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A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in Fellers v. United States

Justin Bishop Grewell

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A WALK IN THE CONSTITUTIONAL ORCHARD: DISTINGUISHING FRUITS OF FIFTH AMENDMENT RIGHT TO COUNSEL FROM SIXTH AMENDMENT RIGHT TO COUNSEL IN *FELLERS V. UNITED STATES*

I. INTRODUCTION

After a grand jury indicted John Fellers for conspiracy to distribute methamphetamine, two officers visited him at his home on February 24, 2000, to make an arrest.[1] The officers deliberately elicited statements in violation of Fellers's Sixth Amendment right to counsel before presenting him with a waiver of that right.[2] Fellers signed the waiver and reiterated his inculpatory statements.[3] The reiterated statements were then used against him at trial.[4] Under the Fifth Amendment right to counsel, the Supreme Court has held that statements repeated after waiver should not be treated as the inadmissible "fruit" of statements taken in violation of the right to counsel before waiver, but rather as admissible evidence.[5] Whether this same standard should apply to the fruits of a Sixth Amendment violation

[1] Fellers v. United States, 540 U.S. 519, 521 (2004). This note was completed before the Eighth Circuit handed down its decision in *Fellers* on remand, which can be found at *United States v. Fellers*, 397 F.3d 1090 (8th Cir. 2005). The Eighth Circuit rejected some of the arguments here and chose not to consider others. But given the circuit court's reliance on *Dickerson v. United States*, 530 U.S. 428 (2000) and what I believe is a mistaken analysis of how the Supreme Court's more recent decisions in *United States v. Patane*, 124 S. Ct. 2620 (2004) and *Chavez v. Martinez*, 538 U.S. 760 (2003) affect the *Dickerson* decision, it seems likely that the Supreme Court will grant certiorari to rehear the *Fellers* decision to clarify the case law and either provide the Eighth Circuit's decision with a seal of approval or overturn. For the reasons provided in this Note, I think the latter decision is warranted.

[2] *See infra* Part IV.A.

[3] *Fellers*, 540 U.S. at 521-22.

[4] *Id.* at 522.

[5] Oregon v. Elstad, 470 U.S. 298, 318 (1985). But see *infra* Part V.B.4 for a discussion contrasting *Elstad* with the 2004 decision in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004). A discussion of the "fruits of the poisonous tree" doctrine occurs *infra* Part II.B.

was the question presented in *Fellers v. United States*. The Supreme Court remanded the question to the Eighth Circuit.[6]

This Note will examine whether waiver of the Fifth Amendment right to counsel and the Sixth Amendment right to counsel require different standards when applying the "fruit of the poisonous tree" doctrine or whether the precedent of *Oregon v. Elstad*[7] should control analysis for both amendments. First, this Note will explain that the Supreme Court properly applied its own deliberate-elicitation standard in overturning the Eighth Circuit's holding that a Sixth Amendment violation had not occurred. With that question disposed, the bulk of this Note will analyze the question remanded to the Eighth Circuit – should *Elstad* control "fruits" analysis regarding a Sixth Amendment violation? It will answer that *Elstad* should not control.

In light of recent decisions, the right to counsel under the Fifth Amendment remains a prophylactic measure, which acts as a proxy for determining whether the Fifth Amendment has been violated.[8] If the prophylactic measure is violated, it is presumed that the constitutional rights of the Fifth Amendment were violated.[9] While these prophylactic rights are constitutionally protected,[10] their violation does not constitute a constitutional violation until statements derived from the violation are used in a criminal case.[11] Hence, it made sense for the *Elstad* court to find that a waiver could remediate a *Miranda* violation, because the waiver could rebut the presumption of constitutional violation.[12]

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[6] *Fellers*, 540 U.S. at 525.

[7] 470 U.S. 298 (1985). A discussion of *Elstad* occurs *infra* Part II.D.

[8] United States v. Patane, 124 S. Ct. 2620, 2626 (2004) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause."); Chavez v. Martinez, 538 U.S. 760, 772 (2003) ("We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause . . . .").

[9] *Patane*, 124 S. Ct. at 2627 (During custodial interrogations "the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief."); *Elstad*, 470 U.S. at 307 ("Failure to administer *Miranda* warnings creates a presumption of compulsion . . . . Thus, in the individual case, *Miranda*'s preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.").

[10] Dickerson v. United States, 530 U.S. 428 (2000).

[11] *Patane*, 124 S. Ct. at 2629 (arguing that the *Miranda* right protects a trial right so that constitutional violations only occur "upon the admission of unwarned statements into evidence at trial"); *Chavez*, 538 U.S. at 767 ("Statements compelled by police interrogations of course may not be used against a defendant at trial . . . but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.").

[12] *Patane*, 124 S. Ct. at 2630 ("[I]t must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced *only for certain purposes*

But the right to counsel under the Sixth Amendment is a constitutional right.[13] The Sixth Amendment right to counsel is not *presumed* violated when breached, it actually *is* violated. Thus, subsequent waiver of the right does not rebut the presumption of a constitutional violation when engaging in Sixth Amendment, as opposed to Fifth Amendment, analysis. The Eighth Circuit should hold that *Elstad* does not apply to the Sixth Amendment. It should exclude the post-waiver statements made by Fellers as inadmissible fruits of a prior constitutional violation. In *Fellers*, constitutional rights were violated as opposed to prophylactic rights.

II. BACKGROUND

A. TWO RIGHTS TO COUNSEL

The Fifth and Sixth Amendments provide two different sources for the right to counsel. "The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations .... The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations."[14] Although the layperson may not grasp the differences between these two distinct rights to counsel, differences do exist.[15] These distinctions exist because the amendments serve different purposes.

1. Miranda's Prophylactic Right to Counsel

In possibly the most famous case of constitutional criminal procedure, *Miranda v. Arizona*,[16] the Supreme Court set out procedural safeguards for ensuring the protections of the Fifth Amendment right against self-incrimination.[17] The Fifth Amendment had previously developed as a ward against the evils of the Spanish Inquisition and the Star Chamber in England where subjects were compelled through torture and other barbaric means to admit their guilt to various crimes whether they had committed

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and then only when necessary to protect the privilege against self-incrimination.") (emphasis added).

[13] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

[14] Michigan v. Jackson, 475 U.S. 625, 629 (1986).

[15] In *Jackson*, the Supreme Court agreed: "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not." *Id.* at 633 n.7.

[16] 384 U.S. 436 (1966).

[17] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

them or not.[18] But as the United States matured as a nation, the Fifth Amendment came to serve goals of both deterring police misbehavior in the interrogation process and assuring the trustworthiness of the evidence derived from a witness's testimony.[19] Concerns about police misbehavior and trustworthy evidence arise when the state has the opportunity to engage in coercive behavior. With the Fifth Amendment, compulsion is the watchword, but the unspoken rule of the court decisions seems to focus on coercion.[20] *Miranda* governs testimony made when the potential for

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[18] Michigan v. Tucker, 417 U.S. 433, 440 (1974).

[19] *Id.* at 447-48. A host of other purposes of the Fifth Amendment privilege were enumerated in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964):

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'

But see David Dolinko, *Is there a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (critiquing the major theories behind the Fifth Amendment privilege).

[20] U.S. CONST. amend. V; Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the government 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'"); Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) ("The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony.").

Coercion and compulsion are not the same thing. Compulsion deals with overcoming free will, but coercion focuses on a more normative assessment of whether force or the threat of force has been used in an attempt to compel someone. The use of compulsion in the text of the Constitution has led the Supreme Court to use the two words interchangeably, which means that analysis has focused on whether inappropriate pressure (generally coercion) has been brought to bear on a suspect rather than whether pressure overcame a person's free will (compulsion). The impossibility of measuring whether or not free will has been overcome (compulsion) has led the court to focus on the practical test of whether force has been applied or not (coercion) in determining violations of the Fifth Amendment. For a discussion of compulsion and free will within the Supreme Court's Fifth Amendment jurisprudence, see Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 250-56 (2004).

To avoid confusion, this Note will follow the Court's convention of using the words interchangeably with the understanding that when the word compulsion is used in modern court cases, it includes an underlying assumption of a coercive element of force or the threat of force.

coercion by officers of the state is greatest: during custodial interrogation.[21] To help protect against this coercion, *Miranda* includes a right to counsel during custodial interrogation.[22]

When a violation of the Fifth Amendment does occur, there are two major remedies. The first remedy is the exclusionary rule. The exclusionary rule developed to deter police from violating the Fourth Amendment.[23] It mandates that that "evidence obtained in violation of the Fourth Amendment [or the fruits of such evidence] . . . cannot be used in a criminal proceeding against the victim of the illegal search and seizure."[24] Excluding evidence at trial lies at the core of the Fifth Amendment exclusionary rule as well, but the Fifth Amendment exclusionary rule is actually in the text of the Amendment itself and therefore is self-executing.[25] The second major remedy for violations are § 1983 actions, where a plaintiff seeks monetary damages.[26] Given the Court's focus in *Fellers* on the question of whether the exclusionary rule should be applied or not, this Note does not explore § 1983 actions.

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[21] Edwards v. Arizona, 451 U.S. 477, 482 (1981); *Miranda*, 384 U.S. at 467 ("[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. For a discussion of what qualifies as "interrogation" and "custody," see RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 750-78 (2001).

[22] *Miranda*, 384 U.S. at 466 ("The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.").

[23] Weeks v. United States, 232 U.S. 383 (1914).

[24] United States v. Calandra, 414 U.S. 338, 347 (1974) (citing *Weeks*, 232 U.S. at 383).

[25] United States v. Patane, 124 S. Ct. 2620, 2628 (2004) ("[T]he Self-Incrimination Clause contains its own exclusionary rule. It provides that [n]o person . . . shall be compelled in any criminal case to be a witness against himself. Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing.") (internal quotations omitted).

[26] 42 U.S.C. § 1983 (2000). For a discussion of the history of § 1983, see *Monell v. Department of Social Services*, 436 U.S. 658 (1978); David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. §1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1 (1999).

2. The Sixth Amendment's Constitutional Right to Counsel

English precedent established many of the legal modes in the early United States, but the two systems diverged on the right to counsel. At the time of the framing of the United States Constitution, English law "forbade the assistance of counsel in nearly all criminal cases."[27] Many theories exist for the English prohibition on counsel, but the most prominent is that criminal cases were brought by private parties in England, so there was no need to level the playing field as both prosecutor and defendant were equally unskilled in the law.[28] In the United States, however, a public prosecutor system developed, which meant criminal lawsuits were brought by professional prosecutors who had handled numerous cases and were well versed in the science of law.[29] The Sixth Amendment right to counsel developed out of a need to "minimize the public prosecutor's tremendous advantage" and ensure fairness in the adversarial system.[30]

In *McNeil v. Wisconsin*,[31] the Supreme Court explained that the "purpose of the Sixth Amendment counsel guarantee . . . is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."[32] To protect the layman, the Sixth Amendment right to counsel attaches once the government's role has "shift[ed] from investigation to accusation."[33] Once the government has decided to prosecute the case, it has moved from stage one, where the information-gathering State is not in opposition to the suspect, to stage two, where the State has expressed its intention to press charges. In stage two, "the prosecutorial forces of organized society" are arrayed against the suspect (now the accused).[34] He needs his own champion to level the playing field. Hence, the Sixth Amendment right to counsel rides in on its white horse (or slithers in on its serpent depending on one's perceptions) with the initiation of adversary judicial proceedings.[35]

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[27] Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1638 (2003).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1640.

[31] 501 U.S. 171 (1991).

[32] *Id.* at 177-78 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

[33] Moran v. Burbine, 475 U.S. 412, 430 (1986).

[34] Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting *Gouveia*, 467 U.S. at 189).

[35] Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). Such proceedings are initiated by "formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting *Kirby*, 406 U.S. at 689). The Sixth Amendment therefore differs from the Fifth Amendment, where formal proceedings play no

Once the Sixth Amendment right has attached, it is applicable during all "critical stages" that might impact "the accused's right to a fair trial."[36] And, unlike the Fifth Amendment right to counsel, the Sixth Amendment right to counsel is written in the text of the constitution itself.[37]

When the Sixth Amendment is violated, the typical remedy is exclusion of the evidence at trial.[38] Exclusion is not constitutionally-mandated by the Sixth Amendment, as it is by the Fifth Amendment,[39] but rather it has been crafted by the Supreme Court as a remedy to deter violations.[40]

B. "FRUIT OF THE POISONOUS TREE" DOCTRINE

The "fruit of the poisonous tree" doctrine first appeared in the 1920 case of *Silverthorne Lumber Co. v. United States*.[41] In that case, the government violated the Fourth Amendment by illegally seizing documents from the defendants.[42] After the documents were returned to the defendants to remedy the illegal seizure, the government sought to obtain the same documents through a subpoena based on the knowledge that it had acquired from the initial illegal seizure.[43] Justice Holmes explained that "[t]he

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role in trumpeting the initiation of the right to counsel. *See* ALLEN ET AL., *supra* note 21, at 814 ("The adversarial process must be initiated before the Sixth Amendment rights discussed in *Massiah* come into play, and custody is not directly relevant to the analysis. The Fifth Amendment rights discussed in *Miranda*, by contrast, are relevant only at the point of custodial interrogation, and the initiation of formal proceedings is irrelevant.").

[36] *See* United States v. Wade, 388 U.S. 218, 227, 236-37 (1967); C. Allen Parker, Jr., Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 371 n.49 (1982) (citing Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961)).

[37] U.S. CONST. amend. VI. For a discussion of the comparative constitutionality of the Fifth Amendment right to counsel, see *infra* Part V.B.1.

[38] Massiah v. United States, 377 U.S. 201, 207 (1964).

[39] Chrisco v. Shafran, 507 F. Supp. 1312, 1321 (1981) ("While evidence seized in violation of the fourth amendment, or statements elicited from a defendant in violation of his sixth amendment-*Massiah* rights are excluded in order to remedy a constitutional violation, in the Miranda context the exclusion of the incriminating statements is itself the constitutional right.").

[40] The Sixth Amendment protection goes a bit further than the Fourth Amendment protection, however, in that it would appear to even exclude evidence where the police were acting in good faith. Maine v. Moulton, 474 U.S. 159, 180 (1985). The Fourth Amendment allows a good faith exception. United States v. Leon, 468 U.S. 897, 926 (1984). *See* Michael J. Howe, Note, *Tomorrow's* Massiah*: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 145-46 (2004).

[41] 251 U.S. 385 (1920).

[42] *Id.* at 390-91.

[43] *Id.* at 391.

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."[44] Hence, the Court excluded the subpoena evidence too, because knowledge of its existence was derived from the illegal search.[45]

The phrase "fruit of the poisonous tree" did not attach to this doctrine until two decades later in *Nardone v. United States*.[46] In that case, the Court explained that evidence obtained because of the State's wrongful behavior could not be used "simply because it is used derivatively."[47] The derivative evidence was "fruit of the poisonous tree."[48]

Twenty years later, *Wong Sun v. United States*[49] expanded the doctrine to cover verbal or testimonial evidence derived from a Fourth Amendment violation.[50] Justice Brennan explained that the "policies underlying the exclusionary rule [did not] invite any logical distinction between physical and verbal evidence."[51] Rather, the question to ask in excluding the fruits of an illicit search was "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[52] Hence, derivative evidence could be admitted if sufficient time had passed between the violation and the later acquisition of the fruit so that the connection between tree and fruit became "so attenuated as to dissipate the taint."[53] In 1967, the

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[44] *Id.* at 392.

[45] *Id.* at 391-92; *see also* Nix v. Williams, 467 U.S. 431, 441 (1984) (citing *Silverthorne Lumber Co.*, 251 U.S. 385) ("[I]n *Silverthorne Lumber Co.* . . . the Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence."). There are two major justifications for the "fruit of the poisonous tree" doctrine. The first justification argues that government shouldn't benefit from its own wrongdoing. ALLEN ET AL., *supra* note 21, at 570. The second justification is that if police know they can use the fruits of illegal searches, they will have an incentive to conduct illegal searches. *Id.* To remove this incentive, all evidence must be suppressed. *Id.*

[46] 308 U.S. 338 (1939).

[47] *Id.* at 341.

[48] *Id.*

[49] 371 U.S. 471 (1963).

[50] *Id.* at 485.

[51] *Id.* at 486.

[52] *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[53] *Id.* at 491 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

Supreme Court extended the "fruits" doctrine to the Sixth Amendment right to counsel.[54]

C. WAIVER OF THE RIGHT TO COUNSEL

While "courts indulge every reasonable presumption against waiver,"[55] both the Sixth Amendment and Fifth Amendment rights to counsel may be waived.[56] In *Patterson v. United States*,[57] the Supreme Court decided that Fifth Amendment waiver is sufficient for waiving the Sixth Amendment right to counsel.[58] In so doing, the Court argued that the warnings provided by *Miranda* were sufficient to make a suspect "aware of the consequences" of a decision to waive the Sixth Amendment rights.[59]

In *Edwards v. Arizona*,[60] the Court provided further protection to the Fifth Amendment *Miranda* rights by deciding that once a suspect has invoked the right to counsel, she may not be subjected to further interrogation until counsel has been made available or unless she (the suspect) initiated the "further communication, exchanges, or conversation with the police."[61] The *Edwards* rule was extended to the Sixth Amendment in *Michigan v. Jackson*[62] to create a prophylactic right in the

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[54] *See* Nix v. Williams, 467 U.S. 431, 442 (1984) (construing United States v. Wade, 388 U.S. 218 (1967)). The doctrine's application to the Fifth Amendment right to counsel is discussed *infra* Part II.D.

[55] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

[56] *Id.* ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

[57] 487 U.S. 285 (1988).

[58] *Id.* at 296-97. The fact pattern in *Patterson* left the court free to avoid answering whether a *Miranda* waiver obtained *before* the Sixth Amendment rights attached would be sufficient to argue that the Sixth Amendment rights remained waived once they finally attach with the State's initiation of adversarial judicial proceedings. *Id.* at 293 n.5 ("We emphasize the significance of the fact that petitioner's waiver of counsel was only for this limited aspect of the criminal proceedings against him—only for postindictment questioning."). As the right to counsel under the Fifth Amendment is not offense-specific, but the Sixth Amendment right is offense-specific, there may be good reason to argue that the Sixth Amendment right should not be waivable until it has at least attached. *See* discussion *infra* notes 245-247 and accompanying text for discussion of offense versus non-offense specific rights.

[59] *Patterson*, 487 U.S. at 293.

[60] 451 U.S. 477 (1981).

[61] *Id.* at 484-85.

[62] 475 U.S. 625 (1986).

Sixth Amendment context.[63] The Court noted, however, that while the Sixth Amendment attached with the start of adverse judicial proceedings, the prophylactic protection provided in *Jackson* did not attach unless the defendant specifically requested counsel.[64]

D. *OREGON V. ELSTAD*—BRINGING ALL THE PIECES TOGETHER

In *Oregon v. Elstad*,[65] the Court combined questions of waiver, the "fruits of the poisonous tree" doctrine, and the Fifth Amendment. *Elstad* is critical to answering the question presented in *Fellers*, because the question remanded by the Supreme Court in *Fellers* was whether the *Elstad* standard should apply in the Sixth Amendment context.[66]

Michael Elstad lived with his parents near the home of Mr. and Mrs. Gilbert Gross.[67] After $150,000 worth of art and furnishings were stolen from the Gross's home, two officers visited the eighteen-year-old Elstad with a warrant for his arrest.[68] One of the officers asked the defendant if he knew why they had come to his home.[69] Elstad answered no and the officer asked if Elstad knew a person by the name of Gross.[70] Elstad responded that he did and that he had heard there was a robbery at the Gross household.[71] The officer explained that he felt Elstad was involved.[72] Elstad responded, "Yes, I was there."[73]

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[63] *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 177-78 (1993) (discussing *Jackson* as "one aspect of [the Court's] Sixth Amendment doctrine [viewed] as prophylactic").

[64] *Patterson*, 487 U.S at 291 ("Our decision in *Jackson*, however, turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police.") (alteration in original). Moreover, the invocation of the *Jackson* right to Sixth Amendment protection does not invoke the *Edwards* right to Fifth Amendment protection against custodial interrogation absent counsel. McNeil v. Wisconsin, 501 U.S. 171, 178 (1991) ("To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest."). As the Court elaborated, "[t]he holding of *Jackson* implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*." *Id.* at 179.

[65] 470 U.S. 298 (1985).

[66] Fellers v. United States, 124 S. Ct. 1019, 1023 (2004).

[67] *Elstad*, 470 U.S. at 300.

[68] *Id.*

[69] *Id.* at 301.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

Elstad was taken to the sheriff's headquarters where about an hour later he was read his *Miranda* rights.[74] The defendant indicated that he understood the rights, but that he wished to speak with the officers anyway.[75] He then explained his involvement in the robbery.[76] He was convicted of first-degree burglary, sentenced to five years in prison, and ordered to pay $18,000 in restitution.[77] After an Oregon appellate court found that the post-waiver confession should have been suppressed as tainted fruit from Elstad's earlier pre-waiver admission of guilt, the Supreme Court agreed to hear the State of Oregon's petition for certiorari.[78]

1. Violations of Miranda Warnings are Prophylactic in Nature, Not Constitutional[79]

In reviewing the decision of the Oregon Court of Appeals, the U.S. Supreme Court explained that the Oregon court was incorrect in assuming that *Miranda* warnings were accorded the same deference as a constitutional right under the "fruit of the poisonous tree" doctrine.[80] The Court wrote:

> The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them.[81]

Without a constitutional violation, the primary illegality necessary for applying the "fruits" doctrine from *Wong Sun* was missing. The Court applied its reasoning in *Michigan v. Tucker* to its decision in *Elstad*.[82] It explained that in *Tucker*, the officers' failure to provide adequate warning "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege."[83] And "[s]ince there was no actual infringement

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[74] *Id.*

[75] *Id.*

[76] *Id.* at 301-02.

[77] *Id.* at 302.

[78] *Id.* at 302-03.

[79] See *supra* Part V.B.1 for a discussion of why *Dickerson v. United States*, 530 U.S. 428 (2000), did not change the prophylactic nature of the warnings in light of the decision in *United States v. Patane*, 124 S. Ct. 2620 (2004).

[80] *Elstad*, 470 U.S. at 304.

[81] *Id.*

[82] *Id.* at 308 (citing Michigan v. Tucker, 417 U.S. 433, 445-46 (1974)).

[83] *Id.* (citing *Tucker*, 417 U.S. at 446).

of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."[84] No constitutional harm, no fruit foul!

2. Miranda Violations Create a Presumption of Compulsion That May be Rebutted Regarding Fruits of the Violation But Not Regarding Primary Evidence

The *Miranda* warnings protect the Fifth Amendment constitutional right by creating a presumption that the constitutional right has been violated.[85] The Court excludes testimony acquired in violation of the *Miranda* rules, even though the defendant "has suffered no identifiable constitutional harm."[86] But the lack of a constitutional harm in *Elstad* was important because it meant that there was no poisonous tree, so the evidentiary fruit was treated differently. With no poisonous tree, the fruit was not tainted. Hence, while the Court excluded the primary evidence to protect the Fifth Amendment, it did not exclude the post-waiver statements.[87]

The Court articulated that the presumption of compulsion was "irrebuttable for purposes of the prosecution's case in chief, [but] does not require that the statements and their fruits be discarded as inherently tainted."[88] The fruits did not require exclusion, because the presumption had been removed by Elstad's waiver.[89] The waiver rebutted the

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[84] *Id.*

[85] The *Elstad* Court explained: "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Id.* at 317. In a more succinct comment, the Court stated simply, "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." *Id.* at 307.

[86] *Id.*

[87] *Id.* at 318.

[88] *Id.* at 307. The Court reaffirmed this holding in *United States v. Patane*, 124 S. Ct. 2620, 2630 (2004) ("[I]t must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced *only for certain purposes* and then only when necessary to protect the privilege against self-incrimination.") (emphasis added).

[89] In the impeachment case of *Harris v. New York*, 401 U.S. 222 (1971), there was no waiver to remedy the situation. *Id.* at 224-25. The Court relied on the fact that while *Miranda* had been violated, the Fifth Amendment had not been violated and that not being able to use evidence for the case in chief would be a sufficient deterrent to keep officers from violating the Fifth Amendment, so further protection by excluding impeachment testimony was not warranted. *Id.* ("Petitioner makes no claim that the statements made to the police were coerced or involuntary .... Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."). Furthermore, impeachment has long been recognized as an exception to the exclusionary rule for

presumption of compulsion for the fruits, because not exercising the *Miranda* rights conveyed information that Elstad did not feel compelled.[90] Regarding the fruits, the Court added, "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary," but rather in these cases, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made."[91] In *Elstad*, the waiver for the second statement helped to remedy the situation by essentially creating the presumption that the statement was voluntary.[92]

3. The Benefits of Suppression are Low and the Costs are High

As further justification for not extending the fruits doctrine to *Miranda* violations where subsequent waiver had occurred, the Court looked to the potential benefits of extending the doctrine and found them wanting.[93] It again cited *Michigan v. Tucker*, this time for the proposition that "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony."[94] The Court decided that *Tucker's* logic applied in *Elstad*: "As in *Tucker*," the Court explained, "the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule."[95] The *Elstad* court claimed that trustworthiness and deterrence were not concerns after receiving the *Miranda* warnings because "the suspect [was] free to exercise

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constitutional violations in the Fourth Amendment context, though not necessarily in the Sixth Amendment context; thus, applying it in the Fifth Amendment context is not a large leap. *See infra* notes 209-210 and accompanying text.

[90] *See infra* notes 190-191 and accompanying text.

[91] *Elstad*, 470 U.S. at 318.

[92] According to the Court:

> A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. "If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.* at 309. If a constitutional violation had occurred, the waiver in *Elstad* could not remediate the earlier failure to administer the *Miranda* rights, but because only the prophylactic *Miranda* procedures were violated, no constitutional violation had occurred and remediation was thus possible.

[93] *Id.* at 303-14.

[94] *Id.* at 308 (citing Michigan v. Tucker, 417 U.S. 433, 445 (1974)).

[95] *Id.* at 308.

his own volition in deciding whether or not to make [the subsequent] statement to the authorities."[96]

The Court then compared the lacking benefits of suppression to the costs of suppression. It found that exclusion would come at a "high cost to legitimate law enforcement activity,"[97] because where admissions of guilt were not coerced, such admissions were "inherently desirable."[98] Thus, in carrying out its cost-benefit analysis, the Court decided that, without coercion, there was "little justification . . . for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder."[99]

The Court also refused to engage in contemplation of lingering psychological compulsion simply because the unwarned first statement "let the cat out of the bag."[100] With a waiver, the Court contended, "the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion."[101] With neither a constitutional violation needing to be remedied, nor any other significant benefits arising from suppression, the Court refused to extend the fruits doctrine to the facts in *Elstad.*

III. FACTS AND PROCEDURAL HISTORY

A. FACTS OF THE CASE

A grand jury indicted John Fellers for conspiracy to distribute methamphetamine on February 24, 2000.[102] Shortly thereafter, the Lancaster County Deputy Sheriff and a city police sergeant visited Fellers's home in Lincoln, Nebraska, to arrest him.[103] Fellers invited the officers into his home.[104] They informed him of the indictment against him, of the federal warrant which they held for his arrest, and of their desire to discuss his involvement in distributing methamphetamine.[105] The officers named

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[96] *Id.* The discussion of *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), *infra* notes 257-262 and accompanying text, demonstrates that the Court may have overstated the case that waiver sufficiently removes worries about the need to deter coercive techniques.

[97] *Elstad*, 470 U.S. at 312.

[98] *Id.* at 305 (quoting United States v. Washington, 431 U.S. 181, 187 (1977)).

[99] *Id.* at 312.

[100] *Id.* at 311-14.

[101] *Id.* at 314.

[102] Fellers v. United States, 540 U.S. 519, 521 (2004).

[103] *Id.*

[104] *Id.*

[105] *Id.*

four individuals included in Fellers's indictment.[106] Fellers admitted that he knew the four people and that he had used methamphetamine with them.[107]

No one read Fellers's *Miranda* rights to him until his arrival at the Lancaster County Jail.[108] Upon having his rights read, the defendant signed a *Miranda* waiver form,[109] which included waiving his right to counsel. He then reiterated the inculpatory statements made during the earlier questioning at his home.[110]

B. DECISION OF THE MAGISTRATE JUDGE

At a preliminary hearing, a magistrate judge recommended suppression of the statements made at Fellers's home.[111] The judge found these statements were in response to "implicit questions" that were raised by the officers without having read the defendant his *Miranda* rights.[112] The magistrate also recommended that portions of the statements made at the jail "be suppressed as fruits of the prior failure to provide *Miranda* warnings."[113]

C. DECISION OF THE DISTRICT COURT OF NEBRASKA

The District Court suppressed the statements made at Fellers's house, but admitted the statements made at the jailhouse into evidence over the magistrate's recommendation, because Fellers "had knowingly and voluntarily waived his *Miranda* rights before making the statements."[114] The District Court cited *Oregon v. Elstad* as controlling.[115]

Fellers's jailhouse statements were included in the evidence against him.[116] He was subsequently convicted of conspiring to possess methamphetamine with intent to distribute.[117] At sentencing, the District Court found that Fellers's past criminal conduct warranted sentencing him to 151 months' imprisonment.[118]

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 521-22.
[110] *Id.* at 522.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* (citing Oregon v. Elstad, 470 U.S. 298 (1985)).
[116] *Id.*
[117] *Id.*
[118] United States v. Fellers, 285 F.3d 721, 723 (8th Cir. 2002).

D. DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS

On appeal, Fellers argued that his jailhouse statements were fruits of the statements garnered at his home in violation of his Sixth Amendment right to counsel, and that they should be suppressed.[119] He claimed that the "the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail."[120] The Eighth Circuit did not agree with Fellers's assessment.[121]

First, the appellate court found that the initial statements offered at Fellers's home did not violate his Sixth Amendment right to counsel because no interrogation took place and thus the Sixth Amendment was not applicable.[122] Second, the appellate court found that Fellers's statements at the jailhouse were also allowable, because *Elstad* controlled statements made subsequent to a *Miranda* reading and waiver.[123] The court, quoting *Elstad*, wrote, "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made."[124] Fellers's jailhouse statements were properly admitted into the evidentiary record according to the Eighth Circuit.[125]

E. SUPREME COURT GRANTED CERTIORARI

John Fellers filed a petition for certiorari with the United States Supreme Court. The Supreme Court granted certiorari[126] to determine whether Fellers's Sixth Amendment right to counsel had been violated and whether its violation required exclusion of the evidence against him under the fruit of the poisonous tree doctrine.[127]

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[119] *Fellers*, 540 U.S. at 522.

[120] *Fellers*, 285 F.3d at 724.

[121] *Fellers*, 540 U.S. at 522-23.

[122] *Fellers*, 285 F.3d at 724.

[123] *Id.* A concurrence by Judge Riley disagreed with the finding that the statements taken at Fellers's home were not in violation of the Sixth Amendment. *Id.* at 726-27 (Riley, J., concurring). Judge Riley felt that the home statements violated the Sixth Amendment, but he agreed with the overall result because he accepted the court's second premise that the jailhouse statements were admissible into the record under *Elstad* due to Fellers's voluntary and knowing waiver of his *Miranda* rights. *Id.* at 727.

[124] *Id.* at 724 (quoting Oregon v. Elstad, 470 U.S. 298, 309 (1985)).

[125] *Fellers*, 540 U.S. at 523.

[126] Fellers v. United States, 538 U.S. 905 (2003).

[127] *Fellers*, 540 U.S. at 522-23.

IV. SUMMARY OF OPINION

A. THE COURT FOUND A SIXTH AMENDMENT VIOLATION

In a succinct and unanimous four-page opinion, Justice O'Connor led the Court in disagreeing with the Eighth Circuit on both points.[128] The Supreme Court first held that the information garnered at Fellers's home was indeed solicited in violation of his Sixth Amendment right to counsel.[129] The Court noted that the Sixth Amendment right is "triggered 'at or after the time that judicial proceedings have been initiated . . . [including] indictment . . . .'"[130] The Court wrote that a defendant is denied his Sixth Amendment rights "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel."[131] Because the officers informed Fellers that their purpose was to discuss his involvement in methamphetamine distribution and intimated at his association with the charged co-conspirators, the Court wrote "there is no question that the officers . . . 'deliberately elicited' information from petitioner."[132] By deliberately eliciting information in their post-indictment discussion with Fellers at his home and without counsel present, the officers violated Fellers's Sixth Amendment rights.[133]

B. THE COURT REMANDED WHETHER ELSTAD APPLIES TO THE FRUITS OF SIXTH AMENDMENT VIOLATIONS

The Court then moved on to the second question and proceeded to determine whether Fellers's waiver of his right to counsel at the jailhouse permitted admission of his post-waiver statements as per *Elstad* or whether a different standard applied to fruits after a waiver of Sixth Amendment rights.[134]

The Supreme Court found that the Court of Appeals's failure to recognize a violation of the Sixth Amendment at Fellers's home led the Eighth Circuit to improperly carry out its analysis under the Fifth

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[128] *Id.* at 524-25.

[129] *Id.*

[130] *Id.* at 523 (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

[131] *Id.* (quoting Massiah v. United States, 377 U.S. 201, 206 (1964)). The Court further explained that the deliberate elicitation standard for the Sixth Amendment is different than the custodial-interrogation standard applied in Fifth Amendment cases. *Id.* at 524.

[132] *Id.* at 524 (quoting *Massiah*, 377 U.S. at 206).

[133] *Id.* at 524-25.

[134] *Id.* at 525.

Amendment.[135] As such, "The Court of Appeals did not reach the question whether the Sixth Amendment requires suppression of petitioner's jailhouse statements on the ground that they were fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard."[136] Finding that it had not previously ruled on whether *Elstad* applied to the Sixth Amendment, the Supreme Court remanded this second issue to the Eighth Circuit for a determination of that question.[137]

V. ANALYSIS

The Supreme Court's holding that the Lancaster County Deputy Sheriff deliberately elicited statements from John Fellers was reasonable. The Eighth Circuit never examined whether "deliberate elicitation" occurred, because it mistakenly did not apply the Sixth Amendment.[138] With no analogous cases directly on point, I will argue that a reasonable reading of the meaning of deliberate elicitation permitted the Court to find that the information had been so elicited from Fellers.

The second issue in *Fellers* was whether *Oregon v. Elstad* should apply in the Sixth Amendment context. I contend that *Elstad* should not apply to constitutional violations of the Sixth Amendment right to counsel. Only a prophylactic violation occurred in *Elstad*.[139] But as a constitutional violation occurred here, Fellers should receive greater protection under the fruit of the poisonous tree doctrine than was provided in *Elstad*.[140] Furthermore, the Fifth Amendment and Sixth Amendment rights to counsel serve different purposes. The differing purposes of the two rights to counsel have led to divergent applications and standards for those rights.[141] Suppression of evidence did not serve the purpose of the Fifth Amendment in *Elstad*, but it does serve the purpose of the Sixth Amendment here.[142] Finally, the more limited reach of the Sixth Amendment lowers the cost of suppression here compared to the cost of suppression in *Elstad*.[143]

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[135] *Id.*

[136] *Id.*

[137] *Id.* ("We have not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards.").

[138] United States v. Fellers, 285 F.3d 721, 724 (8th Cir. 2002).

[139] *See infra* Part V.B.1.

[140] *See infra* Part V.B.2.

[141] *See infra* Part V.B.3.

[142] *See infra* Part V.B.4.

[143] *See infra* Part V.B.5.

Combining the significant differences between the two rights to counsel, the constitutional violation in the Sixth Amendment context, and the relatively low costs of applying a different standard in the Sixth Amendment context, the Eighth Circuit should not apply *Elstad* to the Sixth Amendment on remand. It should exclude the incriminating jailhouse statements as impermissible fruits of the statements obtained in violation of the Sixth Amendment at his home.

A. THE FINDING OF DELIBERATE ELICITATION WAS REASONABLE

The Eighth Circuit never addressed the Sixth Amendment issue in *Fellers*, because it found that no interrogation had occurred and thus the Sixth Amendment did not apply.[144] But interrogation in the traditional *Miranda* sense was the improper standard for the court to apply. As the Supreme Court explained in *Rhode Island v. Innis*, "The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable . . . ."[145] The reason for the difference is that "the policies underlying the two constitutional protections [the Fifth and Sixth Amendments] are quite distinct."[146] The Fifth Amendment right to counsel seeks to protect against compulsion resulting from the intimidation that can occur under direct custodial examination, but the Sixth Amendment is not concerned with compulsion.[147] It is concerned with the adversarial roles between the State and the suspect after formal proceedings have been announced, which is why *Massiah* elucidated that for the Sixth Amendment "to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."[148] As such, the proper standard is deliberate elicitation.

Deliberate elicitation occurs where officers of the State "creat[e] a situation likely to induce . . . incriminating statements without the assistance of counsel . . . ."[149] Inducement is "[t]he act or process of enticing or persuading another person to take a certain course of action."[150] In the present case, after being invited into Mr. Fellers's home, the Lancaster County Deputy Sheriff told Fellers that he and the police sergeant

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[144] United States v. Fellers, 285 F.3d 721, 724 (8th Cir. 2002).

[145] 446 U.S. 291, 300 n.4 (1980).

[146] *Id.*

[147] *See infra* notes 226-244 and accompanying text.

[148] Massiah v. United States, 377 U.S. 201, 206 (1964) (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting)).

[149] United States v. Henry, 447 U.S. 264, 274-75 (1980).

[150] BLACK'S LAW DICTIONARY 790 (8th ed. 2004).

were "there to discuss his involvement regarding the distribution of methamphetamine."[151] He then told Fellers that Fellers had been indicted for the methamphetamine charge and that his indictment stemmed from his association with four other persons in a "conspiracy to distribute methamphetamine."[152] The officer proceeded to name those four persons.[153] It was at this point that Fellers began to share incriminating statements.[154]

Given a lack of cases sufficiently analogous to guide the Court regarding whether the officer's statements qualified as deliberate elicitation, it was well within the Court's bounds to determine independently whether the facts constituted "deliberate elicitation." It was not unreasonable for the Court to determine that the comment made to Fellers that the Deputy Sheriff and the police sergeant were there "to discuss" Fellers's involvement meant that they expected Fellers to share in the exchange.[155] The naming of co-conspirators could only further entice Fellers to share information as the names implied that the officers already had information and that it would be wise for Fellers to cooperate. The Supreme Court's decision here provides a strong analogy for future courtroom determinations of deliberate elicitation.[156]

B. THE *ELSTAD* STANDARD SHOULD NOT APPLY TO CONSTITUTIONAL VIOLATIONS OF THE SIXTH AMENDMENT

1. Violations of Miranda *Remain Prophylactic Rather than Constitutional Violations Until Admitted at Trial*

As the question on remand in *Fellers* is whether protections denied to the Fifth Amendment right to counsel should also be denied to the Sixth Amendment right to counsel,[157] it is important to understand that the Fifth

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[151] Joint Appendix at 17-18, Fellers v. United States, 540 U.S. 519 (2004) (No. 02-6320).

[152] *Id.* at 18.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] And, in fact, *Fellers* already has been used as precedent for "finding that 'implicit questions' and 'discussion' . . . constitute . . . a Sixth Amendment violation." Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004). The unanimous nature of the decision in *Fellers* further supports the conclusion that what qualifies as deliberate elicitation is quite different from the interrogation standard set down for the Fifth Amendment under *Miranda*. It should be noted that the Court felt Fellers's case was not even a close call. The Court asserted "there [was] no question" that deliberate elicitation occurred. Fellers v. United States, 540 U.S. 519, 524 (2004).

[157] *Fellers*, 540 U.S. at 525.

Amendment right to counsel is not a constitutional right in the same sense as the Sixth Amendment right.

Eight years after *Miranda* established the Fifth Amendment right to counsel, the Court explained that *Miranda's* procedural safeguards were not constitutional rights themselves, "but were instead measures to insure that the right against compulsory self-incrimination was protected."[158] In the case of *Michigan v. Tucker*, a convicted rapist claimed that his Fifth Amendment rights had been violated because the police failed to advise him that he could receive counsel free-of-charge if he was indigent.[159] The police had notified him of his other rights, but failed to mention the right to free counsel.[160] The Court limited the power of the new *Miranda* safeguards when it wrote that the police conduct in *Tucker* "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[161]

The prophylactic *Miranda* rights protected the Fifth Amendment by acting as proxies for whether a violation of the Fifth Amendment had occurred.[162] Where prophylactic rights were violated, the Court presumed that the Fifth Amendment was violated.[163] As Justice O'Connor wrote in *New York v. Quarles*, "When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial."[164] She repeated this rule one year later, writing in

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[158] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[159] *Id.* at 435.

[160] *Id.* The officers asked Mr. Tucker if he wanted an attorney, whether or not he knew why he had been arrested, and whether he understood his constitutional rights. *Id.* at 436. He replied that he understood the reason for his arrest, that he did not want an attorney, and that he understood his constitutional rights. *Id.* Tucker's questioning occurred before the *Miranda* decision was handed down. *Id.* at 435.

[161] *Id.* at 445-46.

[162] "[A]s used by the *Tucker* plurality to describe *Miranda*, prophylactic rules are not simply protective devices for constitutional provisions but more importantly . . . rules that may be violated without violating the Constitution." GRANO, *supra* note 63, at 175.

[163] United States v. Patane, 124 S. Ct. 2620, 2630 (2004) ("[I]t must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination."); Oregon v. Elstad, 470 U.S. 298, 310 (1985) ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised.").

[164] 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in part and dissenting in part).

Oregon v. Elstad, "Failure to administer *Miranda* warnings creates a presumption of compulsion."[165]

The Court continued to portray the Fifth Amendment right to counsel as a prophylactic rather than constitutional right in the 1990s. In *Minnick v. Mississippi*,[166] Justice Scalia wrote in dissent, "In *Miranda v. Arizona*, . . . this Court declared that a criminal suspect has a right to have counsel present during custodial interrogation, as a prophylactic assurance that the 'inherently compelling pressures,' . . . of such interrogation will not violate the Fifth Amendment."[167] The majority seemed to agree with Justice Scalia. It repeated *Miranda's* characterization of counsel as "the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."[168] In *Davis v. United States*,[169] Justice O'Connor wrote for the majority, "The right to counsel established in *Miranda* was one of a 'series of recommended 'procedural safeguards' . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'"[170]

Miranda rights were prophylactics to supplement protection of the Fifth Amendment right against self-incrimination rather than constitutional rights themselves,[171] until the Court handed down *Dickerson v. United States*[172] in 2000. In *Dickerson*, the Court faced a congressional statute

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[165] 470 U.S. 298, 307 (1985). See *supra* Part II.D. for extensive discussion of this case.

[166] 498 U.S. 146 (1990).

[167] *Id.* at 159 (Scalia, J., dissenting).

[168] *Id.* at 152 (citing Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

[169] 512 U.S. 452 (1994).

[170] *Id.* at 457.

[171] *See generally* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 968-75 (1995) (discussing the development of the Fifth Amendment right to counsel as a prophylactic measure); *see also* Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule"*, 1998 U. ILL. L. REV. 1207, 1214 (1998) (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)) ("The *Miranda* right to counsel, therefore, is not itself a constitutional right, but rather a court-imposed 'prophylactic rule' . . . ."); Beth G. Hungate-Noland, Note, Texas v. Cobb*: A Narrow Road Ahead for the Sixth Amendment Right to Counsel*, 35 U. RICH. L. REV. 1191, 1205 (2002) ("the Fifth Amendment right to counsel which the Court would later refer to as a "prophylactic rule" rather than a constitutional right, was created").Parker, *supra* note 36, at 363 n.2 ("[T]he fifth amendment right to counsel is not considered a direct constitutional guarantee . . . .").

[172] 530 U.S. 428 (2000).

challenging the *Miranda* decision.[173] The Fourth Circuit had allowed the statute to overrule *Miranda* on the grounds that the measures put forth in the *Miranda* decision were not constitutionally protected, but rather were prophylactic measures.[174] The Supreme Court disagreed. It explained that *Miranda* was a "constitutional decision"[175] and that it set out a "constitutional rule that Congress may not supersede legislatively."[176] Writing in dissent for himself and Justice Thomas, Justice Scalia excoriated the members of the majority opinion by citing numerous cases in which members of the majority had relied upon the prophylactic nature of the *Miranda* rights to reach a decision.[177] Justice Scalia announced that he would refuse to uphold *Dickerson* in future cases.[178]

Commentators quickly argued that *Dickerson* augmented violations of *Miranda* warnings to constitutional violations.[179] But two recent cases demonstrate that these commentators asserted too much. In *Chavez v. Martinez*,[180] Oliverio Martinez brought a § 1983 action against Officer Ben Chavez.[181] No criminal charges were brought against Martinez, but he alleged (and the Ninth Circuit agreed) that his Fifth Amendment rights had been violated, because Officer Chavez questioned him while he was receiving medical treatment without reading the *Miranda* rights and continued to question him even after Martinez's requested that he stop.[182] The Supreme Court explained that because the statements were never used against Martinez in a criminal trial, no constitutional violation occurred.[183]

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[173] *Id.* at 432.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 444.

[177] *Id.* at 445, 450-56 (Scalia, J., dissenting).

[178] *Id.* at 465 (Scalia, J., dissenting).

[179] One commentator argued that in light of *Dickerson*, the "well-settled principle of criminal law . . . that a violation of the defendant's constitutional rights results in a primary illegality" would seem to say that "failure to adequately deliver the *Miranda* warnings to a suspect in custody [constitutes] a 'primary illegality.'" Conor Bateman, Note, Dickerson v. United States*:* Miranda *is Deemed A Constitutional Rule, But Does It Really Matter?* 55 ARK. L. REV. 177, 212, 219 (2002); *see also* Mitch Reid, Note, United States v. Dickerson*: Uncovering* Miranda*'s Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1372 ("[T]he violation of the *Miranda* warning itself is a violation of the Fifth Amendment.").

[180] 538 U.S. 760 (2003).

[181] *Id.* at 764-65 (2003). See *supra* note 26 regarding § 1983 violations.

[182] *Id.* at 764-66.

[183] *Id.* at 767 (noting that the suspect "was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case").

Thus mere violation of the warnings does not constitute a constitutional violation.

In the 2004 case of *United States v. Patane*,[184] the Court asked whether, after *Dickerson*, the "fruit of the poisonous tree" doctrine applied to physical fruits garnered from voluntary statements absent *Miranda* warnings.[185] The plurality opinion put forth by Justice Thomas admitted the fruits.[186] Building on the decision in *Chavez*, Thomas explained that "police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."[187] After *Patane* and *Chavez*, a violation of the prophylactic warnings does not constitute a constitutional violation,[188] but use of statements in the courtroom obtained in violation of those prophylactics does.[189]

Because a hole in the prophylactics does not birth a constitutional violation until it leaks into trial, the violations are only fatal to the inclusion of evidence obtained directly as a result of the violation.[190] The presumption of a Fifth Amendment violation is irrebuttable for determining whether to exclude evidence obtained from a violation of *Miranda*, but the

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[184] 124 S. Ct. 2620, 2629 (2004).

[185] *Id.*

[186] *Id.* at 2624.

[187] *Id.* at 2630.

[188] *Id.* at 2628 ("Our cases . . . make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule.").

[189] This follows from the text of the Fifth Amendment: "nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. There is nothing to prevent a person from being compelled to be a witness against himself *outside* of the criminal case. It is only in the criminal case that the Fifth Amendment can be violated.

Hence, the answer to Bateman's article about *Dickerson*, *supra* note 179, would seem to be that *Miranda* as a constitutional rule does not matter as much in the judiciary system as it does in the legislative arena where constitutional imprimatur for *Miranda* prevents legislatures from tinkering or overturning the ruling. The one place that it might matter in the judiciary is in § 1983 actions where a constitutional violation now certainly occurs when statements taken in violation of *Miranda* make their way into a courtroom.

[190] *Patane*, 124 S. Ct. at 2627-28. The definition of prophylactic turns on that distinction: "A rule is prophylactic only when the rule may be violated without violating the Constitution." GRANO, *supra* note 63, at 191. Professors Dorf and Friedman argue for understanding "what the Fifth Amendment requires is not every aspect of the *Miranda* procedure, but only that an accused learn of the right not to speak with the police, and that the interrogation take place in a manner that permits the suspect to exercise that right at any time." Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 78 (2000).

presumption can be rebutted when deciding whether to exclude subsequent statements as the "fruits" of those statements.[191]

There are then two possible interpretations for the legitimacy of *Elstad* after *Dickerson* and *Patane*. The first possibility is that no constitutional violation occurred in *Elstad*, because the presumption of compulsion was rebutted by the better-late-then-never reading of the *Miranda* rights and subsequent waiver. As both the pre-waiver and post-waiver statements were presumed not coerced, introduction of the pre-waiver statements at trial would not have been a constitutional violation, but merely a violation of the non-constitutional prophylactic, which would still require exclusion. The second possibility is that any use of the pre-waiver statements at trial would have been a constitutional violation, but because the pre-waiver statements were not used at trial, there was no constitutional violation. In either interpretation of *Elstad*, the post-waiver statements (with the presumption of compulsion rebutted by the *Miranda* warnings and waiver) were untainted by a constitutional violation and therefore admissible at trial.[192]

2. *Constitutional Rights (at Stake in* Fellers*) Receive More Protection than Prophylactic Rights (at Stake in* Elstad*)*

When the officers violated John Fellers's constitutional right, it is clear that they violated a different sort of right than the mere prophylactic right in *Elstad*.[193] The Supreme Court has provided constitutional rights such as those in *Fellers* with significantly more protection than prophylactic rights.

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[191] In *Oregon v. Elstad*, Justice O'Connor's majority held that "the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." 470 U.S. 298, 307 (1985). In *Patane*, the majority watered down the language even more by adding the modifier "generally" to its statements. 124 S. Ct. at 2627. "To protect against [the coercion inherent in custodial interrogations], the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief." *Id.*

For further discussion about rebutting the presumption of compulsion, see *supra* Part II.D.2.

[192] The distinction between these two interpretations is not important in *Elstad*. But if we imagine a case where the pre-waiver statements were mistakenly allowed into the courtroom by a trial judge, the distinction could then make a difference as a constitutional violation would occur in the second interpretation, which might lead a reviewing court to then find the "fruits" inadmissible, too, as their status would now include being derived from a constitutional violation simply because the first statements made their way into the courtroom. This would seem to be an odd result, but a legitimate interpretation of the case law.

[193] *See supra* Part V.B.1.

For instance, the Court has allowed derivative evidence and impeachment evidence into courtrooms where prophylactic rights have been violated.[194] But it has not allowed the admission of derivative evidence where constitutional rights have been violated, following the fruit of the poisonous tree doctrine laid out in *Wong Sun*.[195]

Michigan v. Tucker is the first case that finds the fruits of mere prophylactic measures admissible into evidence.[196] In that case, the defendant requested that *Wong Sun* be employed to suppress witness testimony discovered thanks to a statement made by the defendant "without having received full *Miranda* warnings."[197] The Court rejected the argument and admitted the witness testimony because the unwarned questioning, "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards . . . laid down . . . in *Miranda* to safeguard that privilege."[198]

Oregon v. Elstad followed in the footsteps of *Tucker* and refused to apply the fruits analysis to mere prophylactics.[199] Discussed in detail earlier in this Note,[200] *Elstad* asked whether a statement of guilt obtained *after* a waiver should be treated as the fruit of a statement of guilt taken in violation of *Miranda before* the waiver. The Court determined that there was no primary illegality, because there was no constitutional violation, merely a prophylactic violation, and thus there was no poisonous tree so there could be no tainted fruit.[201]

Patane reaffirmed these cases and claimed that *Dickerson* did as well.[202]

In *Michigan v. Harvey*,[203] we find the lone case where evidence was admitted after a violation in the Sixth Amendment context. But *Harvey* is the exception that proves the rule. In *Harvey*, the Court admitted impeachment evidence after the *Jackson* rule had been violated, i.e. after police approached a suspect without counsel present to elicit information

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[194] *See* GRANO, *supra* note 63, at 175-76 (discussing prophylactic cases in the *Miranda* context).

[195] 371 U.S. 471 (1963).

[196] 417 U.S. 433 (1974).

[197] *Id.* at 437.

[198] *Id.* at 446.

[199] 470 U.S. 298 (1985).

[200] *See supra* Part II.D.

[201] *See supra* notes 81-83 and accompanying text.

[202] United States v. Patane, 124 S. Ct. 2620, 2628 (2004).

[203] 494 U.S. 344 (1990). *See* GRANO, *supra* note 63, at 176-78 (discussing prophylaxis in the Sixth Amendment context).

when the suspect had already requested counsel's assistance.[204] The *Jackson* rule is a prophylactic measure. The Court explained that it was not addressing a constitutional right as it might with other Sixth Amendment violations,[205] because only the *Jackson* prophylactic had been violated.[206] The Court specifically noted that the facts before it did not reach the question of whether the evidence would be allowed if a constitutional violation had occurred.[207] Moreover, the evidence allowed in was for impeachment, which is one of the few exceptions carved out of the exclusionary rule in the Fourth Amendment context.[208]

The Court has carved out a few exceptions to admit evidence subsequent to violation of a *constitutional* right, but they have been limited. An impeachment exception to the Fourth Amendment has been allowed where deterrence of police misbehavior would not be affected,[209] but not allowed where the "impeachment exception would significantly weaken the exclusionary rule's deterrent effect on police misconduct."[210] The Court allowed a good faith exception for constitutional violations under the Fourth Amendment in *United States v. Leon*.[211] Beyond impeachment, good faith, issues of standing,[212] and circumstances where the taint of the poisonous tree has subsequently dissipated,[213] the Court has consistently applied the exclusionary rule when constitutional violations have occurred. The exceptions for impeachment and good faith have not been applied to *constitutional* violations of the Sixth Amendment.[214]

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[204] *Harvey*, 494 U.S. 344.

[205] *Id.* at 353-54 (explaining that the factual record was insufficient to determine if a "core value" of the constitutional guarantee had been violated and thus noting it was not considering that issue); *see* GRANO, *supra* note 63, at 178 (same).

[206] *Harvey*, 494 U.S. at 349-50. "We have never prevented use by the prosecution of relevant voluntary statements by a defendant," wrote the Court, "*particularly when the violations alleged by a defendant relate only to procedural safeguards that are 'not themselves rights protected by the Constitution.'*" *Id.* at 351 (emphasis added).

[207] *Id.* at 353-54; GRANO, *supra* note 63, at 178.

[208] *See* ALLEN ET AL., *supra* note 21, at 577-580.

[209] Walder v. United States, 347 U.S. 62 (1954).

[210] James v. Illinois, 493 U.S. 307, 317 (1990).

[211] 468 U.S. 897 (1984).

[212] For a discussion of standing in the exclusionary context, see ALLEN ET AL., *supra* note 21, at 556-67. The standing doctrine has no impact on the case at hand as Fellers clearly had standing.

[213] *See supra* notes 52-53 and accompanying text.

[214] As already discussed *supra* at notes 40, 203-208 and accompanying text, *United States v. Harvey*, 494 U.S. 344 (1990), dealt with a prophylactic of the Sixth Amendment and the "good faith" exception hasn't been extended to the Sixth Amendment.

In *Fellers*, a constitutional right guaranteed by the Sixth Amendment was violated.[215] In *Elstad*, a prophylactic right was violated.[216] The tainted fruits used in *Fellers* were not used for impeachment, but were used for the case in chief. There was no good faith exception claimed, nor was it claimed that significant time had passed between the poisoning of the tree and the picking of the fruit to dissipate the taint. Rather, as soon as the first statements were made in violation of the Sixth Amendment, the arresting officers escorted Fellers to the jailhouse, obtained his waiver, and harvested the fruit as Fellers reiterated his prior statements.[217] Even if good faith or impeachment exceptions had been claimed, the Court has not yet applied either exception to the Sixth Amendment when a constitutional right has been violated.[218] As impermissibly tainted fruits of a constitutional violation under *Wong Sun*,[219] the Eighth Circuit should reject the rule from *Elstad* on remand and exclude the post-waiver statements derived from the Sixth Amendment violation in *Fellers*.

3. Differing Purposes of the Fifth and Sixth Amendments Have Led to Differing Rules for Their Respective Rights to Counsel

Given that the Court is considering a different rule for the Sixth Amendment in *Fellers* than it used for the Fifth Amendment in *Elstad*, it is important to understand how the differing purposes between the two amendments have led to divergent standards, rules, and applications in the past. For instance, the deliberate elicitation standard of the Sixth Amendment is a different standard than the Fifth Amendment standard of custodial interrogation.[220] Compulsion, custody, and interrogation are not the watchwords for a Sixth Amendment violation.[221] *Miranda* violations

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[215] 540 U.S. 519, 524 (2004). As the Court explained:

> Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* . . . and its progeny.

Id. at 524-25.

[216] *See supra* Parts II.D.1, V.B.1.

[217] *Fellers*, 540 U.S. at 521.

[218] *See supra* notes 40, 203-208 and accompanying text.

[219] Wong Sun v. United States, 371 U.S. 471, 484-88 (1963).

[220] *Fellers*, 540 U.S. 519, 524 (2004).

[221] United States v. Henry, 447 U.S. 264, 274 n.11 (1980) ("This is not to read a 'custody' requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amendment. Massiah was in no sense in custody at the time of his conversation with his codefendant."); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980). Deliberate elicitation occurs "whenever state officers intentionally create a situation that is

occur whenever a suspect is interrogated in custody without provision of the right to counsel, but "the Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability."[222]

Evidence of the differing application of the two standards is given in *United States v. Wade*.[223] In *Wade,* the Court held that the right to counsel applied at a post-indictment lineup even though the lineup had no Fifth Amendment implications.[224] The right to counsel still applied without Fifth Amendment concerns because there were existing Sixth Amendment concerns that the defendant's legal inexperience would allow the State—working as an adversary with superior knowledge of the legal process—to prejudice the facts.[225]

The amendments' purposes illuminate the standards of custodial interrogation and deliberate elicitation.[226] The Fifth Amendment seeks to protect moral autonomy by eliminating coercive forces, so custodial interrogation focuses on the suspect's perceptions in determining whether a violation has occurred (i.e., did interrogation occur in a setting or a form

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likely to induce incriminating statements by the accused, regardless of whether he was interrogated." Parker, Jr., *supra* note 36, at 373; *see also Henry*, 447 U.S. at 274-75.

[222] *Fellers*, 540 U.S. at 524 (quoting Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986)).

[223] 388 U.S. 218 (1967).

[224] *Id.* at 223 ("The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel.").

According to the Court, there were Fifth Amendment implications, because there were no concerns of either interrogation or self-incrimination at the pre-trial line-up. *Id.* at 222-23. Only the Sixth Amendment justified a right to counsel at the line-up. *Id.* at 224-28.

[225] *Id.* at 235-37.

[226] In *Rhode Island v. Innis*, the Court enumerated the difference in the two standards:

> [The Sixth Amendment] right, as we held in *Massiah v. United States* . . . prohibits law enforcement officers from "deliberately elicit[ing]" incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed the petitioner in *Massiah* was not in custody. By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.

446 U.S. 291, 300 n.4 (1980) (citation omitted).

See Henry, 447 U.S. at 273 (objecting to the government's effort to "infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel"); Hungate-Noland, *supra* note 171, at 1206.

that the officers "should have known" would likely make the suspect feel coerced into testifying against himself?).[227] In contrast, the Sixth Amendment seeks a fair playing field between the accused and the State, so deliberate elicitation focuses on the intent of the officers and whether the State sought unfair advantage.[228] The purposes attributed to the two amendments lead to their divergent suspect-focused and state actor-focused applications.

For instance, in *Illinois v. Perkins*,[229] a government agent was placed undercover in jail with a murder suspect who was being held for an unrelated charge of aggravated battery.[230] Working undercover, the agent gained Perkins's trust by hatching an escape attempt with Perkins.[231] Based on that trust, the agent elicited incriminating statements from Perkins who then sought to exclude the statements because the agent had failed to read him his *Miranda* rights.[232] The Supreme Court admitted the statements into

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[227] In *Innis*, the Court wrote:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

446 U.S. at 301-02. *See also* Yale Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does it Matter?* 67 GEO. L.J. 1, 63-64 (1978) (discussing how the interplay between custody and interrogation creates intimidation that is "at odds with the privilege against self-incrimination" which violates the Fifth Amendment).

[228] *See* Brewer v. Williams, 430 U.S. 387, 399 (1977) (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information" from the accused); Halama, *supra* note 171, at 1214 ("The Sixth Amendment focuses on the conduct of the police; the Fifth Amendment focuses on whether the suspect felt coerced."). In *United States v. Henry*, the Court elaborated on the Sixth Amendment right:

> By intentionally creating a situation likely to induce . . . incriminating statements without the assistance of counsel, the Government violated . . . Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, "the constable . . . blundered" . . . rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.

447 U.S. at 274-75.

[229] 496 U.S. 292 (1990).

[230] *Id.* at 294.

[231] *Id.* at 295.

[232] *Id.*

evidence because the coercion aspect was lacking.[233] "[A] 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone he believes to be a fellow inmate."[234] Using coercion and compulsion interchangeably, the Court reiterated that "[c]oercion is determined from the perspective of the suspect."[235]

Compare the *Perkins* case to *United States v. Henry*,[236] where the Court reached the opposite conclusion on essentially the same facts.[237] In *Henry*, a paid government informant was serving time on the same cellblock as the accused.[238] The government argued that evidence obtained in conversations between the accused and the informant should be admitted because prompting by an undercover agent deserves less scrutiny than prompting by "persons [the suspect] knows to be Government officers."[239] The Court disagreed because Henry had been indicted before the questioning;[240] therefore his Sixth Amendment right to counsel had attached.[241] The government's line of argument sought "to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel."[242] Since the Sixth Amendment serves to balance the adversarial process, the Court focused on whether the State actors sought unfair advantage, not on the suspect's state of mind and whether he felt coerced.[243] The Court noted that *Henry* was not a case where "'the constable . . . blundered' . . . [but] rather, it is one where the 'constable' planned an impermissible

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[233] *Id.* at 296.

[234] *Id.* The term "police- dominated atmosphere" comes from *Miranda v. Arizona*, 384 U.S. 445 (1966).

[235] *Perkins*, 496 U.S. at 296.

[236] 447 U.S. 264 (1980).

[237] *Id.*

[238] *Id.* at 266. The only major difference in the circumstances of *Perkins* and *Henry* (other than their respective Fifth and Sixth Amendment scenarios) is that the informant in *Henry* was a prisoner serving a sentence for forgery who had proved a useful informant in the past while the informant in *Perkins* was a Federal Bureau of Investigations Agent. But this arguably would call for more exclusion in *Perkins* if the two Amendments sought to protect individuals against the State, given that the latter case involved information sought directly from a state actor.

[239] *Id.* at 272-73.

[240] *Id.* at 265-66.

[241] *See supra* notes 33-35 and accompanying text.

[242] *Henry*, 447 U.S. at 273.

[243] *Id.* at 271-75.

interference . . . ."[244] Because the State had *intentionally* sought to take advantage of its position, the evidence was excluded.

Another important difference for the *Fellers/Elstad* analysis is that the Sixth Amendment right to counsel is an offense-specific right, which makes its application significantly narrower than the Fifth Amendment right to counsel.[245] The Sixth Amendment right to counsel only provides protection for the specific charge or indictment brought against the suspect, which allows officers to elicit information in the absence of counsel regarding offenses for which the suspect has not been charged.[246] In contrast, the Fifth Amendment right to counsel is not offense specific. When the *Miranda* right to counsel is invoked, it prohibits the police from interrogating the suspect without counsel present regarding any offense, even offenses that were previously not under investigation.[247] Thus, if a suspect invokes his *Miranda* right to counsel during a robbery investigation, the right to counsel is also invoked for any other crimes for which the police may wish to interrogate the suspect from homicide to fraud to other robberies. This difference plays an important factor in weighing the costs and benefits of suppression under the two rights to counsel, as seen *infra* in Part V.B.5.

Timing when *constitutional* violations occur is yet another difference between the two rights to counsel. For the Fifth Amendment, as explained earlier, a constitutional violation does not occur until evidence garnered in violation of the *Miranda* prophylactics is used at trial.[248] But for the Sixth Amendment, a violation occurs anytime after the Sixth Amendment right has attached when information is "deliberately elicited" from the suspect without counsel present.[249] Both of these violations assume, of course, that

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[244] *Id.* at 275.

[245] McNeil v. Wisconsin, 501 U.S. 171, 177-78 (1991).

[246] *Id.* In *Texas v. Cobb*, the Court made it clear that the Sixth Amendment right was very narrowly tailored as even offenses that were "factually related" would still be treated as different offenses. 532 U.S. 162, 167 (2001). The Sixth Amendment right to counsel would not attach for the second offense until an indictment for that offense had been issued. *Id.*; *see* Howe, *supra* note 40, at 139-50.

[247] *McNeil*, 501 U.S. at 177.

[248] *See supra* Part V.B.1.

[249] Fellers v. United States, 540 U.S. 519, 524 (2004). Additionally, the Court wrote:

> Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* . . . and its progeny.

Id at 524-25. *See* Michigan v. Jackson, 475 U.S. 625, 633 n.6 (1986) ("In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request . . . ." The Court thus reaffirmed *Brewer v. Williams*, 430 U.S. 387, 404

the suspect did not subsequently waive his right to counsel after being read the *Miranda* warnings.[250]

There are numerous other differences between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel.[251] But the most important difference for the analysis here is that the Sixth Amendment constitutional right may be violated as soon as it attaches with adversary judicial proceedings while no constitutional violation occurs in the Fifth Amendment context until trial.[252]

(1977) that the "[Sixth Amendment] right to counsel does not depend upon a request by the defendant . . . ."); *Jackson*, 475 U.S. at 641 (Rehnquist, J., dissenting) ("[U]nlike a defendant's 'right to counsel' under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, a defendant's Sixth Amendment right to counsel does not depend at all on whether the defendant has requested counsel."); Commonwealth v. Torres, 813 N.E.2d 2161, 1277 (Mass. 2004) (discussing the *Fellers* decision and noting "[w]here government agents 'deliberately and designedly set out to elicit information' from a defendant after Sixth Amendment rights have attached, such conduct violates those rights").

[250] *See supra* Part II.C.

[251] Halama, *supra* note 171, at 1214-15. In her article on the Sixth Amendment, Meredith Halama nicely compares and contrasts the two amendments:

> The differences in the purpose and history of the Sixth and Fifth Amendment rights to counsel cannot be understated. The Sixth Amendment right to counsel is in the Bill of Rights and has been part of our adversarial system for over 200 years; it has applied to pretrial confrontations for sixty years. By contrast, the Supreme Court created the Fifth Amendment right to counsel barely thirty years ago. The Sixth Amendment is a right to counsel for its own sake; *Miranda's* right to counsel protects the privilege against self-incrimination. The Sixth Amendment exists to maintain the integrity of our adversarial system as a whole; the *Miranda* right exists solely to protect suspects from being compelled to waive their Fifth Amendment rights in custodial interrogations. The Sixth Amendment focuses on the conduct of the police; the Fifth Amendment focuses on whether the suspect felt coerced.
>
> Because of the differences in the origins and purposes of the Sixth and Fifth Amendments, they apply at different times in criminal proceedings. The dangers of an imbalanced adversarial system that the Sixth Amendment is designed to protect against arise when the government assumes the posture of an adversary, regardless of custody or interrogation. Conversely, the Fifth Amendment perils of compelled self-incrimination, by definition, exist *only* when a suspect is pressured to divulge his guilt, whether or not adversarial proceedings have begun. Thus, a suspect may have a Fifth Amendment right to counsel to protect his privilege against self-incrimination at a time when he does not have a Sixth Amendment right to counsel, such as in a preindictment or prearraignment interrogation. Conversely, the accused will have a Sixth, but not a Fifth, Amendment right to counsel at all critical stages after the initiation of formal judicial proceedings, regardless of whether he is in custody or under interrogation. Thus, deliberate attempts by the state to elicit information from an unknowing defendant (such as by an undercover agent or wiretap) after he has been indicted implicates the Sixth, but not the Fifth, Amendment. At all custodial interrogations after the initiation of formal judicial proceedings, the accused has a right to counsel under both the Sixth and Fifth Amendments.

Id.

[252] *See supra* Part V.B.1.

4. Suppression Insufficiently Served the Fifth Amendment Purpose in Elstad*; Suppression in* Fellers *Protected the Adversarial Process Guaranteed by the Sixth Amendment*

The previous section explained how the different purposes of the Fifth and Sixth Amendments have led to divergent rules and applications of the two rights to counsel. Their differing purposes argue for different rules in *Fellers* and *Elstad* as well.

The Fifth Amendment protects the substantive right not to be compelled to self-incriminate.[253] *Miranda* employed procedural prophylactics to protect that substantive right.[254] Evidence acquired in violation of the *Miranda* prophylactics is excluded because the information is presumed compelled.[255] Thus, where the presumption of compulsion has been rebutted by a waiver, Fifth Amendment concerns no longer exist. Once compulsion is no longer a factor, the *Elstad* court explained that "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder."[256]

In the 2004 case of *Missouri v. Seibert*,[257] the facts were similar to *Elstad* except that police officers had purposefully used a technique of "interrogating in successive, unwarned and warned phases" to undermine the *Miranda* warnings.[258] Basically, the officers interrogated a suspect until they obtained a confession, then hurriedly read the *Miranda* warnings and secured a waiver before encouraging the suspect to admit guilt again based on the psychological pressure from the previous admission of guilt only seconds earlier. The officers were employing the *Elstad* decision that confessions after a waiver were not inadmissible fruits of a pre-waiver confession as a cover. They were playing by the letter of the law rather than the spirit so the Court punished them to forward the Fifth Amendment purpose of eliminating coercive pressure.

The *Seibert* interrogation technique made it impossible for "the warnings [to] function 'effectively' as *Miranda* requires."[259] Because the warnings were undermined, a waiver based on those warnings could not be considered a valid waiver for rebutting the presumption of coercion. The Court explained, "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly

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[253] *See supra* Parts II.A.1, V.B.1.

[254] Miranda v. Arizona, 384 U.S. 436 (1966).

[255] *See supra* notes 85-86 and accompanying text.

[256] Oregon v. Elstad, 470 U.S. 298, 312 (1985).

[257] 124 S. Ct. 2601 (2004).

[258] *Id.* at 2608.

[259] *Id.* at 2610.

think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."[260] In these circumstances, the Court refused to assume that the suspect's waiver of *Miranda*—and thus her subsequent statements—were genuinely free of compulsion: the whole purpose of *Miranda*. In his deciding concurrence, Justice Kennedy explained that the scope of suppression under *Miranda* depends on "whether admission of the evidence under the circumstances would frustrate *Miranda's* central concerns and objectives."[261] Because he and the majority found that the officers' technique frustrated *Miranda*'s purpose, the evidence was suppressed.[262]

The purpose of the Sixth Amendment right to counsel is very different from the Fifth Amendment right to counsel. Its purpose "is to 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."[263] The existence of compulsion is not a clear cut issue, so its presumption may be rebutted; but assistance of counsel once the State has stepped into an adversarial role is clear cut. The adversarial role of the State cannot be rebutted; counsel was either provided or it was not. Worries about the advantages of the expert adversary during the pre-waiver discussions persist even after a waiver. In as much as the Sixth Amendment guarantees the fairness of an adversarial process, the concerns and objectives of the amendment are violated when expert officers of the State, which has moved from investigatory to accusatory mode,[264] are permitted to ignore the Amendment's protections.

The purpose of the Sixth Amendment was violated in *Fellers* when the state moved from the investigatory to the accusatory mode and ignored the Sixth Amendment's protections. In the Fifth Amendment context, when the Amendment's purpose has been violated (as in *Seibert*) suppression has been found appropriate. When the purpose of the Amendment has not been violated (as in *Elstad*), suppression has not been found appropriate. As the purpose of the Sixth Amendment was violated in *Fellers*, suppression is appropriate.

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[260] *Id.* at 2611.

[261] *Id.* at 2614 (Kennedy, J., concurring).

[262] *Id.* at 2613 ("Because the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted . . . Seibert's postwarning statements are inadmissible.").

[263] McNeil v. Wisconsin, 501 U.S. 171, 177-78 (1991) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

[264] *See supra* notes 32-35 and accompanying text.

5. The Cost of Suppression is Lower in the Sixth Amendment Context

The costs and benefits of suppression are lower in the Sixth Amendment context of *Fellers* than they are in the Fifth Amendment context of *Elstad.*

The *Elstad* court opposed extending suppression to fruits, because there was a "high cost to legitimate law enforcement activity [that added] little desirable protection to the individual's interest in not being compelled to testify against himself."[265] But suppression does add desirable protection in the Sixth Amendment context.[266] In addition, Sixth Amendment suppression imposes lower costs on legitimate law enforcement activity, because Sixth Amendment protection is more limited in its reach than the Fifth Amendment right to counsel addressed in *Elstad.*

Under both the Fifth and Sixth Amendment, officers can prevent suppression by obtaining a waiver before engaging in questioning.[267] But under the Sixth Amendment, investigators could urge prosecutors to postpone formal proceedings so that the Sixth Amendment right does not attach.[268] This postponement will allow the investigation stage to continue without the strictures of the Sixth Amendment. Furthermore, the Sixth Amendment right is offense-specific. It only protects the right to counsel for the charged offense.[269] *Texas v. Cobb* further narrowed the Sixth Amendment right as it refused to allow Sixth Amendment protection even for offenses that were factually-related to the charged offense.[270] The Fifth Amendment is much broader. Once invoked, it is invoked for all possible offenses, so that the State may not question the suspect without her attorney present about *any* offense that she may have committed.[271] As the Court noted in *McNeil v. Wisconsin*, this severely limits questioning because a suspect might be quite willing to speak to the police about matters that are not under prosecution.[272]

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[265] Oregon v. Elstad, 470 U.S. 298, 312 (1985).

[266] *See supra* Part V.B.4.

[267] *Id.*

[268] *See supra* note 35. Note, however, that urging prosecutors to postpone formal proceedings simply to avoid the Sixth Amendment protections would seem to go against the spirit of the Sixth Amendment, because it would entail the State's actors exercising their superior legal knowledge to manipulate the playing field to provide them with an advantage against their adversary—exactly what the amendment seeks to avoid.

[269] *See supra* notes 245-247 and accompanying text.

[270] 532 U.S. 162, 167 (2001). *See supra* note 246.

[271] McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) ("Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.").

[272] *Id.* at 178.

This discussion does not mean that there are no costs to law enforcement from deriving a different rule for *Fellers*. Probative evidence will be lost as accused suspects receive counsel and counsel advises the accused to exercise their rights, including the right to remain silent. Violations by law enforcement officers will also lead to the loss of evidence through exclusion, although these losses will decline as the deterrent effect of the exclusionary rule takes hold.

To the extent that current constitutional rights and other legal protections available to those accused of crimes raise the costs of law enforcement and lead to the loss of probative information, the provision of counsel will further raise these costs by increasing the exercise of those rights. If the right to counsel has become a tool for impeding accurate justice, however, the problem lies not with the legal knowledge provided by the right to counsel. The problem lies with the existence of those legal rules and interpretations that impede the search for truth in the first place. It is to those rules and interpretations that the courts and legislatures should direct reform, not the right to counsel. If the right to remain silent is overly burdensome on the truth-gathering process, reform to achieve the correct balance must be directed there.[273] Promoting ignorance of legal rights and rules should not be employed as a stopgap measure for making an end run around rights and rules that are believed to impede the administration of justice. Such ignorance is the antithesis of the Sixth Amendment's thesis.

While the costs of suppression were high and the value of suppression was low in *Elstad*, the reverse is true in *Fellers* because the Sixth Amendment's very purpose has been undermined—a high cost indeed—while the costs of enforcing that purpose through suppression have been relatively low. This discrepancy provides further reason for the Eighth Circuit to differentiate the Sixth Amendment and the Fifth Amendment rights to counsel by refusing to apply the *Elstad* standard in *Fellers*.

VI. CONCLUSION

After ruling that implicit questions by police officers following indictment constitute a violation of the Sixth Amendment right to counsel, the Court found itself faced with a case of first impression. The Court had never answered whether or not the decision in *Elstad* should apply to violations of the Sixth Amendment, so it remanded the question to the Eighth Circuit.

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[273] And scholars have argued for such reform. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 919, 922-927 (1995). *But see* Kamisar, *supra* note 171.

In reaching that answer, the Eighth Circuit should remember that constitutional rights warrant the highest protection in the land. The Sixth Amendment right to counsel violated in *Fellers* is a constitutional right, while the right violated in *Elstad* was a mere prophylactic. The violation of Mr. Fellers's right to counsel constituted a primary illegality, which warrants exclusionary protection for any evidence obtained by that violation as fruit of the poisonous tree. On remand, the Eighth Circuit has an obligation to uphold Fellers's constitutional right to counsel under the Sixth Amendment. But regardless of the Eighth Circuit's resolution of the matter, the Supreme Court's own indecision proffers reason to believe that it will revisit the issue to provide imprimatur or to overturn.[274]

Like its biblical counterpart, the fruit of the poisonous tree tempts its suitors with knowledge of good and evil. But also like its counterpart, partaking of the fruits comes with a high price. An end run around the Sixth Amendment's goal of protecting an adversarial system risks undermining the system itself.

Justin Bishop Grewell

[274] One commenter has claimed that "[n]o matter how the Eighth Circuit decides this issue of first impression, it is likely the Court will again review the Eighth Circuit's opinion." Lt. Col. David H. Robertson, *Self-Incrimination: Big Changes in the Wind*, ARMY LAW., May 2004, at 37, 47 (2004).