elstad* Court held that a warned statement following an unwarned statement should also be admitted. In both cases, the primary rationale for the exceptions was the prophylactic status of the *Miranda* rule. This status distinguished *Miranda* violations from constitutional violations to which the fruits doctrine was applicable. In 2000, the U.S. Supreme Court reversed its earlier characterization of *Miranda* as a prophylactic rule, and instead reaffirmed the rule's constitutional status in *Dickerson v. United States*. After *Dickerson*, a circuit split developed regarding the admissibility of physical evidence derived from unwarned statements excluded at trial. This Comment argues that the U.S. Supreme Court should hold that both the unwarned statement and its derivative physical evidence should be excluded from the prosecution's case in chief. Fifth Amendment precedent mandates applying the fruits doctrine to physical evidence derived from an unwarned statement in order to effectively deter violations of *Miranda* and to ensure the trustworthiness of evidence obtained in the interrogation setting.

In 1966, *Miranda v. Arizona*[1] dramatically changed the face of custodial interrogation.[2] The United States Supreme Court held that incommunicado[3] custodial surroundings and contemporary interrogation techniques[4] are inherently compelling and in violation of the Fifth

1. 384 U.S. 436 (1966).

2. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 22.01 (3d ed. 2002).

3. "Incommunicado" interrogations are done in a setting that isolates the suspect from anyone and anything familiar in order to deprive the suspect of every psychological advantage and bestow such advantages on the interrogators. *See Miranda*, 384 U.S. at 449–50.

4. *See id.* at 467. By the 1960s, police conducting interrogations had largely adopted and used psychological tactics rather than physical abuse. *See id.* at 448–49. The *Miranda* Court focused on the psychological methods described in two criminal interrogation manuals. *Id.* at 449–54 (citing INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956)). Psychological pressures were more difficult to prove than physical abuse when the voluntariness of the defendant's confession was in question. The Court concluded that police were exploiting the incommunicado nature of custodial interrogation in order to destabilize the suspect by focusing on his insecurities about himself or his surroundings. Once the suspect was off balance, the police used patience, persistence, and trickery to inhibit the defendant

Amendment.[5] This inherent compulsion can be dispelled only by the police explicitly informing the suspect of his or her rights,[6] known as the *Miranda* warnings,[7] and the suspect's voluntary and knowing waiver of those rights.[8] The *Miranda* decision established the broad, presumptive exclusionary rule[9] that "no evidence obtained as a result of interrogation can be used against" the defendant unless the prosecution demonstrates at trial that the warnings were given and the defendant's waiver was voluntary and knowing.[10] However, the Court did not clarify whether "no evidence" was limited to the defendant's statement, or extended to evidence derived from that statement as well. The Court has since carved out three exceptions to *Miranda*'s sweep.[11]

A separate but related doctrine in the context of exclusion of evidence is the "fruit of the poisonous tree"[12] doctrine (fruits doctrine). The fruits doctrine generally forbids the prosecution from using either

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from exercising his constitutional rights. *See id.* at 455.

5. *See id.* at 467.

6. *See id.* at 444–45.

7. An in-custody suspect:
must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

8. *See id.* at 444–45.

9. *See id.* at 476.

10. *See id.* at 479.

11. *See* Oregon v. Elstad, 470 U.S. 298, 314 (1985) (creating the cured statement exception); New York v. Quarles, 467 U.S. 649, 655 (1984) (creating the public safety exception); Michigan v. Tucker, 417 U.S. 433, 447–48 (1974) (creating the limited retroactivity exception). The cured statement exception requires courts to exclude an unwarned statement but admit a subsequent statement if *Miranda* warnings were administered and the suspect knowingly waived those rights before the later statement was made. *See Elstad*, 470 U.S. at 314. Under the public safety exception, courts may admit both the defendant's statement and any evidence derived from that statement when *Miranda* is violated for public safety concerns. *See Quarles*, 467 U.S. at 655. Finally, in the limited retroactivity exception, courts must exclude an unwarned statement but may admit the testimony of a witness identified through that statement if the statement was obtained prior to the *Miranda* decision and the trial occurred afterwards. *See Tucker*, 417 U.S. at 447–48. The Court has also established an impeachment exception whereby an otherwise inadmissible unwarned statement is admissible to attack the credibility of the defendant's trial testimony. *See* Harris v. New York, 401 U.S. 222, 226 (1971). However, this exception is beyond the scope of this Comment because it still does not allow the evidence into the prosecution's case in chief. Another possible exception to *Miranda* is the independent source doctrine. So far, however, this doctrine has only been applied within the Fifth Amendment context to immunity, not interrogation, and therefore it is also beyond the scope of this Comment. *See* Kastigar v. United States, 406 U.S. 441, 460 (1972).

12. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

unconstitutionally obtained primary evidence or its derivative evidence in its case in chief.[13] Primary evidence is the direct product of police action violative of the constitution,[14] such as an illegally seized bag or an unwarned statement. Derivative evidence is the indirect product of police action.[15] The police obtain or become aware of derivative evidence through primary evidence.[16] Examples of derivative evidence include testimony by a non-party witness whose identity was revealed in the unwarned statement, a defendant's subsequent statement, or drugs located through an unwarned statement.[17] Generally, an exclusionary rule presumptively applies to the primary evidence.[18] The fruits doctrine, or the practice of excluding the derivative evidence as well, is an additional safety measure to ensure that the prosecution does not profit from an unconstitutional act.[19] Unless the prosecution proves by a preponderance of the evidence that an exception to the fruits doctrine applies, the derivative evidence is excluded.[20]

The U.S. Supreme Court first extended the general exclusionary rule to derivative evidence, thereby creating the fruits doctrine in the Fourth Amendment context.[21] In *Wong Sun v. United States*,[22] the Court held

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13. In the Fourth Amendment context, see *Wong Sun v. United States*, 371 U.S. 471, 487 (1963), *Nardone v. United States*, 308 U.S. 338, 341 (1939), and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). In the Fifth Amendment context, see *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964). In the Sixth Amendment context, see *United States v. Wade*, 388 U.S. 218, 235 (1967).

14. *See Wong Sun*, 371 U.S. at 484.

15. *See id.*

16. *See id.*

17. *See* United States v. Faulkingham, 295 F.3d 85, 91 (1st Cir. 2002).

18. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966); *Wong Sun*, 371 U.S. at 484. The general exclusionary rule for a Fifth Amendment violation is not merely a remedy for a constitutional right; it is inherent in the right itself. *See* DRESSLER, *supra* note 2, § 23.02[E][1]. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In other words, if the evidence is in any way linked to self-incrimination, it is inadmissible in the prosecution's case in chief. When *Miranda* found custodial interrogation inherently compulsive, it extended the Fifth Amendment's exclusionary rule to custodial, unwarned statements. *See Miranda*, 384 U.S. at 458.

19. *See* Nix v. Williams, 467 U.S. 431, 443 (1984); *see also Wong Sun*, 371 U.S. at 486.

20. *See Nix*, 467 U.S. at 444.

21. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (finding that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all*") (emphasis added).

22. 371 U.S. 471 (1963).

that evidence "come at by exploitation"[23] of an unconstitutional act ("the poisonous tree"[24]) is inadmissible derivative evidence ("the tainted fruit"[25] of the tree).[26] The fruits doctrine applies unless the connection between the Fourth Amendment violation and the derivative evidence is too attenuated.[27] The passage of time and a break in events are two factors relevant to determining whether the fruits doctrine applies in the Fourth Amendment.[28] While the fruits doctrine was first developed under the Fourth Amendment context,[29] the U.S. Supreme Court has also applied it in the context of the Fifth[30] and Sixth Amendments.[31] For example, in the Fifth Amendment context, the Court has held that courts can compel a state witness to offer incriminating testimony only if both the compelled testimony and the evidence derived from that testimony are inadmissible in a criminal prosecution against the witness.[32]

In *Dickerson v. United States*,[33] the U.S. Supreme Court clarified the status of *Miranda*'s rule, which requires the administration of warnings and an effective waiver prior to admitting the statement in the prosecution's case in chief, as a constitutional rule under the Fifth Amendment's privilege against self-incrimination.[34] The *Dickerson* Court held that *Miranda*'s strictures on the admissibility of statements made during custodial interrogation are constitutional, not prophylactic.[35] Notably, the exceptions to *Miranda* survived *Dickerson*,[36] despite their primary reliance on *Miranda*'s former prophylactic status.[37] The Court distinguished them on the ground that

23. *See id.* at 488 (internal quotes omitted).

24. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

25. *See Nix*, 467 U.S. at 441.

26. *See Wong Sun*, 371 U.S. at 488.

27. *See Nardone*, 308 U.S. at 341.

28. *See id.*

29. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

30. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

31. *See* United States v. Wade, 388 U.S. 218, 235–36 (1967).

32. *See Murphy*, 378 U.S. at 79.

33. 530 U.S. 428 (2000).

34. *See id.* at 437–38.

35. *See id.* at 444. A prophylactic rule is formulated to prevent something. BLACK'S LAW DICTIONARY 1234 (7th ed. 1999).

36. *See Dickerson*, 530 U.S. at 441.

37. *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985); Michigan v. Tucker, 417 U.S. 433, 446 (1974).

"no constitutional rule is immutable."[38] The Court recognized that constitutional rules can be modified to have exceptions because courts are unable to foresee all applications of a rule at the time of the original decision.[39]

Since the *Dickerson* decision, a circuit split has developed regarding the admissibility of physical evidence derived from unwarned statements excluded at trial.[40] The crux of the split lies in the circuit courts' interpretations of the impact of *Miranda*'s warnings and waiver as a constitutional right, and not merely a prophylactic safeguard, on two of *Miranda*'s progeny involving derivative evidence.[41] Two circuits have held that the fruits doctrine does not apply to derivative physical evidence.[42] Conversely, two other circuits have held that the fruits doctrine does apply to *Miranda* violations.[43] The U.S. Supreme Court recently granted certiorari to *United States v. Patane*,[44] and therefore this issue will soon be resolved.

This Comment argues that the U.S. Supreme Court should hold that, absent an exception, both the unwarned statement and its derivative physical evidence should be excluded when *Miranda* rights are violated.[45] Part I explores the scope of *Miranda*'s exclusionary rule. Part II discusses the impact of *Dickerson*'s reaffirmation of *Miranda*'s constitutional status on the scope of *Miranda*'s exclusionary rule. Part III reviews the post-*Dickerson* lower federal court split on the application of the fruits doctrine to derivative physical evidence. Part IV argues that the U.S. Supreme Court should hold that the fruits doctrine

38. *See Dickerson*, 530 U.S. at 441.

39. *See id.*

40. *See* United States v. Patane, 304 F.3d 1013, 1029 (10th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183) (excluding gun derived from a statement negligently obtained in violation of *Miranda*); United States v. Faulkingham, 295 F.3d 85, 93–94 (1st Cir. 2002) (admitting statements of a witness and drugs derived from a statement negligently obtained in violation of *Miranda*); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002) (admitting gun derived from an unwarned statement); United States v. DeSumma, 272 F.3d 176, 180–81 (3d Cir. 2001) (admitting gun derived from an unwarned statement).

41. *See Patane*, 304 F.3d at 1025; *Faulkingham*, 295 F.3d at 93; *Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

42. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

43. *See Patane*, 304 F.3d at 1029; *Faulkingham*, 295 F.3d at 90.

44. *See* United States v. Patane, 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183).

45. This Comment is limited in scope to the admissibility of physical fruits of unwarned statements. The current state of other forms of derivative evidence, namely witness identification and defendants' statements, is beyond this Comment's scope—except as they pertain to an established exception to *Miranda*'s exclusionary rule.

should be uniformly[46] applied to physical evidence derived from unwarned statements.

I. *MIRANDA*'S EXCLUSIONARY RULE

In *Miranda v. Arizona*, the U.S. Supreme Court created a default exclusionary rule: courts cannot admit evidence obtained prior to the suspect being given *Miranda* warnings and making a voluntary and knowing waiver of those rights to prove the prosecution's case in chief at trial.[47] The *Miranda* Court did not address the applicability of the fruits doctrine,[48] which mandates exclusion of all evidence derived from a constitutional violation, absent an established exception.[49] Yet in subsequent cases, the Court restricted the scope of *Miranda*'s exclusionary rule by carving out three exceptions to its presumption of inadmissibility.[50] First, the public safety exception allows the prosecution to use both the unwarned statement and its fruits in the prosecution's case in chief.[51] The second and third exceptions are derivative evidence exceptions, requiring courts to exclude the unwarned statement but admit its fruits.[52] The Court has not explicitly ruled on whether an exception exists for physical evidence derived from an unwarned statement excluded at trial,[53] although some Justices have expressed opinions on the issue.[54]

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46. Unless an established exception applies. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 314 (1985) (applying a cured statement exception); New York v. Quarles, 467 U.S. 649, 655 (1984) (applying a public safety exception); Michigan v. Tucker, 417 U.S. 433, 447–48 (1974) (applying the limited retroactivity exception).

47. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

48. *See Tucker*, 417 U.S. at 447, 452 n.26.

49. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

50. *See Elstad*, 470 U.S. at 314; *Quarles*, 467 U.S. at 655; *Tucker*, 417 U.S. at 448. This Comment is limited in scope to exceptions to the exclusion of evidence in the prosecution's case in chief. *See supra* note 11.

51. *See Quarles*, 467 U.S. at 655.

52. *See Elstad*, 470 U.S. at 318; *Tucker*, 417 U.S. at 448.

53. *See* Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari); United States v. Patane, 304 F.3d 1013, 1023 (10th Cir. 2002); United States v. Faulkingham, 295 F.3d 85, 90–91 (1st Cir. 2002).

54. *See, e.g.*, *Quarles*, 467 U.S. at 666 (O'Connor J., concurring in part and dissenting in part); *id.* at 688 (Marshall, J., dissenting).

A. The Scope of Miranda*'s Exclusionary Rule*

Miranda v. Arizona governs the admissibility of evidence obtained through custodial interrogation.[55] *Miranda* was one of four consolidated cases in which the defendants had provided the police with incriminating statements while in custody and subject to interrogation.[56] While the cases were from different jurisdictions, they had four significant facts in common: (1) each suspect was in custody; (2) each suspect was questioned in the police-dominated atmosphere of an interrogation room; (3) each suspect was run through police interrogation procedures; and (4) none of the suspects was informed of the privilege against self-incrimination.[57] The question before the Court was whether custodial interrogation rendered the defendants' statements inadmissible as violations of the Fifth Amendment.[58] Prior to the *Miranda* decision, the admissibility of a confession was determined by a voluntariness test inquiring whether a defendant's will was overborne.[59] This voluntariness test was derived from two constitutional bases: the Fifth Amendment privilege against self-incrimination[60] and the Fourteenth Amendment's Due Process Clause.[61] After reviewing police practices and interrogation manuals, however, the *Miranda* Court concluded that there was an inherent compulsion about custodial interrogation that the voluntariness test could not safeguard.[62]

The Court determined that custodial surroundings and interrogation procedures blurred the line between voluntary and involuntary statements, thus heightening the risk that an individual's Fifth Amendment privilege against self-incrimination would not be protected.[63] To alleviate this risk, the Court created a concrete set of

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55. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

56. *See Miranda*, 384 U.S. at 456–57.

57. *See id.* at 445, 456–57; DRESSLER, *supra* note 2, § 24.04[A].

58. *See Miranda*, 384 U.S. at 445.

59. *See* Malloy v. Hogan, 378 U.S. 1, 7 (1964).

60. U.S. CONST. amend. V.

61. U.S. CONST. amend. XIV, § 1. *See Malloy*, 378 U.S. at 6–7; Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding that state courts must suppress involuntary confessions under the Fourteenth Amendment's Due Process Clause); Bram v. United States, 168 U.S. 532, 542–43 (1897) (holding that federal courts must suppress compelled confessions under the Fifth Amendment).

62. *See Miranda*, 384 U.S. at 457–58.

63. *See* Dickerson v. United States, 530 U.S. 428, 435 (2000); *Miranda*, 384 U.S. at 457–58.

procedural safeguards for law enforcement agencies and courts to follow[64] and grounded the admissibility of any statement made during custodial interrogation upon the administration of the four *Miranda* warnings and waiver of those rights.[65] The prosecution has the burden of demonstrating that the *Miranda* warnings were administered and that the defendant knowingly and intelligently waived those rights before the court can admit the defendant's statement.[66] Thus, the *Miranda* Court announced a broad exclusionary rule: "unless and until [the *Miranda*] warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against [the defendant]."[67]

The Court directed that "the prosecution may not *use* statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[68] The Court did not address whether this use was limited to the defendant's statements, or whether it was more broadly meant to include the fruits doctrine, thus prohibiting the prosecution from using derivative evidence obtained from the unwarned statement as well.[69] The fruits doctrine arises in the *Miranda* context when an unwarned statement leads to: (1) the identification of a witness whom the prosecution seeks to use in its case in chief,[70] (2) self-incriminating statements from the defendant,[71] or (3) information regarding the location of physical evidence.[72] Thus far, the

64. *See Miranda*, 384 U.S. at 442.

65. *See id.* at 444–45. The four *Miranda* warnings require that an in-custody suspect "be warned prior to any questioning": (1) "that he has the right to remain silent," (2) "that anything he says can be used against him in a court of law," (3) "that he has the right to the presence of an attorney," and (4) "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

66. *See id.* at 444, 479.

67. *See id.* at 479 (emphasis added).

68. *Id.* at 444 (emphasis added).

69. *See* Michigan v. Tucker, 417 U.S. 433, 447, 452 n.26 (1974).

70. *See id.* at 436–37.

71. *See* Oregon v. Elstad, 470 U.S. 298, 311–12 (1985).

72. *See* United States v. Patane, 304 F.3d 1013, 1015–16 (10th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183); United States v. Faulkingham, 295 F.3d 85, 86 (1st Cir. 2002); United States v. Sterling, 283 F.3d 216, 218 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 178 (3d Cir. 2001).

U.S. Supreme Court has neither explicitly adopted nor rejected the fruits doctrine in the *Miranda* context.[73]

B. Exceptions to Miranda*'s Exclusionary Rule*

The U.S. Supreme Court has carved out three exceptions to *Miranda*'s exclusionary rule.[74] First, courts can admit an unwarned statement and its fruits when the defendant was providing information regarding pressing public safety concerns.[75] In *New York v. Quarles*,[76] the U.S. Supreme Court determined that an unwarned statement and its fruits are admissible when public safety would be immediately jeopardized by any delay in obtaining the evidence.[77] The Court held that an unwarned statement revealing the location of a gun and the gun itself should be admitted, even without *Miranda* warnings, because the defendant had discarded the gun in a populated supermarket.[78] The Court characterized the situation as one in which "the need for answers to questions . . . outweighs the need for the prophylactic rule" protecting the defendant's Fifth Amendment rights.[79] Therefore, where public safety is at issue, the *Miranda* rule does not apply and both the primary and derivative evidence are admissible.[80]

The second exception to *Miranda*'s exclusionary rule stems from *Michigan v. Tucker*.[81] In *Tucker*, the police gave the defendant the warnings constitutionally required before *Miranda*,[82] but at the time, the

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73. *See* Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari); *Patane*, 304 F.3d at 1023; *Faulkingham*, 295 F.3d at 90–91.

74. *See Elstad*, 470 U.S. at 314; New York v. Quarles, 467 U.S. 649, 655 (1984); *Tucker*, 417 U.S. at 447–48. These are exceptions to the exclusion of evidence from the prosecution's case in chief. For other exceptions outside the scope of this Comment, see *supra* note 11.

75. *See Quarles*, 467 U.S. at 657.

76. 467 U.S. 649 (1984).

77. *See id.* at 655.

78. *See id.* at 652.

79. *See id.* at 657.

80. *See id.* at 659–60.

81. 417 U.S. 433 (1974).

82. *See id.* at 447 (finding that "at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in Escobedo v. Illinois") (citation omitted). The *Escobedo* decision set the stage for *Miranda* by holding that the custodial interrogation of a suspect without honoring the suspect's request for an attorney and not effectively warning him of his right to remain silent or his right to consult with his attorney renders any statement elicited from him inadmissible under the Sixth Amendment. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

warnings did not include the right to free counsel.[83] After waiving his rights, the defendant identified Robert Henderson as an alibi witness.[84] Mr. Henderson, however, discredited the defendant's statement, and the prosecution used him in its case in chief.[85] After the interrogation, but before the trial date,[86] the U.S. Supreme Court announced the *Miranda* rule, which included the indigent defendant's right to state-provided counsel.[87] At trial, the judge retroactively applied *Miranda* and excluded the defendant's statement.[88] The U.S. Supreme Court, however, held that the derivative witness identification evidence should be admitted.[89]

Under *Tucker*, the Court created a limited retroactivity exception for witnesses identified by a defendant's statement made before *Miranda* was decided, but after the defendant received the warnings required at the time.[90] The *Tucker* Court rationalized admitting the derivative evidence by characterizing *Miranda* as a prophylactic rule.[91] The Court reasoned that the *Miranda* warnings were not a constitutionally protected right.[92] Instead, the warnings were prophylactic measures designed to protect the privilege against self-incrimination, and the failure to give them did not abridge the Fifth Amendment.[93] The *Tucker* Court also determined that the traditional fruits doctrine does not apply when the police do not actually infringe upon the defendant's constitutional rights.[94] The Court distinguished *Tucker* from *Wong Sun*, where the fruits doctrine applied[95] because a constitutional violation had occurred.[96] Consequently, the traditional fruits doctrine requiring

83. *See Tucker*, 417 U.S. at 436.

84. *Id.*

85. *Id.* at 436–37.

86. *See id.* at 437.

87. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

88. *See Tucker*, 417 U.S. at 447–48; *see also* Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (holding that *Miranda* would not be applied retroactively to cases in which the trial had begun before the decision was announced, but that it would apply retroactively to cases in which the trial began after the date of decision).

89. *See Tucker*, 417 U.S. at 447–48.

90. *See id.* at 448.

91. *See id.* at 446.

92. *See id.* at 444.

93. *See id.* at 446.

94. *See id.*

95. *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963).

96. *See Tucker*, 417 U.S. at 445–46.

exclusion of derivative evidence was not controlling for prophylactic *Miranda* violations.[97]

Finally, the U.S. Supreme Court created an additional derivative evidence exception to *Miranda*'s exclusionary rule in *Oregon v. Elstad*.[98] In *Elstad*, the defendant implicated himself in an answer to a police question after being arrested, but before receiving his *Miranda* warnings.[99] An hour later at the stationhouse, the defendant received the *Miranda* warnings, waived them, and gave the police a fully incriminating statement.[100] The Court decided that a suspect who responds to unwarned but non-coercive questioning does not thereby lose the ability to waive his rights and confess after being given the requisite *Miranda* warnings.[101] Thus, the Court held that the defendant's warned statement, although derived from an earlier unwarned statement, should be admitted.[102] Unlike a Fourth Amendment violation,[103] sufficient passage of time or a break in events is not required to cure the second, derivative statement.[104] The administration of the *Miranda* warnings and the defendant's waiver of those rights were sufficient to validate the derivative statement.[105]

The *Elstad* Court identified the factors necessary to cure a warned confession derived from an earlier unwarned statement.[106] The Court held that "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible."[107] Comparatively, a Fourth Amendment violation triggers the fruits doctrine and taints all derivative evidence until a sufficient break in events neutralizes it.[108] Yet, the Court concluded that this

97. *See id.* at 448.

98. 470 U.S. 298 (1985).

99. *See id.* at 301.

100. *See id.*

101. *See id.* at 318.

102. *See id.*

103. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (holding that derivative evidence of a Fourth Amendment violation may be admitted if it has become so attenuated from the original violation as to sufficiently dissipate the taint).

104. *See Elstad*, 470 U.S. at 306.

105. *See id.* at 318.

106. *See id.* at 309–10.

107. *See id.* at 310–11.

108. *See Nardone*, 308 U.S. at 341.

"break in events" test is unnecessary to cure a *Miranda* violation[109] because in any custodial interrogation setting, arming the defendant with his rights dispels the inherent compulsion.[110] If the defendant subsequently knowingly and voluntarily waives his or her rights, courts must admit the statement under this cured statement exception.[111]

The *Elstad* Court reaffirmed the prophylactic rationale behind the *Miranda* warnings and determined that *Miranda* violations warranted less severe consequences than constitutional violations.[112] The Court's leniency toward *Miranda* violations relied in part on the differences between the Fourth and Fifth Amendments.[113] Although the Court has not clearly articulated these differences, it has noted that "[w]here 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."[114] *Miranda* created the additional requirement that an otherwise voluntary confession may still be inadmissible if *Miranda* warnings were not administered.[115] Consequently, the *Elstad* Court determined that *Miranda* provides a remedy for the defendant who has not suffered a constitutional harm.[116] In this respect, "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."[117]

Although the failure to administer *Miranda* warnings constitutes a violation of the defendant's Fifth Amendment right against self-incrimination,[118] the U.S. Supreme Court has refused to apply the traditional fruits doctrine to *Miranda* violations.[119] Having characterized *Miranda* warnings as prophylactic, not constitutional,[120] the Court reasoned that the fruits doctrine, a constitutional violation remedy, did

109. *See Elstad*, 470 U.S. at 310–11.

110. *See id.* at 311; Miranda v. Arizona, 384 U.S. 436, 467 (1966).

111. *See Elstad*, 470 U.S. at 318.

112. *See id.* at 307–08.

113. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000); *Elstad*, 470 U.S. at 306–07.

114. *Elstad*, 470 U.S. at 306.

115. *See id.* at 307.

116. *See id.*

117. *Id.* at 306.

118. *See Dickerson*, 530 U.S. at 439; Miranda v. Arizona, 384 U.S. 436, 441–42 (1966).

119. *See Dickerson*, 530 U.S. at 441; *Elstad*, 470 U.S. at 308.

120. *See* Michigan v. Tucker, 417 U.S. 433, 446 (1974).

not apply.[121] Instead, the Court carved out three exceptions to *Miranda*'s exclusionary rule, enabling the prosecution to use derivative evidence previously obtained illegally in its case in chief.[122]

C. *The Undecided Question of Derivative Physical Evidence*

The U.S. Supreme Court has yet to address the applicability of the fruits doctrine to physical evidence derived from unwarned statements excluded at trial.[123] Although the Court determined that derivative physical evidence should be admitted in *New York v. Quarles*, the evidence at issue in *Quarles* involved a public safety concern[124] and the defendant's statement was admitted as well.[125] The Court has not determined whether courts should admit derivative physical evidence of an excluded unwarned statement.[126] But, several Justices have expressed views on the subject.[127] In *Quarles*, four of the Justices opined on the admissibility of derivative physical evidence in the *Miranda* context[128] after rejecting the majority's "public safety" exception.[129]

In his dissenting opinion in *Quarles*, Justice Marshall, with whom Justices Brennan and Stevens joined, determined that both the unwarned statement and the derivative physical evidence must be presumed inadmissible.[130] Justice Marshall recognized the U.S. Supreme Court's

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121. *See Elstad*, 470 U.S. at 318; New York v. Quarles, 467 U.S. 649, 657 (1984); *Tucker*, 417 U.S. at 445–46.

122. *See Elstad*, 470 U.S. at 314 (admitting a derivative, warned statement under the cured statement exception); *Quarles*, 467 U.S. at 655 (admitting an unwarned statement and derivative physical evidence under the public safety exception); *Tucker*, 417 U.S. at 447–48 (admitting a derivative witness identification under the limited retroactivity exception).

123. *See* Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari); United States v. Patane, 304 F.3d 1013, 1023 (10th Cir. 2002); United States v. Faulkingham, 295 F.3d 85, 90–91 (1st Cir. 2002).

124. *See Quarles*, 467 U.S. at 657–58.

125. *See id.* at 659–60.

126. *See Patterson*, 485 U.S. at 922–23; *Patane*, 304 F.3d at 1023; *Faulkingham*, 295 F.3d at 90–91.

127. *See Quarles*, 467 U.S. at 666 (O'Connor, J., concurring in part and dissenting in part); *id.* at 688 (Marshall, J., dissenting).

128. *See id.* at 666, 688.

129. *See id.* at 665 (O'Connor, J., concurring in part, dissenting in part); *id.* at 674 (Marshall, J., dissenting).

130. *See id.* at 688 (Marshall, J., dissenting). In light of *Nix v. Williams*, 467 U.S. 431 (1984), Justice Marshall concluded that the derivative evidence might be admissible if the police would have inevitably discovered it. Consequently, he would have affirmed the Court of Appeals' exclusion of the unwarned statement, but would remand the matter of the derivative evidence for

prior extension of the fruits doctrine to the Fifth Amendment context[131] and reasoned that *Miranda* was in fact a constitutional rule.[132] Therefore, he suggested that precedent required suppressing physical evidence discovered as a direct result of an unwarned statement.[133]

Justice O'Connor, on the other hand, concurred in admitting the derivative physical evidence on the ground that *Miranda*'s exclusionary rule was limited to testimonial evidence.[134] She reasoned that the Fifth Amendment only prohibits compelling a suspect to disclose evidence of a testimonial or communicative nature.[135] Nontestimonial or physical evidence is outside the scope of the Fifth Amendment.[136] Justice O'Connor based this conclusion on a series of cases admitting evidence obtained from the defendant's body.[137] Specifically, the Court has upheld police action compelling defendants to provide blood samples,[138] voice exemplars,[139] handwriting samples,[140] and speak during a lineup,[141] as not violating the Fifth Amendment. The Court reasoned that procuring evidence from the defendant's body did not in any way compel self-incrimination.[142] In these cases, the Court limited testimonial evidence invoking the Fifth Amendment to an accused's communication that explicitly or implicitly relates to a factual assertion or discloses information.[143] Consequently, Justice O'Connor concluded that in light of the nontestimonial evidence precedent, the non-

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reconsideration in light of *Nix*. *See Quarles*, 467 U.S. at 689–90 (Marshall, J., dissenting).

131. *See Quarles*, 467 U.S. at 687–88 (Marshall, J., dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

132. *See Quarles*, 467 U.S. at 683 (Marshall, J., dissenting).

133. *See id.* at 688–89 (Marshall, J., dissenting).

134. *See id.* at 660 (O'Connor, J., concurring in part and dissenting in part).

135. *See id.* at 666 (O'Connor, J., concurring in part and dissenting in part).

136. *See id.*

137. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 5–7 (1973) (supplying voice exemplars); Gilbert v. California, 388 U.S. 263, 265–66 (1967) (providing handwriting samples); United States v. Wade, 388 U.S. 218, 221–23 (1967) (speaking during a lineup); Schmerber v. California, 384 U.S. 757, 761 (1966) (drawing blood).

138. *Schmerber*, 384 U.S. at 761.

139. *Dionisio*, 410 U.S. at 5–7.

140. *Gilbert*, 388 U.S. at 265–66.

141. *Wade*, 388 U.S. at 221–23.

142. *See Schmerber*, 384 U.S. at 764.

143. *See* Doe v. United States, 487 U.S. 201, 210 (1988).

communicative nature of the derivative physical evidence itself foreclosed excluding such evidence on Fifth Amendment grounds.[144]

Ultimately, the majority in *Miranda* did not draw such distinctions; instead, it created a broad exclusionary rule that evidence obtained from a suspect without the full administration of the *Miranda* warnings and a knowing and voluntary waiver should not be admitted in the prosecution's case in chief.[145] The U.S. Supreme Court has limited the application of *Miranda*'s exclusionary rule in three situations.[146] In carving out these exceptions, the Court characterized the *Miranda* warnings as a prophylactic safeguard, as distinguished from a constitutional rule.[147] The Court has not ruled on the admissibility of derivative physical evidence when the unwarned statement has been excluded.[148]

II. *DICKERSON V. UNITED STATES*: *MIRANDA* IS A CONSTITUTIONAL RULE

The *Dickerson* decision represents the U.S. Supreme Court's break from characterizing *Miranda*'s requirements as prophylactic.[149] In *Tucker*, *Quarles*, and *Elstad*, the Court characterized *Miranda* as a prophylactic rule and used that characterization as a rationale for carving out the three exceptions.[150] In *Dickerson*, however, the Court held that *Miranda* was a constitutional rule.[151] The issue before the Court was whether Congress had the constitutional authority to supersede *Miranda* when it enacted 18 U.S.C. § 3501.[152] Under § 3501, admissibility of

144. *See* New York v. Quarles, 467 U.S. 649, 667–68 (1984) (O'Connor, J., concurring in part and dissenting in part).

145. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

146. *See* Oregon v. Elstad, 470 U.S. 298, 314 (1985); *Quarles*, 467 U.S. at 655; Michigan v. Tucker, 417 U.S. 433, 447–48 (1974). These are exceptions to the exclusion of evidence in the prosecution's case in chief. For other exceptions outside the scope of this Comment, see *supra* note 11.

147. *See Elstad*, 470 U.S. at 307–08; *Quarles*, 467 U.S. at 653; *Tucker*, 417 U.S. at 446.

148. *See* Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari); United States v. Patane, 304 F.3d 1013, 1023 (10th Cir. 2002); United States v. Faulkingham, 295 F.3d 85, 90–91 (1st Cir. 2002).

149. *See* Dickerson v. United States, 530 U.S. 428, 437–38 (2000).

150. *See Elstad*, 470 U.S. at 308–09; *Quarles*, 467 U.S. at 657; *Tucker*, 417 U.S. at 445–46.

151. *See Dickerson*, 530 U.S. at 444.

152. 18 U.S.C. § 3501 (2000). Section 3501 was part of the Ominbus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat 210. *See Dickerson*, 530 U.S. at 437.

statements made during custodial interrogation was based solely on their voluntariness.[153] Thus, § 3501 represented a return to the pre-*Miranda* voluntariness test, rejecting *Miranda* per se.[154] If *Miranda* warnings were a prophylactic safeguard, then Congress had the constitutional authority to enact § 3501.[155] If *Miranda* warnings were required under the Constitution, on the other hand, then Congress had overstepped its authority.[156]

This issue surfaced when the United States Court of Appeals for the Fourth Circuit determined the admissibility of an unwarned custodial statement under § 3501.[157] The Fourth Circuit held that an unwarned but voluntary confession was admissible under § 3501.[158] In *Dickerson*, the police arrested and interrogated the defendant in connection with a bank robbery without administering *Miranda* warnings.[159] At trial, the defendant argued that his incriminating statements should be suppressed under *Miranda*.[160] The trial court granted his motion to suppress.[161] On appeal, the Fourth Circuit ruled that while the defendant had not received *Miranda* warnings, the confession was voluntary, thus meeting § 3501's admissibility requirements.[162]

The U.S. Supreme Court reversed and held that *Miranda*'s warning-based rule governing the admissibility of statements made during custodial interrogation was a constitutional decision, which a legislative act could not overrule.[163] The Court returned to its rationale for the warnings in *Miranda*: "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment.'"[164] The Court reasoned that the warnings were constitutionally required to protect a suspect's Fifth Amendment

153. *See Dickerson*, 530 U.S. at 435–36.

154. *See id.* at 436.

155. *See id.* at 437.

156. *See id.*

157. *See id.* at 432.

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* at 444.

164. *Id.* at 435 (quoting Miranda v. Arizona, 384 U.S. 436, 439 (1966)).

rights.[165] Thus, while *Miranda* left the door open for the legislature to design safeguards that exceed *Miranda*'s constitutional requirements, it also represents the minimum constitutional standard that the legislature cannot go below.[166]

Although the *Dickerson* Court rejected the prophylactic rationale used to create the three exceptions in earlier jurisprudence,[167] it did not overrule any of these cases.[168] In fact, it incorporated the prophylactic *Miranda* opinions directly into its holding.[169] Yet, the Court did not explain how it reconciled the prophylactic *Miranda* holdings with *Miranda*'s "reaffirmed" constitutional status.[170] Instead, the Court held that *Miranda*'s exceptions merely illustrated "that no constitutional rule is immutable."[171] In other words, because courts cannot foresee every circumstance in which counsel will seek to apply a general rule, it is necessary for courts to be able to modify such rules accordingly.[172] The Court noted that these modifications are as much a part of constitutional law as the original decision.[173] Therefore, while the *Dickerson* opinion greatly undermined the principal reasoning underlying both *Tucker* and *Elstad*, their exceptions are still good law.[174] The Court's decision in *Dickerson*, however, threw into question whether the Court would adopt another rationale to further limit the scope of *Miranda*'s exclusionary rule, or whether it would use the fruits doctrine to exclude physical evidence derived from a now constitutional *Miranda* violation.

III. POST-*DICKERSON* APPLICATION OF *MIRANDA* TO DERIVATIVE PHYSICAL EVIDENCE

Following *Dickerson*, a circuit split developed regarding the admissibility of physical evidence derived from unwarned statements.[175]

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165. *Id.* at 439.

166. *Id.* at 440.

167. *See id.* at 437–38.

168. *See id.* at 432.

169. *See id.* ("We therefore hold that *Miranda and its progeny* in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.") (emphasis added).

170. *See id.* at 437–38, 441.

171. *Id.* at 441.

172. *See id.*

173. *See id.*

174. *See id.* at 432.

175. *See* United States v. Patane, 304 F.3d 1013 (10th Cir. 2002); United States v. Faulkingham,

The United States Courts of Appeals for the Third and Fourth Circuits rejected the fruits doctrine in the *Miranda* context,[176] and reaffirmed their pre-*Dickerson* holdings that physical fruits are admissible after excluding the unwarned statement.[177] In contrast, the United States Court of Appeals for the First Circuit reaffirmed its pre-*Dickerson* holding that the fruits doctrine applies to intentional *Miranda* violations.[178] The United States Court of Appeals for the Tenth Circuit went a step further and held that the fruits doctrine applies to negligent *Miranda* violations.[179]

A. Physical Fruits Are Admissible

Since *Dickerson*, two circuits have held that the fruits doctrine does not apply to physical evidence derived from an unwarned statement.[180] In *United States v. DeSumma*,[181] the Third Circuit refused to apply the fruits doctrine to the physical fruits of a *Miranda* violation.[182] An FBI agent asked an arrested, unwarned defendant if he had any weapons in his possession.[183] The defendant replied that he had a gun in his car, which the agent subsequently found.[184] The Third Circuit held that the gun could be admitted without violating the Fifth Amendment, even though it was obtained through a non-*Mirandized* statement.[185]

Relying on the *Dickerson* Court's affirmation of the distinction between Fourth and Fifth Amendment violations in *Elstad*,[186] the Third Circuit determined that *Dickerson*'s characterization of *Miranda* as a constitutional rule did not fatally undermine *Elstad*'s rationale for not applying the fruits doctrine.[187] The court focused on *Elstad*'s

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295 F.3d 85 (1st Cir. 2002); United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176 (3d Cir. 2001).

176. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

177. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

178. *See Faulkingham*, 295 F.3d at 93 (citing United States v. Byram, 145 F.3d 405, 410 (1st Cir. 1998)).

179. *See Patane*, 304 F.3d at 1019.

180. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

181. 272 F.3d 176 (3d Cir. 2001).

182. *See id.* at 180.

183. *See id.* at 180–81.

184. *See id.*

185. *See id.* at 181.

186. *See id.* at 180.

187. *See id.*

determination of *Miranda*'s exclusionary rule as sweeping more broadly than the Fifth Amendment itself.[188] The court reasoned that while voluntary unwarned statements were excluded from evidence, "'the *Miranda* presumption . . . does not require that the statements and their fruits be discarded as inherently tainted.'"[189] Consequently, the court held that the fruits doctrine does not apply to *Miranda* violations because the police would be no more deterred after the trial court excludes the unwarned statement.[190]

Similarly, in *United States v. Sterling*,[191] the Fourth Circuit refused to apply the fruits doctrine to physical evidence derived from an unwarned statement.[192] The arresting officer asked the arrested, unwarned defendant whether he had any weapons. The defendant stated that he had a shotgun in his truck, which police subsequently found.[193] The Fourth Circuit held that the trial court properly admitted the shotgun because the fruits doctrine did not extend to Fifth Amendment violations.[194]

The *Sterling* court determined that *Dickerson* did not impact the Fourth Circuit's earlier holding that the fruits doctrine does not apply in a *Miranda* context.[195] The court reasoned that *Dickerson*'s incorporation of *Miranda*'s progeny into its holding was evidence that "the established exceptions, like those in *Tucker* and *Elstad*, survive."[196] Further, the *Sterling* court suggested that *Miranda*'s exclusionary rule did not extend beyond the unwarned statements made in violation of the *Miranda* rule, regardless of whether *Miranda* was constitutional or not.[197] Therefore, while acknowledging *Miranda*'s constitutional status, the court held that *Tucker* and *Elstad* continued to support its rejection of the application of the fruits doctrine to derivative physical evidence.[198]

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188. *See id.* at 179 (citing Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

189. *Id.* (quoting *Elstad*, 470 U.S. at 307).

190. *See id.* at 180.

191. 283 F.3d 216 (4th Cir. 2002).

192. *See id.* at 219.

193. *See id.* at 218.

194. *See id.* at 219.

195. *See id.* (citing United States v. Elie, 111 F.3d 1135 (4th Cir. 1997)).

196. *Id.*

197. *See id.*

198. *See id.*

B. *Exclusion of Derivative Physical Evidence Limited to Willful* Miranda *Violations*

Before *Dickerson*, the United States Court of Appeals for the First Circuit held that *Elstad* did not prevent the application of the fruits doctrine in the *Miranda* context.[199] After *Dickerson*, the court reaffirmed this position in *United States v. Faulkingham*,[200] but limited the application of the fruits doctrine to exclude only derivative evidence obtained by willful violations of *Miranda*, not merely negligent acts.[201] In *Faulkingham*, the police failed to administer *Miranda* warnings to the defendant before a series of events unfolded where the police assisted the defendant in connecting with his drug supplier.[202] However, to achieve that end, the arrested and unwarned defendant made incriminating statements, which led the officers to the drug supplier, who in turn led the officers to heroin.[203] Because there was no evidence that the police deliberately failed to give the warnings or did so to get more possibly incriminating evidence, the court determined that the *Miranda* violation at issue was the result of negligent police conduct.[204] The court held that while the fruits doctrine applied to the *Miranda* context,[205] courts can still admit derivative evidence where the unwarned statement was suppressed and the law enforcement agents merely acted negligently, not willfully or maliciously.[206]

The *Faulkingham* court reasoned that *Elstad* did not bar the application of the fruits doctrine because in *Elstad* the defendant's warned statement, not a derivative witness or physical evidence, was at issue.[207] Nevertheless, the court noted the *Elstad* Court's broad language discouraging the use of the fruits doctrine in the *Miranda* context, regardless of the nature of the derivative evidence.[208] Consequently, the *Faulkingham* court framed a limited application of the fruits doctrine.[209]

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199. *See* United States v. Byram, 145 F.3d 405, 410 (1st Cir. 1998).

200. 295 F.3d 85, 90–91 (1st Cir. 2002).

201. *See id.* at 93–94.

202. *See id.* at 87–88.

203. *See id.*

204. *See id.* at 93–94.

205. *See id.* at 90.

206. *See id.* at 94.

207. *See id.* at 90–91.

208. *See id.* at 91 (citing Oregon v. Elstad, 470 U.S. 298, 307 (1985)).

209. *See id.* at 93–94.

The court held that in the Fifth Amendment context, once the unwarned statements are suppressed, the rationale of deterring police misconduct becomes less primary.[210] The First Circuit balanced the reduced importance of the deterrence goal against the importance of the evidence to the truth-seeking process.[211] Applying this balancing analysis, the court concluded that derivative physical evidence is admissible where police negligently fail to administer *Miranda* warnings.[212]

C. *Exclusion of Derivative Physical Evidence in Negligent* Miranda *Violations*

Contradicting the First Circuit, the Tenth Circuit in *United States v. Patane*[213] applied the fruits doctrine to physical evidence derived from a negligent *Miranda* violation.[214] Without administering the full *Miranda* warnings, the officer in *Patane* asked the arrested defendant about his Glock .40 caliber pistol.[215] The defendant replied, "The Glock is in my bedroom . . . ."[216] The court determined that the police officer's conduct was negligent and not willful,[217] although the court did not elaborate on this conclusion. Ultimately the Tenth Circuit held that the firearm, discovered as a result of the defendant's statement following the police officer's negligent administration of *Miranda* warnings, must be suppressed under *Miranda*'s exclusionary rule.[218]

The *Patane* court held that *Elstad* and *Tucker* were not controlling.[219] The court reasoned that while these cases declined to apply the traditional fruits doctrine of *Wong Sun*, their holdings were grounded on the rationale that suppression only applies to the fruits of *unconstitutional* conduct, and "the violation of a prophylactic rule [does]

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210. *See id.*

211. *See id.*

212. *See id.* at 94. For an example of the application of the fruits doctrine to a willful violation, see *United States v. Byram*, 145 F.3d 405, 410 (1st Cir. 1998).

213. 304 F.3d 1013 (10th Cir. 2002).

214. *See id.* at 1023. This case represents a reversal of the Tenth Circuit rule that the physical fruits of *Miranda* violations need not be suppressed. *See id.* (citing United States v. McCurdy, 40 F.3d 1111, 1117 (10th Cir. 1994)).

215. *See id.* at 1015.

216. *Id.*

217. *See id.* at 1027.

218. *See id.* at 1019.

219. *See id.* at 1023.

not require the same remedy."[220] Because *Dickerson* fatally undermined such logic in *Tucker* and *Elstad*,[221] the Tenth Circuit concluded that *Tucker* and *Elstad* did not foreclose the application of the fruits doctrine in the *Miranda* context.[222]

The *Patane* court also suggested that the Third and Fourth Circuits erred in their refusal to exclude physical fruit.[223] The court criticized the blanket bar of the fruits doctrine as having two fundamental problems.[224] First, the *Patane* court suggested that *Dickerson*'s referral to "*Miranda* and its progeny"[225] did not foreclose suppression of physical evidence for the simple reason that *Elstad* and *Tucker* did not involve derivative physical evidence.[226] Second, the court suggested that *Dickerson*'s reaffirmation of *Elstad*'s distinction between Fourth and Fifth Amendment violations did not bar the application of the fruits doctrine to *Miranda* violations.[227] The *Patane* court reasoned that the difference between the violations was in the breadth of the fruits doctrine, not in its application.[228] In other words, the court determined that the *Miranda* exceptions created a narrowed fruits doctrine, not an absolute bar on the doctrine itself.[229]

Finally, the *Patane* court criticized the First Circuit's selective use of the fruits doctrine in the *Miranda* context.[230] Specifically, it disagreed with the *Faulkingham* court's differentiation between negligent and willful violations of a defendant's *Miranda* rights.[231] The Tenth Circuit asserted that the Fifth Amendment privilege against self-incrimination was equally violated whether the police were negligent or willful in their failure to administer the *Miranda* warnings.[232] Moreover, limiting the fruits doctrine to willful violations would not vindicate the deterrence

220. *Id.* at 1019.

221. *See id.*

222. *See id.* at 1022–23.

223. *See id.* at 1027.

224. *See id.* at 1024.

225. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000).

226. *See Patane*, 304 F.3d at 1024.

227. *See id.* at 1025.

228. *See id.*

229. *See id.*

230. *See id.* at 1027 (citing United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002)).

231. *See id.*

232. *See id.* at 1028.

goal of the exclusionary rule.[233] Relying on the subjective view of the police officer would also make it difficult for courts to apply the *Miranda* presumption consistently.[234] Instead, the *Patane* court held that applying the fruits doctrine to physical fruits, regardless of the officer's subjective intent, "provides certainty in application and clarity for the officers charged with operating under it [and therefore] better serves the interests of citizens, officers, and judicial efficiency."[235]

The U.S. Supreme Court granted certiorari to *Patane*,[236] and therefore, this circuit split will soon be resolved. The circuit split outlines three possible outcomes. If the Court agrees with the reasoning of the Third and Fourth Circuits, derivative physical evidence will be admitted into the prosecution's case in chief.[237] On the other hand, the Court could agree with the First Circuit and conclude that the fruits doctrine is applicable in the *Miranda* context,[238] but limited to willful violations of *Miranda*.[239] This holding would admit physical evidence derived from negligent *Miranda* violations.[240] Finally, the Court could affirm the Tenth Circuit's ruling and hold that derivative physical evidence should be excluded regardless of officer intent.[241]

IV. PHYSICAL EVIDENCE DERIVED FROM UNWARNED STATEMENTS SHOULD BE EXCLUDED FROM THE PROSECUTION'S CASE IN CHIEF

Having recently granted certiorari to *United States v. Patane*,[242] the U.S. Supreme Court should hold that physical evidence derived from statements obtained in violation of *Miranda* should be excluded from the prosecution's case in chief for two reasons. First, no U.S. Supreme Court precedent forecloses exclusion of physical evidence derived from an

233. *Id.* at 1029.

234. *Id.*

235. *Id.*

236. 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183).

237. *See* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001).

238. *See* United States v. Faulkingham, 295 F.3d 85, 90–91 (1st Cir. 2002).

239. *See id.* at 93; *see also* United States v. Byram,145 F.3d 405, 409–10 (1st Cir. 1998).

240. *See Faulkingham*, 295 F.3d at 94.

241. *See* United States v. Patane, 304 F.3d 1013, 1029 (10th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183).

242. *See* United States v. Patane, 71 U.S.L.W. 3530 (U.S. Apr. 21, 2003) (No. 02-1183).

excluded unwarned statement.[243] *Tucker* and *Elstad* are distinguishable on their facts.[244] Furthermore, *Dickerson* undermined extending *Tucker* and *Elstad* by clarifying *Miranda*'s constitutional status.[245] Consequently, the Third and Fourth Circuits erred in extending *Tucker* and *Elstad* to admit the physical fruits of excluded unwarned statements.[246] Second, U.S. Supreme Court precedent directs courts to apply the fruits doctrine to derivative physical evidence of an unwarned statement.[247] This application should not be conditioned on officer intent.[248] Anything less than an objective application of the fruits doctrine to physical evidence would undermine the effect of *Miranda*'s exclusionary rule.[249] Although the First and Tenth Circuits have correctly applied the fruits doctrine to derivative physical evidence,[250] the First Circuit incorrectly limited its application to willful violations of *Miranda*.[251] The U.S. Supreme Court has not conditioned *Miranda*'s exclusionary rule or its exceptions on officer intent.[252] The Court has not created an exception for derivative physical evidence,[253] and therefore, courts should exclude such evidence along with the unwarned statement.[254]

A. There Is No U.S. Supreme Court Precedent Governing the Application of the Fruits Doctrine to Derivative Physical Evidence

The U.S. Supreme Court has not decided whether the fruits doctrine applies to physical evidence derived from unwarned statements excluded

243. *See Patane*, 304 F.3d at 1023; *Faulkingham*, 295 F.3d at 90.

244. *See Patane*, 304 F.3d at 1024.

245. *See id.* at 1023–25.

246. *See id.* at 1024–25.

247. *See* New York v. Quarles, 467 U.S. 649, 688 (Marshall, J., dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

248. *See Patane*, 304 F.3d. at 1028–29. *But see* United States v. Faulkingham, 295 F.3d 85, 93–94 (1st Cir. 2002).

249. *See Patane*, 304 F.3d at 1029; *cf.* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (finding that the protection of the Fifth Amendment outweighs any hardships the *Miranda* rule imposes upon law enforcement).

250. *See Patane*, 304 F.3d at 1021–27; *Faulkingham*, 295 F.3d at 90–91.

251. *See Patane*, 304 F.3d at 1027–28. *But see Faulkingham*, 295 F.3d at 93–94.

252. *See, e.g.*, *Quarles*, 467 U.S. at 656; *Miranda*, 384 U.S. at 467, 475.

253. *See Patane*, 304 F.3d at 1022–23 (citing Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari)).

254. *See id.* at 1029.

at trial.[255] In *New York v. Quarles*, the Court created a public safety exception to *Miranda*'s exclusionary rule allowing the admission of derivative physical evidence when public safety would be immediately jeopardized by any delay in obtaining evidence.[256] This public safety exception, however, does not broadly apply to admit all derivative physical evidence. The Court has recognized that *Quarles* is a "narrow exception"[257] for situations in which public safety is threatened.[258] Further, the Court determined that where public safety is at issue, the evidence is outside the scope of *Miranda* altogether.[259] Therefore, the issue of whether derivative physical evidence is admissible when *Miranda* does apply and the unwarned statement has been excluded remains open.

Neither *Michigan v. Tucker* nor *Oregon v. Elstad* resolve this issue because they are grounded on *Miranda*'s former prophylactic status.[260] The *Tucker* and *Elstad* decisions provide two exceptions to *Miranda*'s exclusionary rule that allow derivative evidence to be admitted after the court has excluded the unwarned statement.[261] The *Dickerson* case fundamentally undermined these holdings by characterizing *Miranda* as a constitutional decision.[262] Once stripped of its prophylactic rationale, the *Tucker* case exists as a unique case limited to the timing of the interrogation and the *Miranda* decision.[263] The *Elstad* rule becomes a rule for curing derivative evidence from being excluded under the fruits doctrine.[264] The Third and Fourth Circuits erred by expanding these exceptions to admit the physical fruits of unwarned statements.[265]

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255. *See Patterson*, 485 U.S. at 922–23 (White, J., dissenting from denial of certiorari); *Patane*, 304 F.3d at 1023; *Faulkingham*, 295 F.3d at 90–91.

256. *See Quarles*, 467 U.S. at 655.

257. *See id.* at 658.

258. *See id.* at 657–58.

259. *See id.* at 657.

260. *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985); Michigan v. Tucker, 417 U.S. 433, 445–46 (1974).

261. *See Elstad*, 470 U.S. at 314; *Tucker*, 417 U.S. at 447–48.

262. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000).

263. *See Tucker*, 417 U.S. at 447.

264. *See Elstad*, 470 U.S. at 306.

265. *See* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001).

1. Tucker *Is Limited to Its Facts*

The *Tucker* decision does not control the issue of whether derivative physical evidence should be admitted.[266] The *Tucker* Court explicitly declined "to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place."[267] Instead, the Court rooted its holding "on a narrower ground" because of the unique facts of the case.[268] The *Miranda* violation at issue in *Tucker* occurred prior to the Court's decision in *Miranda*,[269] but the trial occurred after *Miranda*'s announcement.[270] The *Tucker* Court held that because the police did not actually violate the law while they were interrogating the defendant, a special limited retroactivity exception applied to admit the derivative evidence.[271]

Because the *Dickerson* Court characterized *Miranda* as a constitutional rule,[272] police failure to either administer *Miranda* warnings or obtain an effective waiver should result in the suppression of both the unwarned statement and its fruit,[273] unless the public safety exception in *Quarles* applies.[274] The *Tucker* Court concluded that because *Miranda* warnings were merely prophylactic, violating *Miranda* should not reap consequences as severe as those for a constitutional violation.[275] After *Dickerson*, this rationale has been undermined.[276] Moreover, once the prophylactic language and conclusions are withdrawn from the *Tucker* opinion, *Wong Sun* is controlling.[277] The *Tucker* Court distinguished *Wong Sun* on the ground that it involved a

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266. *See Tucker*, 417 U.S. at 447.

267. *Id.*

268. *See id.*

269. *See id.* at 447–48.

270. *See id.* at 437.

271. *See id.* at 447–48.

272. *See* Dickerson v. United States, 530 U.S. 428, 438 (2000).

273. *Cf. Tucker*, 417 U.S. at 446–47 (distinguishing the consequences of police conduct abridging a constitutional right from police conduct departing only from prophylactic standards).

274. *See* New York v. Quarles, 467 U.S. 649, 655 (1984).

275. *See Tucker*, 417 U.S. at 445–48.

276. *See Dickerson*, 530 U.S. at 432.

277. *Cf. Tucker*, 417 U.S. at 445–46 (distinguishing actual abridgement of a defendant's constitutional rights, in which case suppression of derivative evidence is warranted, from departure from a prophylactic standard); *see also* Wong Sun v. United States, 371 U.S. 471, 485, 488 (1963) (excluding verbal and physical evidence derived from a constitutional violation.

constitutional violation whereas *Miranda* violations depart only from prophylactic standards.[278] The Court therefore acknowledged that actual constitutional violations require suppression of the fruits of that conduct under *Wong Sun*.[279] Thus, after a police failure to either administer the *Miranda* warnings or obtain an effective waiver, both the unwarned statement and its physical fruit should be suppressed at trial unless the public safety exception applies.

2. Elstad *Established the Rule for Curing a* Miranda *Violation*

As an exception limited to admitting warned statements derived from unwarned statements,[280] *Elstad* does not control whether derivative physical evidence should be admitted.[281] The *Elstad* Court held that the defendant's derivative statement should be admitted based on the rationale that *Miranda* warnings are merely prophylactic safeguards requiring a narrower exclusionary rule than the fruits doctrine applied to constitutional violations.[282] The Court reasoned in *Elstad* that *Miranda*'s warnings and waiver requirements swept more broadly than the Fifth Amendment itself.[283] The Court suggested that while *Miranda*'s prophylactic safeguards barred otherwise constitutional confessions, the severe consequences of the fruits doctrine were inapplicable for such non-constitutional violations.[284] However, this reasoning does not survive after *Dickerson*'s reaffirmation of *Miranda* as a constitutional rule. The logical consequence of *Dickerson*'s characterization of *Miranda* as a constitutional decision is that the scope of *Miranda*'s exclusionary rule is the same as the Fifth Amendment.[285] Therefore, in direct contrast to the Court's holding in *Elstad*, if law enforcement officers fail to properly administer the *Miranda* warnings and obtain a knowing and voluntary waiver from the defendant, these violations

278. *See Tucker*, 417 U.S. at 445-46.

279. *See id*; *see also Wong Sun*, 371 U.S. at 484 (determining that "[t]he exclusionary prohibition extends as well to the indirect as the direct products of [unlawful] invasions").

280. *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985).

281. *See* United States v. Patane, 304 F.3d 1013, 1022 (10th Cir. 2002) (citing Patterson v. United States, 485 U.S. 922, 922–23 (1988) (White, J., dissenting from denial of certiorari)).

282. *See Elstad*, 470 U.S. at 305–06.

283. *See id.* at 306.

284. *Id.* at 308–09.

285. *See* Dickerson v. United States, 530 U.S. 428, 438–40, 440 n.5 (2000).

should "breed the same irremediable consequences as police infringement of the Fifth Amendment itself."[286]

Once shed of its prophylactic rationale, *Elstad* survives only as a curing rule for *Miranda* violations,[287] distinct from the Fourth Amendment attenuation doctrine.[288] The *Elstad* Court based its holding in part on the distinction between unwarned interrogation under the Fifth Amendment and unreasonable searches under the Fourth Amendment.[289] Because the evidence at issue in *Elstad* was in fact a *Mirandized* statement, impliedly the difference between unwarned interrogation and unreasonable searches is that the warnings and a waiver can cure a *Miranda* violation.[290] In *Elstad*, the Court held that "a careful and thorough administration of *Miranda* warnings serves to *cure* the condition that rendered the unwarned statement inadmissible."[291] In contrast, courts apply the attenuation doctrine to Fourth Amendment violations to determine when derivative evidence is admissible.[292] Under this doctrine, unreasonable searches and seizures are not "cured" until the connection between the illegality and the contested evidence has "become so attenuated as to dissipate the taint."[293]

Distinguishing the consequences of Fourth and Fifth Amendment violations based on how or when those consequences end is reasonable. Once police undertake a search and seizure, it is arguably impossible to cure the initial invasion of privacy. Instead, a court must review the proximity of the Fourth Amendment violation and the discovery of the derivative evidence to determine whether there has been a sufficient break to untaint the evidence.[294] Curing is easier under the Fifth Amendment because informing a suspect of his or her *Miranda* rights at any point in the interrogation process dispels the inherent compulsion of interrogation.[295] Consequently, the potential taint from the earlier

286. *See Elstad*, 470 U.S. at 309.

287. *See id.* at 311.

288. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (concluding that derivative evidence may be admissible when the connection between the illegality and the evidence becomes "so attenuated as to dissipate the taint").

289. *See Elstad*, 470 U.S. at 306.

290. *See id.* at 306, 310–11.

291. *Id.* at 310–11 (emphasis added).

292. *See Nardone*, 308 U.S. at 341.

293. *Id.*

294. *See id.*

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

violation to any statement made subsequent to a waiver dissipates.[296] Under this interpretation, the difference between the Fourth and Fifth Amendments relates to the limits of the fruits doctrine, not its application.[297]

Dickerson reaffirmed *Elstad*'s distinction between unreasonable searches and unwarned interrogations.[298] However, contrary to the Third and Fourth Circuits' interpretations,[299] this reaffirmation did not provide a blanket admission of all derivative evidence of unwarned statements.[300] Instead, this distinction highlighted *Elstad*'s enunciation of a curing rule,[301] separate from the attenuation doctrine in the Fourth Amendment.[302]

Furthermore, *Dickerson*'s characterization of *Elstad* as "refusing to apply the traditional fruits doctrine developed in the Fourth Amendment"[303] does not foreclose application of the fruits doctrine in the *Miranda* context. The "traditional" fruits doctrine incorporates the attenuation doctrine.[304] *Elstad* held that this was not necessary in the Fifth Amendment context because the administration and waiver of the *Miranda* warnings prior to the statement in question sufficiently cured the statement of illegality.[305]

On review in *Patane*, the Court should recognize that *Miranda*'s exclusionary rule would not require a curing test if the fruits doctrine was not applicable in the *Miranda* context. Curing inherently recognizes that a violation has occurred with ongoing consequences until the taint of the violation appropriately dissipates. In the *Miranda* context, dissipation occurs when warnings are administered and a waiver is given.[306] In the case of physical evidence derived from an unwarned statement, however, there is no possibility of intervening warnings between the unwarned statement (i.e., the poisonous tree) and the

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296. *See Elstad*, 470 U.S. at 311; *Miranda*, 384 U.S. at 479.

297. *See* United States v. Patane, 304 F.3d 1013, 1025 (10th Cir. 2002).

298. Dickerson v. United States, 530 U.S. 428, 441 (2000).

299. *See* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001).

300. *See Patane*, 304 F.3d at 1026.

301. *See Elstad*, 470 U.S. at 311.

302. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

303. *Dickerson*, 530 U.S. at 441 (internal quotations omitted).

304. *See Nardone*, 308 U.S. at 341.

305. *See Elstad*, 470 U.S. at 311.

306. *See id.*

physical evidence (i.e., the fruit) to cure its taint. Therefore, the Court should hold that both the unwarned statement and its physical fruit should be excluded from the prosecution's case in chief, absent a public safety exception.

3. *The Third and Fourth Circuits Erred in Extending* Tucker *and* Elstad *to Exclude Derivative Physical Evidence from* Miranda*'s Exclusionary Rule*

The Third and Fourth Circuits improperly extended *Elstad* and *Tucker*'s derivative evidence exceptions to admit physical evidence derived from an excluded unwarned statement.[307] In upholding their pre-*Dickerson* interpretations of *Tucker* and *Elstad*, the Third and Fourth Circuits relied on the *Dickerson* decision's recognition of *Miranda*'s progeny and its distinction between the Fourth and Fifth Amendments to find that the *Elstad* and *Tucker* exceptions survived *Dickerson*.[308] The courts interpreted the survival of these exceptions to mean that *Tucker* and *Elstad* should be extended to bar the application of the fruits doctrine to derivative physical evidence of *Miranda* violations.[309] Yet, the *Tucker* and *Elstad* cases are sufficiently distinguishable on their facts and should be limited to their holdings.[310]

Further, the circuit courts failed to recognize the implications of *Miranda*'s constitutional status.[311] Although the Fourth Circuit noted that its own pre-*Dickerson* characterization of *Miranda* as prophylactic was no longer good law,[312] it failed to consider how this limited the *Tucker* and *Elstad* holdings. In addition, the Third Circuit incorrectly relied on the *Dickerson* decision's reaffirmation of *Elstad* as ground to dismiss the constitutional argument.[313] This dismissive treatment of *Miranda*'s constitutional status does not survive the logical consequences of *Dickerson*'s impact on *Tucker* and *Elstad*.[314]

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307. *See* United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001).

308. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

309. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

310. *See supra* Part IV.A.1–2.

311. *See Sterling*, 283 F.3d at 219; *DeSumma*, 272 F.3d at 180.

312. *See Sterling*, 283 F.3d at 219.

313. *See DeSumma*, 272 F.3d at 180.

314. *See supra* Part IV.A.1–2.

B. *The U.S. Supreme Court Should Hold that Both the Unwarned Statement and Its Physical Fruits Should Be Excluded, Regardless of Officer Intent, to Ensure Full Protection of the Defendant's Fifth Amendment Rights*

Fifth Amendment precedent requires courts to exclude unwarned statements and their physical fruits from the prosecution's case in chief in order to enforce *Miranda*'s substantive protections.[315] Because the fruits doctrine applies to Fifth Amendment violations,[316] it should also apply to physical evidence derived from violations of *Miranda*'s Fifth Amendment safeguards.[317] Furthermore, *Miranda*'s exclusionary rule is most effective at deterring police violations of suspects' Fifth Amendment rights when courts exclude both the unwarned statement and its physical fruits at trial.[318] The First and Tenth Circuits followed Fifth Amendment precedent and applied the fruits doctrine to physical fruit.[319] But, contrary to the First Circuit's approach, the fruits doctrine should not be limited to willful violations of *Miranda* because officer intent is irrelevant to the admissibility of evidence obtained in violation of *Miranda*.[320]

1. *The Fruits Doctrine's Application to the Fifth Amendment Encompasses Physical Evidence in the Post-*Dickerson Miranda *Context*

The *Dickerson* decision clarified that *Miranda*'s warnings are constitutionally required to protect a suspect's Fifth Amendment rights.[321] The U.S. Supreme Court has held that the fruits doctrine applies to the Fifth Amendment.[322] A court cannot compel a witness to make self-incriminating statements "unless the compelled testimony *and*

315. *See* New York v. Quarles, 467 U.S. 649, 688 (1984) (Marshall, J., dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); *see also* United States v. Patane, 304 F.3d 1013, 1026 (10th Cir. 2002).

316. *See Murphy*, 378 U.S. at 79.

317. *See Quarles*, 467 U.S. at 688 (Marshall, J., dissenting).

318. *See Patane*, 304 F.3d at 1026–27.

319. *See Patane*, 304 F.3d at 1021, 1026; United States v. Faulkingham, 295 F.3d 85, 90–91, 93–94 (1st Cir. 2002).

320. *See Quarles*, 467 U.S. at 656; *cf.* Miranda v. Arizona, 384 U.S. 436, 467, 475 (1966).

321. *See* Dickerson v. United States, 530 U.S. 428, 439–40, 440 n.4 (2000).

322. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

its fruits cannot be used" against the witness in a criminal trial.[323] When the Court extended the scope of the Fifth Amendment to encompass pre-trial custodial interrogation in *Miranda*,[324] it should have clearly incorporated the fruits doctrine as part of the Fifth Amendment precedent.[325]

Moreover, the Court's language in both *Tucker* and *Elstad* suggests that the doctrine expressed in *Wong Sun*, "that fruits of a constitutional violation must be suppressed,"[326] controls and bars the admissibility of physical fruits.[327] In *Tucker*, the Court decided that *Wong Sun* was not controlling specifically because "the police conduct at issue here did not abridge [the defendant's] constitutional privilege against compulsory self-incrimination."[328] Once the *Dickerson* Court clarified that a violation of *Miranda* did in fact abridge the defendant's Fifth Amendment rights, the *Wong Sun* decision should control. Similarly, in *Elstad*, the Court determined that the defendant's contention that the fruits doctrine applied to his case "assumes the existence of a constitutional violation."[329] Now that such an assumption is correct, all evidence discovered as a result of that violation should be excluded as tainted fruit.[330]

The U.S. Supreme Court has not carved out an exception for the physical fruits of excluded unwarned statements,[331] although some of its opinions have used language that could reasonably lead courts to conclude that such an exception exists.[332] In *Quarles*, Justice O'Connor

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323. *See id.* (emphasis added).

324. *See Miranda*, 384 U.S. at 444; *see also Dickerson*, 530 U.S. at 440 n.5 (highlighting *Miranda* as a Fifth Amendment rule).

325. *Cf. Quarles*, 467 U.S. at 688–89 (Marshall, J. dissenting) (discussing the inadmissibility of derivative physical evidence under Supreme Court precedent).

326. *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (discussing Wong Sun v. United States, 371 U.S. 471, 487–88 (1963)).

327. *See id.*; Michigan v. Tucker, 417 U.S. 433, 445–46 (1974).

328. *See Tucker*, 417 U.S. at 445–46.

329. *Elstad*, 470 U.S. at 305.

330. *See id.* at 305–06.

331. *See* United States v. Patane, 304 F.3d 1013, 1023 (10th Cir. 2002) (concluding that *Elstad* and *Tucker* do not bar exclusion of derivative physical evidence); United States v. Faulkingham, 295 F.3d 85, 90–91 (1st Cir. 2002) (finding that *Elstad* does not "wholly bar the door" to excluding derivative evidence).

332. *See, e.g.*, *Elstad*, 470 U.S. at 304 ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence."); *see also* New York v. Quarles, 467 U.S. 649, 666 (1984) (O'Connor, J., concurring in part and dissenting in part) (stating that the Fifth Amendment's mandate "does not protect an accused from being compelled to surrender nontestimonial evidence against himself").

wrote a concurring opinion in which she justified admission of derivative physical evidence on the ground that *Miranda*'s exclusionary rule was limited to testimonial evidence.[333] Because nontestimonial evidence falls outside the scope of the Fifth Amendment, Justice O'Connor reasoned that the fruits doctrine could not apply to derivative physical evidence.[334] Writing for the majority in *Elstad*, Justice O'Connor again noted in dicta that nontestimonial evidence is outside the scope of the Fifth Amendment.[335]

Yet, the principal flaw in equating derivative physical evidence with nontestimonial evidence is that derivative evidence is never inadmissible because of a defect in the manner in which it was obtained; it is excluded because it is the indirect product of an earlier constitutional violation.[336] In other words, the constitutional violation that results in an unwarned statement taints the derivative physical evidence—not the act of locating the evidence itself. The inadmissibility of the derivative evidence is grounded in the rule that the prosecution cannot profit from a constitutional violation.[337] The nontestimonial evidence line of cases involved physical evidence unconnected to any constitutional violation.[338] Thus, nontestimonial evidence is outside the scope of the Fifth Amendment strictly because the act of obtaining the evidence does not itself compel the defendant to self-incriminate.[339]

The Court should recognize on review in *Patane* that Fifth Amendment precedent excludes both the unwarned statement and its physical fruits obtained from a *Miranda* violation.[340] *Miranda* created a

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333. *See Quarles*, 467 U.S. at 660 (O'Connor, J., concurring in part, and dissenting in part).

334. *See id.* at 666.

335. *See Elstad*, 470 U.S. at 304.

336. *Cf.* Wong Sun v. United States, 371 U.S. 471, 485 (1963) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

337. *See* Nix v. Williams, 467 U.S. 431, 443 (1984).

338. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 5–7 (1973) (supplying voice exemplars); Gilbert v. California, 388 U.S. 263, 265–66 (1967) (providing handwriting samples); United States v. Wade, 388 U.S. 218, 221–23 (1967) (speaking during a lineup); Schmerber v. California, 384 U.S. 757, 761 (1966) (drawing blood).

339. *See* Doe v. United States, 487 U.S. 201, 210 (1988) (defining testimonial evidence to mean that an accused's communication explicitly or implicitly relates a factual assertion or discloses information); *see also Schmerber*, 384 U.S. at 765 (finding that "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis" of the blood sample).

340. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 688–89 (1984) (Marshall, J., dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); United States v. Patane, 304 F.3d 1013, 1026 (10th Cir. 2002) (finding that a "blanket rule barring application of the fruits doctrine to the

presumption of inadmissibility for evidence obtained without warnings and a waiver.[341] Although the Court has created three narrow exceptions to this rule,[342] it has not created such an exception for derivative physical evidence.[343] Fifth Amendment precedent should apply to *Miranda* now that the Court has recognized *Miranda* as a Fifth Amendment rule.[344] Fifth Amendment precedent suggests that derivative physical evidence is an unwarned statement's tainted fruit.[345] Therefore, the U.S. Supreme Court should hold that both the unwarned statement and its physical fruits should be excluded, absent a public safety concern or an interim warning and waiver.[346]

2. *Applying the Fruits Doctrine to Derivative Physical Evidence Is Necessary to Give* Miranda*'s Exclusionary Rule Its Intended Weight*

The exclusionary rule is a harsh penalty for law enforcement officers and prosecutors, but it is the deterrent the Court has chosen for *Miranda* violations.[347] The *Miranda* Court concluded that society's need for interrogation did not outweigh the constitutional privilege against self-incrimination.[348] Preventing the government from profiting from its illegal conduct is necessary to give effect to the fundamental right against self-incrimination.[349] Admitting the physical fruits of an excluded statement allows the prosecution to make the same if not

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physical fruits of a *Miranda* violation would mark a dramatic departure from Supreme Court precedent").

341. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

342. *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (creating the cured statement exception); *Quarles*, 467 U.S. at 657 (creating the public safety exception); Michigan v. Tucker, 417 U.S. 433, 445 (1974) (creating the limited retroactivity exception).

343. *See Patane*, 304 F.3d at 1023.

344. *See* Dickerson v. United States, 530 U.S. 428, 437–38 (2000).

345. *See Murphy*, 378 U.S. at 79.

346. *See Elstad*, 470 U.S. at 314; *Quarles*, 467 U.S. at 655.

347. *See* Miranda v. Arizona, 384 U.S. 436, 481 (1966). The U.S. Supreme Court has suggested that the principal reason for extending the exclusionary rule to fruit of the unlawful police conduct is that "this admittedly drastic and socially costly course" is necessary to deter police from violating suspects' constitutional and statutory rights. *See* Nix v. Williams, 467 U.S. 431, 442–43 (1984).

348. *Miranda*, 384 U.S. at 479–80.

349. *See Nix*, 467 U.S. at 443; *Miranda*, 384 U.S. at 479–80; *cf.* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (discussing search and seizure).

"greater use of the confession than merely introducing the words themselves."[350]

Excluding the defendant's statement but admitting its physical fruits creates negative incentives. It encourages the police to interrogate the defendant so that crucial physical evidence can be discovered before *Miranda* warnings are administered.[351] Admitting derivative physical evidence, but not the unwarned statement, is a loophole exacting the same "heavy toll on individual liberty"[352] as custodial interrogation did before *Miranda*. Instead, the Court should exclude both the unwarned statement and its physical fruits because this is the most effective means for achieving the twin purposes behind *Miranda*'s exclusionary rule: trustworthiness and deterrence.[353] First, admitting the physical fruits of inherently compelling custodial interrogations jeopardizes the integrity of the fact-finding process in court.[354] Second, excluding the physical fruits of an unwarned statement best deters compelled interrogations and safeguards the defendant's Fifth Amendment rights.[355] It forewarns police officers that the prosecution bears the heavy burden of demonstrating the suspect was warned and sufficiently waived his or her rights before a court can admit an unwarned statement and its physical fruits, thereby encouraging compliance with *Miranda*'s safeguards.[356]

3. *The First and Tenth Circuits Correctly Applied the Fruits Doctrine to the* Miranda *Context, Although the First Circuit Erred in Restricting Its Application to Intentional Violations of* Miranda

The First and Tenth Circuits determined that in order to achieve the goals of *Miranda*, derivative physical evidence must be suppressed in certain situations.[357] These circuit courts limited *Elstad*'s application to

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350. *See* United States v. Patane, 304 F.3d 1013, 1027 (10th Cir. 2002) (emphasis omitted); *cf. Nix*, 467 U.S. at 443 (reasoning that "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired").

351. *See Patane*, 304 F.3d at 1026.

352. *Miranda*, 384 U.S. at 455.

353. *See* Michigan v. Tucker, 417 U.S. 433, 447–48 (1974) (reasoning that deterrence and trustworthiness are two justifications for the exclusionary rule); *see also* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (concluding that "the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule").

354. *See Miranda*, 384 U.S. at 466.

355. *See id.* at 457–58.

356. *See id.* at 479.

357. *See* United States v. Patane, 304 F.3d 1013, 1029 (10th Cir. 2002); United States v.

only admit warned statements following unwarned statements.[358] The Tenth Circuit limited the holding in *Tucker* to apply only to derivative evidence stemming from violations preceding the *Miranda* opinion itself.[359]

While both the First and Tenth Circuits applied the fruits doctrine to derivative physical evidence,[360] the First Circuit narrowed its application to intentional violations only.[361] However, the First Circuit's reliance on the officer's subjective intent clouds *Miranda*'s bright-line rule presuming exclusion unless the prosecution can demonstrate the police properly administered *Miranda* warnings and the suspect waived those rights.[362] It also places courts in the position of weighing subjective belief.[363] Not only is it difficult for courts to uncover and evaluate the subjective motivation of a police officer, but such attempts can lead to inconsistent results.

Miranda's presumption of exclusion reflects the reality that negligent conduct violates a defendant's personal right against self-incrimination to the same extent as willful conduct.[364] The *Miranda* Court did not condition the compulsion of the interrogation environment on officer intent; instead, it reasoned that only warned statements could be the product of a defendant's free choice.[365] The *Miranda* Court created a severe penalty for obtaining unwarned statements to deter officers from foregoing or undermining the defendant's rights and to ensure the trustworthiness of admitted evidence.[366] The Court recognized the severity of *Miranda*'s exclusionary rule, but held that the Fifth Amendment required such extreme measures.[367] There is language in the

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Faulkingham, 295 F.3d 85, 93 (1st Cir. 2002).

358. *See Patane*, 304 F.3d at 1021 (discussing the exclusion of derivative evidence outside of the *Elstad* facts); *Faulkingham*, 295 F.3d at 90–91 (same).

359. *See Patane*, 304 F.3d at 1020 (stating that the U.S. Supreme Court's ruling rested largely on pre-*Miranda* facts).

360. *See id.* at 1019; *Faulkingham*, 295 F.3d at 90–91.

361. *See Faulkingham*, 295 F.3d at 93–94.

362. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966); *Patane*, 304 F.3d at 1029.

363. *Patane*, 304 F.3d at 1029.

364. *Id.* at 1028.

365. *See Miranda*, 384 U.S. at 458.

366. *See id.* at 479; *see also id.* at 467.

367. *See id.*

Court's opinion to suggest that deterrence is only achieved by administering *Miranda* warnings and adequately waiving those rights.[368]

The U.S. Supreme Court has also created a separate presumption that absent an exception, evidence derived from a constitutional violation is tainted fruit that should be excluded from court.[369] The Court has placed the burden on the prosecution to prove by a preponderance of the evidence that an exception applies.[370] The Court has not created an exception for the negligent failure to administer the *Miranda* warnings. Indeed, the Court has never suggested that officer intent is relevant to the exceptions carved out of *Miranda*'s exclusionary rule.[371] Thus, the Court should hold that both the unwarned statement and derivative physical evidence should be excluded from the prosecution's case in chief, regardless of officer intent.

V. CONCLUSION

Currently, there is a split among circuit courts regarding the admissibility of physical evidence derived from non-*Mirandized* statements. In addressing this issue, the U.S. Supreme Court should provide a definitive answer in *Patane* on the admissibility of physical evidence directly derived from unwarned statements. After reviewing *Miranda* and its progeny, the Court should apply the fruits doctrine to physical evidence obtained by negligent or willful *Miranda* violations. It is also the most effective measure for ensuring that *Miranda* warnings are properly "employed to dispel the compulsion inherent in custodial surroundings."[372] Consequently, absent an established exception, the

368. *See id.* at 457–58 ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."); *id.* at 467 ("In order to combat [custodial interrogation's inherently compelling] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored.").

369. *See* Nix v. Williams, 467 U.S. 431, 441–42 (1984); Wong Sun v. United States, 371 U.S. 471, 477–88 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

370. *See Nix*, 467 U.S. at 444.

371. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 656 (1984) (stating that "the availability of [the public safety] exception does not depend upon the motivation of the individual officers involved").

372. *See Miranda*, 384 U.S. at 458.

Court should hold that physical evidence derived from an unwarned statement should be excluded from the prosecution's case in chief.