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SAVING *MASSIAH* FROM *ELSTAD*: THE ADMISSIBILITY OF SUCCESSIVE CONFESSIONS FOLLOWING A DEPRIVATION OF COUNSEL

James J. Tomkovicz*

INTRODUCTION

Fellers v. United States[1] brought two issues before the Supreme Court. The first, quite elementary issue pertained to the substance of the Sixth Amendment entitlement to the assistance of counsel to protect against the government's pretrial efforts to secure confessions.[2] More specifically, the question was whether the guarantee of counsel is available only when officials employ "interrogation."[3] The second, decidedly more complicated issue focused on the exclusionary consequences of a counsel deprivation.[4] More particularly, the question was whether the doctrine of *Oregon v. Elstad*[5]—a Fifth Amendment based, *Miranda* doctrine rule—governs in analogous Sixth Amendment situations.[6] In a previous article, I analyzed the Court's decisive resolution of the substantive issue at length, promising to turn my attention later to the second, unresolved exclusionary rule question.[7] This piece fulfills that pledge.

The Sixth Amendment exclusionary rule question raised in *Fellers* is interesting and significant for a number of reasons. First, severe erosion of the protections afforded by the *Miranda* doctrine has made preservation of the Sixth Amendment safeguards against official efforts to secure admissions of guilt all the more critical. Second, the reaffirmation of a generous entitlement to pretrial assistance in *Fellers* could prove inconsequential if the evidentiary products of pretrial deprivations are liberally admitted at trial. Finally, the narrow question raised in *Fellers* affords a unique occasion to examine the somewhat murky underpinnings of the *Elstad* doctrine and

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[1] 540 U.S. 519 (2004).

[2] *Id.* at 523–24.

[3] *Id.*

[4] *Id.* at 525.

[5] 470 U.S. 298 (1985).

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

[7] *See* James J. Tomkovicz, *Reaffirming the Right to Pretrial Assistance: The Surprising Little Case of* Fellers v. United States, 15 WM. & MARY BILL RTS. J. 501 (2006) [hereinafter, Tomkovicz, *Pretrial Assistance*].

the long-neglected justifications for Sixth Amendment exclusion. This examination yields useful insights into both the *Miranda* and *Massiah* doctrines and highlights critical differences between their respective "exclusionary rules."

Part I of this Article includes a brief review of the *Fellers* case, summarizing the proceedings that occurred prior to the Eighth Circuit's second opinion on remand from the Supreme Court. It then undertakes a detailed explanation of the Eighth Circuit's second effort to resolve Fellers's claim. In Part II, I explore and analyze the question that was remanded. After pausing to comment upon the Supreme Court's decision not to confront the exclusionary rule issue, I explore the landmark opinion in *Elstad* and the insights into *Elstad* and *Miranda* exclusion furnished by a trio of Supreme Court opinions—those in *Dickerson v. United States*,[8] *Missouri v. Seibert*,[9] and *United States v. Patane*.[10] I next discuss the underpinnings of Sixth Amendment based exclusion, documenting the unclarity and uncertainty generated by Supreme Court opinions and offering an explanation that is consistent with the essence of the pretrial guarantee of assistance afforded by the *Massiah* doctrine. With these premises all in place, it is possible to analyze the logic of the Eighth Circuit's remand opinion and to determine whether *Elstad* should, in fact, apply to Sixth Amendment deprivations.

I. THE UPS AND DOWNS OF *FELLERS V. UNITED STATES*

This preliminary section tersely describes the history of *Fellers* from the time of the indictment through the Supreme Court's reversal and remand. It then spends considerable time illuminating the Eighth Circuit's elaborate opinion on remand, an opinion that the Supreme Court declined to review.

A. The Road from Indictment to Supreme Court Reversal

John Fellers was indicted in federal court for conspiracy to distribute methamphetamine.[11] The officers who went to Fellers's home to arrest him explained that the indictment described his involvement with other individuals and named four such persons.[12] Fellers responded "that he knew the four people and had used methamphetamine during his association with them."[13] Later, at the county jail, officers delivered *Miranda* warnings.[14] Fellers waived his rights, repeated the incriminating admissions he made in his home, and made a number of additional inculpatory statements.[15]

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[8] 530 U.S. 428 (2000).
[9] 542 U.S. 600 (2004).
[10] 542 U.S. 630 (2004).
[11] *Fellers*, 540 U.S. at 521.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 521–22.

Before trial, Fellers moved to suppress all of his inculpatory statements.[16] A federal magistrate ruled that the statements made at his home should be suppressed because of the officers' "deceptive stratagems" and that the jailhouse admissions should also be excluded because they "would not have been made but for the prior ill-gotten statements."[17] The district court judge agreed that the in-home statements had to be excluded from trial, but decided that the jailhouse statements were admissible pursuant to *Oregon v. Elstad*.[18] After a trial in which the prosecution introduced the jailhouse statements, a jury convicted Fellers of conspiracy to possess methamphetamine with intent to distribute it.[19]

On appeal, the Eighth Circuit sustained the district court's refusal to suppress the jailhouse statements and affirmed Fellers's conviction.[20] Two judges thought that the Sixth Amendment counsel guarantee did not apply during the encounter at Fellers's home because "the officers did not *interrogate*" him.[21] They also concluded that the record supported the district court's finding that the "jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning."[22] Consequently, the statements made at the jail were properly admitted at trial.[23]

A concurring judge disagreed with the conclusion that the officers' interaction with the accused had not triggered an entitlement to the assistance of counsel.[24] He nonetheless agreed that the jailhouse statements were admissible, believing that *Oregon v. Elstad* dictated that conclusion.[25]

Fellers successfully sought a writ of certiorari from the Supreme Court.[26] A unanimous Court opined that it had "consistently" adhered to "the deliberate-elicitation standard in . . . Sixth Amendment cases."[27] The Eighth Circuit, therefore, had erred in concluding that the "absence of an 'interrogation'" precluded a Sixth Amendment violation and "foreclosed [Fellers's] claim that the jailhouse statements" had to be excluded as the "fruits of the statements taken from [Fellers] at his home."[28] Because Fellers had been indicted, his Sixth Amendment right to counsel had attached.[29] When the officers came to his home, "informed him that their purpose . . . was to discuss

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[16] *Id.* at 522.

[17] United States v. Fellers, 285 F.3d 721, 723 (8th Cir. 2002), *rev'd*, 540 U.S. 519 (2004), *aff'd*, 397 F.3d 1090 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005).

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

[19] *Id.*

[20] *Fellers*, 285 F.3d at 723.

[21] *Id.* at 724 (emphasis added).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 726–27 (Riley, J., concurring).

[25] *Id.* at 727.

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

[27] Fellers v. United States, 540 U.S. 519, 524 (2004). For support, the Court cited *United States v. Henry*, 447 U.S. 264, 270 (1980), and *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

[28] *Fellers*, 540 U.S. at 524.

[29] *Id.*

his involvement" in methamphetamine distribution "and his association with certain charged co-conspirators," and then discussed these matters with him, they "'deliberately elicited' information" from the accused in violation of "the Sixth Amendment standards established in *Massiah* . . . and its progeny."[30]

According to Justice O'Connor, the Eighth Circuit's Sixth Amendment error caused it to "improperly conduct[] its 'fruits' analysis under the Fifth Amendment."[31] As a result, the court had "not reach[ed] the question whether the *Sixth Amendment* requires suppression of [the] jailhouse statements" as "the fruits of . . . questioning . . . in violation of the Sixth Amendment deliberate-elicitation standard."[32] For this reason, and because the Supreme Court itself had not yet addressed whether the *Elstad* rule applies to Sixth Amendment deprivations, it remanded that question to the Eighth Circuit, affording that court the first opportunity to untangle this thorny issue.[33]

B. The Court of Appeals Opinion on Remand

It took the Eighth Circuit approximately one year to resolve the remanded question. In mid-February 2005, that court held that the statements Fellers made at the jail were admissible under the *Elstad* doctrine.[34] While the court's conclusion was the same as in its first opinion, the nature and quantity of the supportive reasoning were dramatically different this time. The opinion on remand reflects a conscientious effort to come to grips with *Elstad*'s relevance to Sixth Amendment transgressions.[35]

Fellers argued that the *Elstad* rule should not control because it "was never designed to deal with actual violations of the Constitution" and "is ill-suited to serve the distinct concerns raised by the Sixth Amendment."[36] In his view, the *Miranda* violations that the *Elstad* rule was "crafted to serve" are "fundamentally different from the Sixth Amendment violation" in his case.[37] The appellate court disagreed with his contentions.[38]

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[30] *Id.* at 524–25.

[31] *Id.* at 525.

[32] *Id.* (emphasis added).

[33] *Id.*

[34] United States v. Fellers, 397 F.3d 1090, 1095–97 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005).

[35] The painstakingly thorough opinion gives the impression of a court that is determined to cover every base this time, dotting every "i" and crossing every "t" along the way. The opinion does not concede that the court's initial discussion of *Elstad*'s impact rested on a faulty foundation. It seems entirely possible that the court believed it was merely redoing what it had already done—resolving the question of *Elstad*'s application to Sixth Amendment deprivations. As will be discussed later, it is not at all clear that the first Eighth Circuit opinion rested on the defective Fifth Amendment foundation that the Supreme Court discerned. *See infra* notes 76–78 and accompanying text.

[36] *Fellers*, 397 F.3d at 1093.

[37] *Id.*

[38] *Id.*

The court devoted considerable effort to explaining the *Elstad* doctrine, its original premises, and the impact of *Dickerson v. United States*[39] on that doctrine. According to the court, although *Dickerson* "undercut" one "justification for *Elstad*'s holding," it reaffirmed the validity of the *Elstad* rule.[40] The court acknowledged that the determination of "[w]hether the exclusionary rule applies to evidence acquired subsequent to a constitutional violation requires consideration of the . . . 'distinct policies and interests' of each Amendment."[41] It then announced an apparently general rule that confessions secured after improper conduct are excluded "unless they result from an 'intervening act of free will' by the suspect."[42]

The Eighth Circuit observed that although the exclusionary rule is most frequently applied in cases involving Fourth Amendment violations, it also applies to Fifth and Sixth Amendment transgressions.[43] According to the court, the Supreme Court has "repeatedly noted . . . that the *core reason* for extending the exclusionary rule to [Fifth and Sixth Amendment contexts] is *to deter* police from violating constitutional and statutory protections."[44] Nonetheless, "[a]nother relevant consideration . . . is whether [the exclusion of evidence] would effectuate the purposes of the constitutional provision at issue" in a particular case.[45]

Before turning to the Sixth Amendment rule involved in *Fellers*, the court contrasted the application of the Fourth and Fifth Amendment exclusionary rules to

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[39] 530 U.S. 428 (2000).

[40] *Fellers*, 397 F.3d at 1094. According to the court, *Elstad* was originally "premised on the fact that a violation of *Miranda* was not, by itself, a violation of the Fifth Amendment and on the fact that the protections afforded by the *Miranda* rule sweep more broadly than the Fifth Amendment itself." *Id.* The court apparently believed that *Dickerson*'s holding that *Miranda* is a constitutionally rooted doctrine was inconsistent with and, therefore, "undercut" this "justification." *Id.* In the Eighth Circuit's view, *Dickerson* "held that *Elstad*'s rationale rested not on the fact that *Miranda* was not a constitutionally mandated rule, but instead on the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Id.* The Court's decision in *United States v. Patane* made it clear that *Dickerson* did not contradict or even modify *any* of *Elstad*'s underpinnings. *See* United States v. Patane, 542 U.S. 630, 640–41 (2004) (plurality opinion) (indicating that *Dickerson* did not undermine the validity or the logic of *Elstad* and other pre-*Dickerson* opinions explaining the premises that underlie *Miranda*); *id.* at 645 (Kennedy, J., concurring in the judgment) (agreeing that *Dickerson* "did not undermine" *Elstad*). The *Elstad* Court did not rest its conclusion on the premise that *Miranda* has *no* constitutional foundation. Instead, it asserted that *Miranda*'s presumption of compulsion was somewhat overprotective, requiring suppression of some statements that are not, in fact, compelled and that *Miranda* violations are not necessarily violations of the Fifth Amendment privilege. Those premises survived *Dickerson* unscathed and are alive and well today.

[41] *Fellers*, 397 F.3d at 1094.

[42] *Id.* (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)).

[43] *Id.*

[44] *Id.* (emphasis added).

[45] *Id.*

confessions alleged to be the "fruits" of illegality.[46] According to the court of appeals, when a confession is obtained as a result of a failure to abide by the Fourth Amendment, "courts apply the exclusionary rule to ensure that the confession is not causally linked to the initial illegality."[47] The mere intervening delivery of *Miranda* warnings does not establish "an act of free will sufficient to break the causal connection between the violation and the confession" and does not guarantee that the unconstitutionality has not been unduly exploited.[48] On the other hand, when the official transgression is a failure to warn in violation of *Miranda*'s Fifth Amendment based dictates, the *Elstad* doctrine holds that a subsequent statement following the *Miranda* warnings is "normally viewed as" the product of "an 'act of free will'" sufficient to justify admission of that statement.[49] The reason for this differential treatment is the nature of the Fifth Amendment's core concerns—preventing the use of "compelled testimony" and "ensur[ing] that any evidence introduced at trial will be voluntary and thus trustworthy."[50] Despite an initial failure to warn, the introduction of a statement made after complete *Miranda* warnings and a valid waiver "entails no risk that compelled testimony will be used against a suspect."[51] Consequently, suppression of such a statement "neither deters violations of the Fifth Amendment nor ensures that the statement was not compelled" and "the ordinary exclusionary rule gives way to the *Elstad* rule" of admissibility.[52]

In the court's view, the *Massiah* doctrine's prohibition on "the use at trial of statements deliberately elicited" after indictment "serves to exclude uncounseled post-indictment statements taken in violation of the Sixth Amendment and thereby preserves the integrity and fairness of the criminal trial."[53] The Fifth Amendment based *Elstad* doctrine governed the Sixth Amendment violation in *Fellers* because the exclusion of the statements made *after* the officers satisfied *Massiah*'s requirements "would serve neither deterrence nor any other goal of the Sixth Amendment."[54] In *Fellers*, the officers did not refer to the uncounseled, in-home statements to "prompt" the incriminating jailhouse statements.[55] Moreover, they would have had a basis for the jailhouse questioning even if Fellers had not made prior statements, and the content of the defendant's jailhouse statements went well beyond the content of the initial,

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[46] *Id.* at 1094–95.

[47] *Id.* at 1095.

[48] *Id.*

[49] *Id.*

[50] *Id.* (citing Oregon v. Elstad, 470 U.S. 298, 306–08 (1985)).

[51] *Id.*

[52] *Id.* After *United States v. Patane*, 542 U.S. 630 (2004), it is quite incorrect to conclude that there is an "ordinary exclusionary rule" for *any* "fruits" of statements acquired in violation of *Miranda*. Because no derivative evidence is subject to exclusion, there is an ordinary, apparently inflexible, *admissibility* rule.

[53] *Fellers*, 397 F.3d at 1095.

[54] *Id.*

[55] *Id.* at 1095–96.

in-home statements obtained in violation of *Massiah*'s standards.[56] For these reasons, the introduction of the jailhouse statements "was not unfair to Fellers."[57]

According to the Eighth Circuit, it is a general, "historical" principle that "evidence acquired after a Sixth Amendment violation is excluded in the absence of proof that the Sixth Amendment violation did not contribute to or produce the subsequent evidence."[58] The introduction of Fellers's jailhouse statements was deemed fully consistent with this principle.[59] Despite the initial failure either to warn him or to ensure counsel's presence, Fellers was given *Miranda* warnings prior to his jailhouse statements.[60] His subsequent "knowing, intelligent, and voluntary choice to waive his right to counsel constitute[d] an intervening act of free will that [broke] the causal link between the prior uncounseled statements . . . and the subsequent statements."[61]

The court found further support for its conclusion that the *Elstad* rule extends to Sixth Amendment violations in the Supreme Court's emphasis on "the similarity between pre-indictment suspects subjected to custodial interrogation and post-indictment defendants subjected to questioning."[62] Specifically, in *Patterson v. Illinois*,[63] the majority had recognized that "there is no significant difference between a lawyer's usefulness to a suspect" in pre-indictment and post-indictment contexts and held that *Miranda* warnings generally provide sufficient information for a waiver of *Massiah*'s Sixth Amendment right to counsel.[64]

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[56] *See id.* at 1096.

[57] *Id.*

[58] *Id.* The court found this principle reflected in *United States v. Wade*, 388 U.S. 218 (1967). *Wade* held that if the government stages a post-indictment lineup without counsel, any subsequent, in-court identification of the accused by the same witness is inadmissible unless the government demonstrates, by clear and convincing evidence, that its origin was independent of the lineup—i.e., that the witness's in-court identification is based on observations of the accused other than those at the lineup. *Id.* at 239–40.

[59] *Fellers*, 397 F.3d at 1095–96.

[60] *Id.* at 1097.

[61] *Id.* at 1096.

[62] *Id.*

[63] 487 U.S. 285 (1988).

[64] *Fellers*, 397 F.3d at 1096–97 (citing *Patterson*, 487 U.S. at 293–94, 298–99). The Eighth Circuit found an additional acknowledgment of the similarity of *Miranda* and *Massiah* transgressions in the Court's conclusion that, like statements "taken in violation of *Miranda*, uncounseled statements obtained in violation of the Sixth Amendment may be used at trial for impeachment purposes." *Id.* at 1097. In fact, the Court has not yet decided whether statements obtained in violation of the Sixth Amendment are generally admissible to impeach a defendant. Instead, the Court has narrowly held that for one particular type of *Massiah* violation impeachment use is permissible, leaving the question of impeachment use unresolved for other types of Sixth Amendment transgressions. *See* Michigan v. Harvey, 494 U.S. 344, 345–46 (1990) (concluding that statements obtained in violation of the prophylactic safeguard that applies after an accused requests counsel are admissible to impeach the accused's testimony). It seems fair to say that a prime reason why the Court eschewed a broader holding regarding the permissibility of impeachment under *Massiah* is that the rationales for Sixth Amendment exclusion are ordinarily distinct from the rationales for exclusion under *Miranda*.

The court found no merit in the argument that the "psychological effect" of the statement that was improperly secured "inherently taints the second statement or coerces a post-indictment accused into expanding upon statements previously made because the first statement 'let the cat out of the bag.'"[65] The *Elstad* Court "squarely rejected" that same argument under *Miranda*, and the similarities between Fifth and Sixth Amendment settings made the *Elstad* "analysis . . . equally applicable in" *Fellers*.[66] Just as in an analogous situation involving a *Miranda* violation, "the condition that made [Fellers's initial] statements inadmissible . . . was removed" by the full warnings and valid waiver made prior to his jailhouse admissions.[67]

The court concluded its exhaustive reasoning by considering whether admission of the jailhouse statements was consistent with the Court's 2004 qualification of *Elstad* in *Missouri v. Seibert*.[68] *In Seibert*, a majority held that in some circumstances *Miranda* warnings that follow initial *Miranda* violations are *ineffective*.[69] According to the Eighth Circuit, under both the *Seibert* plurality's multi-factor test and the standard developed in Justice Kennedy's concurrence, the conduct of the officers in *Fellers* did not "vitiate the effectiveness of the *Miranda* warnings given" to the accused.[70] The officers provided Fellers with the information necessary to choose whether he wished to make additional incriminating statements.[71]

II. THE ROAD NOT TRAVELED BY THE SUPREME COURT: SHOULD *OREGON V. ELSTAD* GOVERN SIXTH AMENDMENT EXCLUSION?[72]

This section analyzes the Sixth Amendment exclusionary rule issue that the Supreme Court remanded and the Eighth Circuit decided. Initially, I reflect upon

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[65] *Fellers*, 397 F.3d at 1097 n.2.

[66] *Id.*

[67] *Id.* at 1097.

[68] *Id.* at 1098 (discussing Missouri v. Seibert, 542 U.S. 600 (2004)).

[69] *Seibert*, 542 U.S. at 612–13 (emphasis added).

[70] *Fellers*, 397 F.3d at 1097–98. The Court applied both the four Justice plurality standard and Justice Kennedy's separate standard because Justice Kennedy's vote was essential to the outcome and holding in *Seibert*. In fact, his narrower specification of the circumstances in which *Miranda* warnings ought to be deemed ineffective to accomplish their purposes prescribes the governing law. *See infra* text accompanying notes 164–76.

[71] *Fellers*, 397 F.3d at 1097. For good measure, and perhaps to insulate its holding from reversal even if its analysis of the Sixth Amendment exclusionary rule issue proved faulty, the court added that the admission of the jailhouse statements "was harmless beyond a reasonable doubt." *Id.* at 1098. It is clear that the admission of evidence in violation of the *Massiah* doctrine can be a harmless constitutional error. *See* Milton v. Wainwright, 407 U.S. 371, 372 (1972).

[72] As noted earlier, the Court refused to address the exclusionary rule issue the first time, remanding it to the Eighth Circuit. *See supra* notes 31–33 and accompanying text. After that court's decision, the Supreme Court again refused to address the question, denying Fellers's petition for review. Fellers v. United States, 126 S. Ct. 415 (2005).

the Court's decision not to analyze the applicability of the *Elstad* rule to Sixth Amendment deprivations. I then examine at length the reasoning and premises that support the *Elstad* doctrine, discussing not only *Elstad* itself, but subsequent opinions that have shed light on its meaning. After that, I turn my attention to the *Massiah* doctrine's Sixth Amendment exclusionary rule in an effort to ascertain and describe its underlying logic and rationales. With a complete foundation in place, I turn, at last, to the central question—whether extension of the rule of *Oregon v. Elstad* to Sixth Amendment contexts is constitutionally defensible.

A. The Decision Not to Address the Exclusionary Rule Issue: The Court Steers Around the Massiah-Elstad *Collision*

As already noted, *Fellers* presented the Court with two separable but related questions. Both were fully briefed and argued. The first was whether the officers' conduct at the accused's home even implicated his right to counsel—i.e., whether the officers engaged in conduct that the Sixth Amendment entitlement to legal assistance provides shelter against. The second question—based on the assumption that there was an initial Sixth Amendment transgression—was whether the statements the accused made later at the jail were admissible under the rule of *Oregon v. Elstad*. It seemed likely that the Court would quickly dispense with the first question, ruling in Fellers's favor and would then devote primary attention to the exclusionary rule issue.[73] The Court did exactly as expected with regard to the substantive Sixth Amendment issue, but then sidestepped the much more interesting, challenging, and complex exclusionary rule question.

There is nothing astounding about a Supreme Court decision not to address an issue on which it has granted review. The decision to avoid the *Elstad* question in *Fellers*, however, was somewhat surprising because it required, at best, a strained reading of the Eighth Circuit's initial opinion. According to the Court, a remand was in order because the lower court's opinion simply had not addressed the issue.[74] Instead, because the Eighth Circuit majority had erroneously concluded that the absence of interrogation

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[73] Most observers surely thought that the second question was the one that really merited Supreme Court review. The parties' briefs reflected an expectation that the exclusionary rule question would be the focus of most attention and concern by the Court. Fellers's initial brief devoted approximately seven pages to the first issue and approximately twenty-five to the second. *See* Brief for Petitioner, Fellers v. United States, 540 U.S. 519 (2004) (No. 02–6320). His reply brief devoted three pages to the first issue and nearly sixteen to the second. *See* Reply Brief for Petitioner, *Fellers*, 540 U.S. 519. The United States's brief devoted roughly nine pages to the first issue and nearly twenty-eight to the second. *See* Brief for the United States, *Fellers*, 540 U.S. 519.

[74] *See Fellers*, 540 U.S. at 525. The other reason for the remand was that the Justices themselves had never addressed the applicability of *Elstad* to Sixth Amendment deprivations. *See id.*

precluded a *Massiah* violation, it had "improperly conducted its 'fruits' analysis under the Fifth Amendment."[75]

The Eighth Circuit's apparent conclusion that the officers' failure to interrogate defeated Fellers's Sixth Amendment claim did provide a logical basis for inferring that the court had not conducted a Sixth Amendment based exclusionary rule analysis.[76] On the other hand, without interrogation (or custody, for that matter), *Miranda*'s Fifth Amendment doctrine was entirely, unarguably inapposite. The Eighth Circuit had positively no reason to conduct a Fifth Amendment "fruits" analysis, and its terse opinion contains no overt indication that its discussion of *Elstad* was rooted in or confined to the Fifth Amendment context.[77] Because a *Miranda* claim lacked any possible merit

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[75] *Id.*

[76] I say "apparent" conclusion because of the somewhat opaque and contradictory nature of the court's reasoning. The majority opinion first "conclude[d] that *Oregon v. Elstad* . . . render[ed] admissible the statements made by Fellers at the jail." United States v. Fellers, 285 F.3d 721, 724 (8th Cir. 2002), *rev'd*, 540 U.S. 519 (2004). Because the *Elstad* doctrine governs successive confessions *following an initial impropriety*, there would be no reason to rely upon it unless an initial violation of some sort had occurred. The court then observed that Fellers relied upon *Patterson v. Illinois*, 487 U.S. 285 (1988), to support his argument that "the officers' failure to administer *Miranda* warnings at his home violated his [S]ixth [A]mendment right to counsel." *Fellers*, 285 F.3d at 724. The court responded that "*Patterson* [was] not applicable . . . for the officers did not interrogate Fellers at his home." *Id.* Although the court did not explicitly state that the right to counsel hinges on official interrogation, the declaration that *Patterson* was "not applicable" because the officers "did not interrogate Fellers" surely was an indirect way of expressing that conclusion. *Id. Patterson* is a Sixth Amendment *Massiah* doctrine holding that *Miranda* warnings contain most if not all of the information needed for a knowing waiver of the right to counsel. *Patterson*, 487 U.S. at 292–93. By deeming it inapplicable, the court *was* indicating that the officers conduct was insufficient to require a valid waiver of the right to assistance. In other words, it had not given rise to any entitlement to counsel. That alone would have been a more than adequate basis for declaring *any and all* statements made by Fellers to be admissible. The court, however, proceeded to obfuscate its reasoning by then concluding that "the district court did not err in" refusing to suppress the jailhouse statements because "the record amply support[ed] the . . . finding that [those] statements were knowingly and voluntarily made following . . . *Miranda* warning[s]." *Fellers*, 285 F.3d at 724. The court cited *Elstad* for support. *Id.* Once again, there was no reason to rely on *Elstad* to justify admission of the jailhouse statements if there was no transgression during the encounter at Fellers's home. Any effort to explain these inconsistencies by inferring that the court was denying a right to counsel violation but affirming a *Miranda* violation founders on the fact that "interrogation" *is* an invariable predicate for *Miranda* protection.

In sum, although the Eighth Circuit did assert, albeit somewhat obliquely, that the absence of interrogation at his home defeated Fellers's Sixth Amendment claim, the court twice explained the admissibility of the jailhouse statements on a basis that assumed the existence of an official impropriety during the in-home encounter. Logical reconciliation of the court's premises seems impossible.

[77] The description of the progress of the case in the decision on remand suggests that the Eighth Circuit itself may not have agreed with the Supreme Court's characterization of its initial opinion. The court observed that it had previously "upheld Fellers's conviction against

and because Fellers had argued that the failure to warn him "violated his [S]ixth [A]mendment right to counsel,"[78] perhaps a more logical interpretation of the lower court's reasoning was that it first found no right to counsel deprivation, then concluded that *even if* there had been a Sixth Amendment transgression, the jailhouse statements were immune from suppression under *Elstad*. In other words, it seems likely that the Eighth Circuit's ambiguous discussion of *Elstad was*, in fact, grounded in the Sixth Amendment, not in *Miranda*'s patently irrelevant Fifth Amendment doctrine.

The Supreme Court's questionable characterization of the lower court's logic suggests a deliberate decision to avoid the Sixth Amendment exclusionary rule issue despite a thorough adversarial presentation of the arguments. Presented with opportunities not only to provide a definitive answer to the narrow *Elstad* question, but also to fill a serious void by explaining the rationales for Sixth Amendment-*Massiah* doctrine suppression, and, thereby, to furnish guidance for the resolution of other Sixth Amendment exclusionary rule issues, the Court opted to give the court of appeals the first chance to address the question.[79]

It is undeniably risky to speculate about the meaning of the Court's cautious handling of *Fellers*. Nonetheless, it is at least possible, perhaps even likely, that the decision to bypass the Sixth Amendment-*Elstad* question evinces a genuinely open mind about *Elstad*'s relevance to *Massiah* violations.[80] After all, the Justices all joined an opinion emphasizing that Sixth Amendment "fruits" analysis is distinct from Fifth Amendment "fruits" analysis. Moreover, if a majority had been convinced that *Elstad* governs, there would have been no good reason for its questionable interpretation of the lower court's reasoning. In addition, Justice O'Connor's opinion lacks the slightest hint about the merits of the remanded question. The absence of any effort to guide or influence the lower court's resolution could be further evidence of genuine indecision.[81]

Fifth and Sixth Amendment challenges and held that Fellers's jailhouse statements were admissible under *Oregon v. Elstad*." United States v. Fellers, 397 F.3d 1090, 1093 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005). It then noted that the "Supreme Court reversed our decision and concluded that the officers had deliberately elicited the statements made at Fellers's home in violation of Fellers's Sixth Amendment right to counsel" before remanding the question of whether *Elstad*'s rationale applies to Sixth Amendment violations. *Id.* At no point did the court acknowledge that the reliance on and discussion of *Elstad* in its initial opinion had been a misguided Fifth Amendment fruits analysis rather than a confusing Sixth Amendment fruits analysis.

[78] *Fellers*, 285 F.3d at 724 (basing his argument on *Patterson*, 487 U.S. 285, a Sixth Amendment *Massiah* doctrine precedent).

[79] Because the Court did not grant review of the Second Circuit court decision, the effect of the remand was to give the Eighth Circuit not only the first but the final word on the subject—at least for now. Perhaps this outcome was predictable in light of the Court's past hesitation to wade far into Sixth Amendment exclusionary rule waters. *See infra* text accompanying notes 225–71.

[80] The intent is not to suggest that *all* of the Justices are undecided about *Elstad*'s application to Sixth Amendment deprivations but, rather, that a determinative number of Justices may well be open to persuasion on the question.

[81] On the other hand, I suppose it is possible that the Justices, early on, discovered a way they

As noted, the Eighth Circuit had no doubt that *Elstad* does apply to deprivations of the right to counsel. Whether that conclusion can withstand constitutional scrutiny depends, in part, on the character of the *Elstad* doctrine and, in part, on the character of the Sixth Amendment "exclusionary rule." I turn first to an in-depth exploration of *Elstad.*

B. The Meaning and Significance of Oregon v. Elstad

1. The Holding and Reasoning of the *Elstad* Majority: Why *Miranda* Doesn't Care Whether the Cat Is out of the Bag

Oregon v. Elstad[82] has proven to have major theoretical and practical significance for *Miranda* law. Its conception of the rationales for *Miranda* suppression has provided a foundation for limiting that landmark's practical consequences, a foundation likely to have lasting impact. Its holding that unwarned custodial interrogation that yields admissions *ordinarily* provides no basis for excluding "successive" statements—those made following compliance with *Miranda*'s dictates[83]—diminishes the significance of a *Miranda* violation[84] and expands the power to effectively investigate and successfully prosecute.

In *Elstad*, officers went to a young man's home to investigate a burglary.[85] While the suspect was still in his home, an officer interrogated him and secured an

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might dodge the exclusionary rule question and decided to exercise that option, giving little real thought to whether a different outcome might really be warranted under the Sixth Amendment.

[82] 470 U.S. 298 (1985).

[83] *Id.* at 306–07.

[84] The *Elstad* majority specifically and repeatedly limited its holding to *Miranda* violations of the "failure to warn" variety. *See, e.g., id.* at 307–08, 310–11, 312. It seems likely that *Elstad*'s logic and its principle of admissibility would be extended to situations in which an initial statement results not from a failure to warn, but from an invalid waiver of rights, and a successive statement is made after full compliance with *Miranda*'s dictates. The *Elstad* majority did declare "inapposite" cases that involved "suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." *Id.* at 313 n.3. One analytical problem in such cases is that after officers have failed to honor the additional doctrinal safeguards that arise upon a suspect's invocation of either right, it may be difficult for them to later comply with *Miranda*'s dictates. In other words, if officers fail to "scrupulously honor[]" the right to cut off questioning, *see* Michigan v. Mosley, 423 U.S. 96, 103 (1975), or if they "initiate communications" following a clear request for counsel, *see* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981), they may not be able to eliminate the effects of their impropriety and conduct a custodial interrogation that does adhere to *Miranda*'s commands. Assuming that either time or curative steps can clean the slate and enable officers to satisfy *Miranda* at a subsequent session, the *Elstad* principle—that a successive confession is not tainted by the earlier violation and initial confession—may well apply.

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

incriminating admission.[86] Shortly thereafter, at the police station, the suspect was given complete *Miranda* warnings, waived his rights, and responded to interrogation with additional admissions.[87] The Oregon Court of Appeals concluded that the *Miranda* violation dictated exclusion of both the initial confession and the post-warning statements.[88] In its view, the improperly obtained admission had "let the cat out of the bag."[89] The resulting psychological impact upon the suspect—his awareness that he had already confessed his guilt to the officers—"impaired [his] ability to give a valid waiver."[90] According to the Oregon court, when officers initially fail to warn a suspect, obtain an inadmissible confession, then comply with *Miranda*'s requirements and secure a successive confession, the latter is presumptively barred from trial.[91] Exclusion is necessary *unless* the prosecution proves that intervening events—the passage of time and a change in location, for example—"dissipate[d] . . . the 'coercive impact' of the inadmissible statement."[92]

Six Justices disagreed with this reasoning. In an opinion authored by Justice O'Connor, they concluded that the initial *Miranda* violation did *not* justify suppression of Elstad's post-warning statement.[93] Rather, the intervening adherence to *Miranda* had cured the Fifth Amendment infirmity and rendered the second statement admissible.[94] The majority offered an array of reasons for its holding that the *Miranda* exclusionary doctrine does not encompass such a successive confession. To determine whether *Elstad* should govern right to counsel deprivations, it is critical to identify and explain the Court's logic.[95]

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[86] *Id.* at 301. The Court intimated that whether the suspect was in custody at the time was a debatable question and that the officer's failure to warn was an "oversight" that "may have been the result of confusion" about whether he was conducting a custodial interrogation. *Id.* at 315–16. The plurality in *Missouri v. Seibert* relied on this characterization of the encounter in concluding that "it is fair to read *Elstad* as treating the living room conversation [between the officer and suspect] as a good-faith *Miranda* mistake, . . . open to correction by careful warnings." *See* Missouri v. Seibert, 542 U.S. 600, 615 (2004) (plurality opinion). The "good-faith" nature of the violation was among the reasons the *Seibert* plurality later found that *Elstad* did not govern deliberate strategic decisions to neglect *Miranda* warnings—the situation at issue in *Seibert*. *Id.* at 616; *see also id.* at 619–20 (Kennedy, J., concurring in the judgment) (highlighting the distinction between *Elstad*, in which it was "not clear whether the suspect was in custody," and *Seibert*, which involved "a deliberate violation of *Miranda*" used "to obscure . . . the . . . significance" of warnings).

[87] *Elstad*, 470 U.S. at 301.

[88] *Id.* at 303, 309–10.

[89] *Id.* at 311.

[90] *Id.* at 310.

[91] *Id.* at 303, 310.

[92] *Id.* at 310.

[93] *Id.* at 300.

[94] *Id.* at 310–11, 314.

[95] I agree with Justice Stevens that the reasoning of the majority opinion is, at least at times, "opaque." *See id.* at 365 (Stevens, J., dissenting). The effort here is to explain the underlying premises as clearly as possible. Fortunately, some clarifying insights have been provided by

One important premise was that *Miranda* had "required suppression of many statements that would have been admissible under [the] traditional due process" coerced confession doctrine.[96] By "presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment,"[97] the *Miranda* Court had erected a significant and novel impediment to the government's freedom to use confessions to convict. Another key underpinning of *Elstad* was that the Fourth Amendment's "'fruit of the poisonous tree'" doctrine, which presumptively bars all evidence with a causal connection to government misconduct, "assumes the existence of *a constitutional violation*."[98] In other words, it dictates the exclusion of derivative evidence[99] *only* for those official, out-of-court improprieties that actually violate constitutional rights. Because a "procedural *Miranda* violation" is not itself a violation of the Fifth Amendment, there is no "mandate[]" for "a broad application of the 'fruits' doctrine" to *Miranda* transgressions.[100]

The Elstad Court did acknowledge that *Miranda*'s "exclusionary rule . . . serves the Fifth Amendment," but it asserted that the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation."[101] This is so because "[a] *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal *presumption* of coercion, requiring suppression of all unwarned statements."[102] In other words, the presumption established by *Miranda*, which renders inadmissible all statements made during unwarned custodial interrogation, results in the suppression of some statements that are not

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subsequent opinions.

[96] *Id.* at 304 (majority opinion). Prior to *Miranda*, the Due Process Clause was *the* source of constitutional protection against convictions based on confessions produced by official coercion. Confessions were inadmissible if, in the totality of the circumstances, the suspect's will had been overborne. *See* Spano v. New York, 360 U.S. 315, 323 (1959). The Court first declared a confession inadmissible on due process grounds in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). In the three decades between that ruling and *Miranda*, the Court had explained, applied, and developed the due process-coerced confession doctrine in numerous cases. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960); Payne v. Arkansas, 356 U.S. 560 (1958); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lisenba v. California, 314 U.S. 219 (1941). The relevant circumstances identified by the Court included not only the pressures brought to bear by the authorities, but the characteristics of the suspect that made him more susceptible to those pressures. *See* Dickerson v. United States, 530 U.S. 428, 434 (2000) ("The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973))).

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

[98] *Id.* at 305 (emphasis added).

[99] "Primary" evidence is evidence secured as the immediate result of an unconstitutionality or other impropriety. "Derivative" evidence is evidence that is subsequently acquired as a result of a short or long chain of events causally linked to the initial transgression.

[100] *Elstad*, 470 U.S. at 306.

[101] *Id.*

[102] *Id.* at 307 n.1 (second emphasis added).

actually compelled, and, therefore, are not in fact forbidden by the Fifth Amendment privilege.[103] When a voluntary (not compelled) statement is kept from the courtroom, "*Miranda*'s preventive medicine provides a remedy . . . to the defendant who has suffered no identifiable constitutional harm."[104]

The *Elstad* majority declared that *Miranda*'s overbroad presumption "does not require" that the fruits of inadmissible statements "be discarded as inherently tainted,"[105] finding ample support for this proposition in *Michigan v. Tucker*.[106] In Tucker, a witness was discovered as a result of statements a suspect made without receiving complete *Miranda* warnings.[107] The admissibility of the witness's testimony was at issue.[108] According to *Elstad*, because "there was no actual infringement of the suspect's constitutional rights" but only a violation of *Miranda*'s prophylactic dictates, "the case was not controlled by the doctrine . . . that fruits of a constitutional violation must be suppressed."[109] To determine whether the fruit of a *Miranda* violation—in this case, the witness's testimony—had to be suppressed, the *Tucker* majority was guided by the two ostensible purposes for exclusion under *Miranda*: the "general goal of deterring improper police conduct" and "the Fifth Amendment goal of assuring trustworthy evidence."[110] Because exclusion of the witness's testimony would have furthered neither objective, the *Tucker* Court "ruled that introduction of [that] testimony did not violate" the Fifth Amendment and declared it admissible.[111]

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[103] Not long before the opinion in *Elstad*, the Court relied on this very same distinction to create a "public safety" exception to *Miranda*. *See* New York v. Quarles, 467 U.S. 649, 654, 655 n.5 (1984) (distinguishing between statements that are "actually compelled" and those that "must be *presumed* compelled" because of a failure to give *Miranda* warnings).

[104] *Elstad*, 470 U.S. at 307. Justice O'Connor apparently meant that the suspect *had* suffered no constitutional rights deprivation during custodial interrogation and *would* suffer no such deprivation *if* his statements were to be admitted at trial.

[105] *Id.* The Court also observed that statements themselves are not discarded as inherently tainted. Support for that proposition was found in *Harris v. New York*, 401 U.S. 222 (1971), which held that statements obtained without proper warnings may be used to impeach an accused's inconsistent direct testimony. *Id.* at 226.

[106] 417 U.S. 433 (1974).

[107] *Id.* at 436.

[108] *Id.* at 435.

[109] *Elstad*, 470 U.S. at 308.

[110] *Id.* Later, I question the Court's restrictive description of the second goal as "trustworthiness" alone. *See infra* note 212.

[111] *Elstad*, 470 U.S. at 308. The Fifth Amendment goal of assuring trustworthy evidence was not threatened because the failure to warn the suspect and provide a safeguard against the compulsion produced by custodial interrogation did not generate any risk that the third-party witness's testimony would in any way be unreliable—i.e., that it would misleadingly, inaccurately inculpate the accused and yield injustice. *See Tucker*, 417 U.S. at 449. The objective of deterring failures to adhere to *Miranda* was not undermined because that goal "necessarily assumes . . . willful, or at the very least negligent, conduct" by officers. *Id.* at 447. "[T]he deterrence rationale" for suppressing evidence "loses much of its force" in cases involving "good faith" violations by officers. *Id.* In *Tucker*, there could be no doubt that the

Having construed *Tucker* expansively, the *Elstad* majority announced that that opinion's "reasoning" about the scope of *Miranda* exclusion "applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony."[112] According to Justice O'Connor, the "twin rationales" for a "broader [exclusionary] rule"—"trustworthiness and deterrence"—are undercut by "the absence of any [actual] coercion or improper tactics."[113] Put otherwise, when officers merely violate *Miranda*'s prophylactic safeguards, neither of the aims of *Miranda* exclusion can justify the exclusion of evidence other than the accused's statements. Although this was dictum, the Court was effectively declaring that all evidentiary products of a statement obtained without *Miranda* warnings—witness testimony, tangible evidence, or subsequent "voluntary" statements by the suspect himself—are outside the reach of *Miranda*'s exclusionary doctrine. Despite a causal connection to the *Miranda* transgression, "derivative" evidence is not presumptively inadmissible.[114]

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failure to warn the suspect "of his right to appointed counsel" was in complete good faith because it "occurred prior to the decision in *Miranda*." *Id.* Consequently, the Court did not believe that excluding the witness's testimony would "significantly augment[]" any deterrent effect "on future police conduct" produced by suppressing the suspect's statements. *Id.* at 448.

The *Tucker* majority specifically refused to rule on the question of whether "evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place," preferring to rest on the "narrower ground" that evidence derived from pre-*Miranda* violations need not be excluded. *Id.* at 447. It is significant that the *Elstad* majority did not acknowledge the narrowness of *Tucker*'s holding and reasoning. Instead, Justice O'Connor depicted *Tucker* as a broad ruling that neither objective of *Miranda* suppression is ever served by excluding derivative evidence, be it a witness's testimony or any other "article of evidence." *Elstad*, 470 U.S. at 308.

[112] *Elstad*, 470 U.S. at 308.

[113] *Id.* The use of the phrase "improper tactics" as an alternative to "coercion" on more than one occasion is one of the sources of *Elstad*'s opaqueness. *See supra* note 92. The Court did not explain what it meant by "improper tactics" and thus left unclear the contours of the category of cases that would not be governed by the *Elstad* rule of admissibility.

[114] Justice Brennan highlighted and was alarmed by the Court's deliberately broad pronouncements about the "fruits" of *Miranda* violations, but observed that these declarations were not a part of the holding. *Elstad*, 470 U.S. at 319 n.2 (Brennan, J., dissenting). The Court's apparent elimination of any derivative evidence principle under *Miranda* was dictum because the only evidence at issue was a "voluntary" statement made after subsequent compliance with *Miranda*. Physical or other evidence that was acquired without any intervening exercise of free will by the suspect or anyone else was arguably distinguishable from the successive confession involved in *Elstad* because the exercise of free will can attenuate a connection between an impropriety and derivative evidence. *See* United States v. Ceccolini, 435 U.S. 268, 277 (1978) (asserting that free will exercised by witness discovered by means of unreasonable search is important factor in determining whether it is sufficiently attenuated from illegality to justify admission); Brown v. Illinois, 422 U.S. 590, 602 (1975) (concluding that confession secured by means of illegal arrest is admissible under attenuation exception only if the decision to confess was "'sufficiently an act of free will to purge the primary taint'" (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))). In fact, much of the remaining reasoning of the

The Court distinguished "errors . . . in administering the prophylactic *Miranda* procedures" from "police infringement of the Fifth Amendment itself"[115]—that is, from cases in which there is proof that officers have *actually* compelled a suspect to speak.[116] Mere *Miranda* "errors," according to Justice O'Connor, "should not breed the same irremediable consequences" as genuine, proven compulsion.[117] A conclusion that the "simple failure to administer the warnings," absent proof of "any actual coercion" or other undermining of a suspect's "free will," precludes "a subsequent voluntary and informed waiver . . . for some indeterminate period," would have been "an unwarranted extension of *Miranda*."[118] Instead, "the admissibility of any subsequent statement should turn . . . *solely* on whether it is knowingly and voluntarily made."[119] In other words, in cases involving successive confessions following initial failures to warn, the analysis should focus exclusively on whether compliance with *Miranda* preceded the second confession. The initial *Miranda* violation has no bearing on the second confession's admissibility.

The majority could have ended its opinion at this point, reversing the suppression of the post-warning confession on the broad, general ground that neither the interest in avoiding compelled self-incrimination and in preventing the potentially erroneous convictions that result from extorted statements nor the interest in ensuring that officers abide by the *Miranda* scheme justify the exclusion of voluntary confessions that follow initial unwarned confessions. The Court opted to continue, however, focusing more

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Elstad majority had relied heavily upon the exercise of free will by the suspect preceding his second confession, a factor that is often not present when officers follow the leads provided by a suspect's admissions to other inculpatory evidence.

[115] *Elstad*, 470 U.S. at 309.

[116] It is noteworthy that the Court subsequently held that actual compulsion of a suspect to speak is *not* a violation of the Fifth Amendment privilege itself because that guarantee is a courtroom protection against *conviction* based on compelled statements. *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion); *id.* at 777–79 (Souter, J., concurring in the judgment).

[117] *Elstad*, 470 U.S. at 309. This is the first of a number of misleading suggestions (or, perhaps, "strawmen") in Justice O'Connor's opinion. No one had contended that the consequences of a failure to warn should be "irremediable." The argument was that a failure to warn should be presumed to have continuing effects beyond subsequent *Miranda* warnings, and the state should have the burden of demonstrating that a later statement was not the product of those effects. Even in situations where actual coercion produces an initial confession, it is possible to "remedy" the wrong and secure an admissible statement by taking steps to eradicate the impact of the coercion. *See id.* at 310 ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether the coercion has carried over to the second confession."); *see also* Missouri v. Seibert, 542 U.S. 600, 628 (2004) (O'Connor, J., dissenting) ("*Elstad* commands that if [a] first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances."). No one suggested otherwise.

[118] *Elstad*, 470 U.S. at 309.

[119] *Id.* (emphasis added).

specifically on the topic of successive confessions and on the logical missteps that led Oregon to suppress Elstad's second admission.

The state court had declared the second statement inadmissible because of the "'coercive impact' of the inadmissible statement," which could only be "dissipate[d]" by a "lapse of time and change of place."[120] Justice O'Connor again observed that a mere failure to warn "does not mean" that an initial statement has "actually been coerced" but instead merely gives rise to a presumption that "the privilege against compulsory self-incrimination has not been intelligently exercised."[121] Consequently, there is no basis to assume that coercion has carried over to a subsequent confession and to require the government to prove otherwise. The condition that renders the first statements inadmissible—the absence of warnings—is cured by "a careful and thorough administration of *Miranda* warnings" prior to a second statement.[122] The warnings equip the suspect to make an adequately informed and free choice, eliminating any basis for presuming compulsion and excluding a post-warning admission.

The Oregon court's reliance on the "subtle form of lingering compulsion" generated by a "suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate," was also misguided.[123] According to the *Elstad* majority, "the psychological impact of *voluntary* disclosure of a guilty secret [does not] qualif[y] as state compulsion or compromise[] the voluntariness of a subsequent informed waiver."[124] To exclude a post-warning statement on this ground would be to "disable the police from obtaining . . . informed cooperation" and "immunize[] a suspect . . . from the consequences of his . . . informed waiver" even though the statement at issue was not, in fact, the product of any "official coercion."[125] In sum, "[w]hen neither the initial nor the subsequent admission is coerced," there is no Fifth Amendment justification for "permitting [a] highly probative . . . voluntary confession to be irretrievably

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[120] *Id.* at 310.

[121] *Id.* I have always found this turn of phrase to be odd and misguided. The question surely is not whether an individual has made an informed or wise choice to exercise his right not to be compelled to be a witness against himself. When a suspect chooses to speak, he is not electing to forego that right—i.e., he has not decided to allow officials to break his will. It seems far preferable to describe the effect of a failure to warn as a "presumption that a suspect has been compelled to speak." The *Elstad* majority, however, cannot be faulted as the source of this misdescription. Chief Justice Warren used the same language in *Miranda* itself. *See* Miranda v. Arizona, 384 U.S. 436, 468 (1966) (holding that a warning of the "right to remain silent" is a "threshold requirement for an intelligent decision as to [the] exercise" of the privilege); *id.* at 469 (stating that only by warning suspect of "consequences of forgoing" the privilege can there "be any assurance of real understanding and intelligent exercise of the privilege").

[122] *Elstad*, 470 U.S. at 310–11.

[123] *Id.* at 311.

[124] *Id.* at 312 (emphasis added). *Miranda*'s prophylactic safeguards require that the suspect's disclosure of the guilty secret be *presumed* to be compelled; but that disclosure is *actually* voluntary because there has been no specific proof that it was, in fact, forced from the suspect's mind against his will. *Id.* at 307.

[125] *Id.* at 311–12.

lost to the factfinder."[126] The "high cost to legitimate law enforcement activity" imposed by suppression is not counterbalanced by any protection that would be gained for "the individual's interest in not being *compelled* to testify against himself."[127]

The majority perceived a genuine "causal distinction between" initial confessions that are the product of actual coercion and those that result from a mere failure to warn.[128] There is reason to fear "the direct consequences flowing from [actual] coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will"[129] because the official pressures that overcame the suspect's will are likely to have continuing influence. On the other hand, the "consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question" are "uncertain."[130] When the official misconduct is a mere failure to warn, the consequences are uncertain because it is unknown whether there is "any psychological disadvantage created by [the unwarned] admission" and unclear whether any disadvantage affected the "ultimate decision to cooperate" by making a second statement.[131] In such circumstances, "[i]t is difficult to tell with certainty what motivates a suspect to speak."[132] Thus, the mere making of "an unwarned admission does not warrant a presumption of compulsion."[133] The "administration of *Miranda* warnings" prior to a second statement "should suffice to remove the conditions that precluded admission of the earlier statement."[134]

The majority concluded its opinion by turning its attention briefly to the specific facts of *Elstad*. It determined that there had been no actual coercion initially and that the waiver prior to the suspect's second inculpatory statement was knowing and voluntary.[135] Therefore, under the principles the Court had endorsed, the defendant's

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[126] *Id.* at 312.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 313. The Court noted that in the particular circumstances of *Elstad*, "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate [was] speculative and attenuated at best." *Id.* at 313–14.

[132] *Id.* at 314.

[133] *Id.*

[134] *Id.* One might view this as a sort of "presumptive attenuation" resulting from compliance with *Miranda*. Under the Fourth Amendment, the government has the burden of showing a sufficient weakening of the causal link; *Miranda* warnings alone do not suffice. *See* Brown v. Illinois, 422 U.S. 590, 603 (1975) (rejecting a per se rule that compliance with *Miranda*'s dictates attenuates the connection between an illegal arrest and a confession). For *Miranda* violations, that burden is effectively carried by satisfying *Miranda*'s requirements before the successive confession is made. *Elstad*, 470 U.S. at 314.

[135] *Elstad*, 470 U.S. at 314–16. Elstad had argued that the waiver was not "*informed* . . . because he was unaware that his prior statement could not be used against him." *Id.* at 316. The majority replied that a waiver is valid even though a suspect might not be aware of the inadmissibility of his first statement. *Id.* First, it would not be "practicable" to tell a suspect

police station confession was admissible. In a concluding section, the majority did return to generalities in what appears to have been an effort to downplay the *Miranda*-corrosive nature of its ruling. According to the majority, it had "in no way retreat[ed] from the bright-line rule of *Miranda*," had not "impl[ied] that good faith excuses a failure" to warn, and was not "condon[ing] inherently coercive police tactics or methods offensive to due process . . . ."[136] Moreover, the majority was not "establishing a rigid rule," but instead was holding that "there is no warrant for presuming coercive effect" where an initial statement, though "technically" obtained "in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made."[137] This approach was appropriate because "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony" can be "satisfied" without suppressing successive confessions and because "[n]o further purpose is served" by barring admissions that follow "a voluntary and knowing waiver."[138] In sum, the Court had merely held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[139]

2. Potential Retreats from the Logic of *Elstad*: The Court's Opinions in *Withrow* and *Dickerson*

For almost twenty years, the Court provided little insight into the scope or meaning of *Elstad*. During that time there were two opinions that did suggest that the Court might be backing away from some of *Elstad*'s more expansive reasoning. This section examines those opinions and their potential implications.

In *Withrow v. Williams*,[140] the Court surprised analysts by construing *Miranda*'s exclusionary rule *more broadly* than the Fourth Amendment rule.[141] The *Elstad* majority had indicated that the Fourth Amendment exclusionary rule had a deservedly

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that his statement is inadmissible. *Id.* More important, "complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case" is not necessary to establish a valid, sufficiently knowing waiver. *Id.* at 317.

[136] *Id.* at 317.

[137] *Id.* at 318 (footnote omitted).

[138] *Id.*

[139] *Id.* In dissent, Justice Stevens observed that he found "nothing objectionable" in this formulation of the majority's holding. *Id.* at 364 (Stevens, J., dissenting). In fact, this summary of the *Elstad* rule was misleading. Neither the defendant nor the Oregon court had suggested that a failure to warn should permanently *disable* a suspect who has confessed from subsequently waiving his rights. A more accurate description of the holding would have been considerably broader. In truth, the Court held that a failure to warn alone provides no basis for excluding a subsequent confession made after officers have complied with *Miranda*'s dictates. Moreover, in dictum, it powerfully indicated that there was no basis for excluding *any* derivative evidence under *Miranda*. *See supra* text accompanying notes 112–14.

[140] 507 U.S. 680 (1993).

[141] *Id.* at 691.

broader sweep than *Miranda* exclusion—a "fruits" doctrine that suppressed derivative evidence, for example—because its targets were actual violations of genuine constitutional rights, not mere failures to abide by overbroad prophylactic safeguards.[142] In *Withrow*, a five Justice majority held that a *Miranda* claim is cognizable on habeas corpus review even without a showing that the state courts denied a full and fair hearing of the claim.[143] This more generous treatment of *Miranda* exclusion was clearly rooted in the differences in the objectives of Fourth Amendment and *Miranda* suppression. The suppression of evidence secured in violation of the Fourth Amendment prohibition on unreasonable searches and seizures is a mere deterrent device aimed at future illegalities but powerless to remedy any present wrong. The exclusion of evidence under *Miranda*, however, "safeguards 'a fundamental trial right'"—the privilege against compulsory self-incrimination—and does so at the time the suppression occurs.[144] By keeping potentially compelled statements from the courtroom, the *Miranda* rule prevents Fifth Amendment violations at trial and preserves the critical interests and values that underlie that guarantee.[145] This justifiable but nonetheless remarkable account of the vital functions *Miranda* exclusion plays in shielding a fundamental constitutional freedom stood in dramatic contrast to *Elstad*'s emphasis on the costly constitutional overbreadth of *Miranda* suppression and the distinct, repeated intimations that the prophylactic objectives of *Miranda* exclusion are less worthy and more easily outweighed than the aims of Fourth Amendment exclusion. Although the *holdings* of *Withrow* and *Elstad* were reconcilable,[146] the two opinions' *attitudes* toward *Miranda*-based suppression seemed worlds apart.[147]

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[142] *Elstad*, 470 U.S. at 306.

[143] *Withrow*, 507 U.S. at 683–84. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court held that the balance of interests underlying the Fourth Amendment exclusionary rule tipped against allowing habeas review of those claims unless a state had denied a full and fair hearing. *Id.* at 489–94.

[144] *Withrow*, 507 U.S. at 691 (emphasis omitted) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

[145] These values include the preference for an accusatorial justice system, opposition to inhumane treatment, dedication to principles of fair play that insist on balance between the state and individuals and require the government to carry its burden of proof without relying on thoughts forced from the mind of the accused, respect for human dignity, and the entitlement to preserve the privacy of thoughts. *See Withrow*, 507 U.S. at 692 (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964)). Moreover, *Miranda* exclusion also promotes the core Fifth Amendment interest in avoiding the untrustworthy convictions that some compelled statements would yield. *See id.*

[146] *Withrow* dealt with the substantive use of statements obtained in violation of *Miranda* in the government's case-in-chief—that is, the immediate products of improprieties. *Elstad*, on the other hand, was concerned with successive confessions and other "derivative" evidence.

[147] As will be seen, the vision of *Miranda* exclusion on which *Withrow* rests has proven to be anomalous, not a harbinger of dramatic change in the Court's attitude toward *Miranda* suppression. In more recent years, the Court has clearly endorsed *Elstad*'s crabbed, restrictive conception of *Miranda*-based exclusion. *See* United States v. Patane, 542 U.S. 630, 639–40 (2004); *id.* at 645 (Kennedy, J., concurring in the judgment). Barring some dramatic shift on

The other opinion that cast some doubt upon the vitality of *Elstad*'s premises is *Dickerson v. United States*,[148] the landmark decision that rejected an effort to overthrow *Miranda*. The arguments in support of the attempted coup—i.e., the reasons favoring the view that *Miranda* could be replaced by congressional legislation effectively enacting the due process voluntariness standard that *Miranda* had declared insufficient—derived much of their force from *Elstad* and the other precedents that had declared the *Miranda* prescriptions and its exclusionary rule to be prophylactic rules, not constitutional rights. According to the logic of these arguments, because *Miranda*'s constraints on custodial interrogation and on the use of confessions were mere guidelines and procedural protections, failures to comply with the *Miranda* scheme did not violate the Fifth Amendment or deprive anyone of a constitutional entitlement.[149] Consequently, Congress and the states must have the authority to supplant any and all of *Miranda*'s dictates with rules of their own choice. Nothing in the Fifth Amendment privilege stood in their way.

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the Court, *Elstad*'s logic will undoubtedly continue to serve as the foundation for further erosion of the *Miranda* doctrine. The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito surely will change nothing.

One explanation for *Withrow* is that it was decided when Justice Kennedy—who was not a member of the Court at the time of *Elstad*—was relatively new to the Court and not yet inclined to join in the dismantling of *Miranda* protections. If that same question were to arise today, he might agree with the position of the dissenters, in which case the five-to-four decision not to extend the *Stone v. Powell* doctrine to *Miranda* violations would almost certainly come out the opposite way. On the other hand, Justice Kennedy remains unwilling to accept *every* invitation to whittle away at *Miranda*. *See id.* (refusing to join plurality opinion's narrowing assertions about *Miranda*); Missouri v. Seibert, 542 U.S. 600, 618–21 (2004) (Kennedy, J., concurring in the judgment) (agreeing that there are some successive confession cases following failures to warn in which *Elstad* does not govern); Minnick v. Mississippi, 498 U.S. 146 (1990) (authoring majority opinion that refuses to allow officers to initiate communications with suspect who requests counsel following consultation with counsel). For that reason, it is still *possible* to garner a bare majority (Justices Stevens, Souter, Kennedy, Ginsburg, and Breyer) to resist some extreme inroads upon *Miranda*'s safeguards. Five Justices might still consider the extension of *Stone v. Powell* to *statements* obtained in violation of *Miranda* to be too destructive of the protection *Miranda* affords against the "risk of overlooking an involuntary custodial confession, . . . a risk that" is "unacceptably great when the confession is offered in the case in chief to prove guilt." Dickerson v. United States, 530 U.S. 428, 442 (2000).

[148] 530 U.S. 428.

[149] *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 307 (1985) (characterizing *Miranda* as "protective medicine," which "provides a remedy even to the defendant who has suffered no identifiable constitutional harm"); New York v. Quarles, 467 U.S. 649, 654 (1984) (interpreting *Miranda* warnings as "'not themselves rights protected by the Constitution'" (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974))); *Tucker*, 417 U.S. at 443 ("[T]he court in *Miranda* established a set of specific protective guidelines, now commonly known as the *Miranda* rules."); *id.* at 444 (noting that "[t]he suggested [*Miranda*] safeguards were not intended to 'create[] a constitutional straitjacket'" (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966))).

The *Dickerson* Court rejected the argument that *Elstad* and other cases explaining the nature of *Miranda*'s scheme had rendered it susceptible to replacement by *any* alternative a federal or state legislature saw fit to enact.[150] Moreover, the Court refused to use the logical footings of *Elstad* as a foundation for overruling *Miranda*.[151] Instead, the Court affirmed *Miranda*'s constitutional stature, announcing that even though its prescriptions are *not* constitutional rights, they *are* "constitutionally required."[152] In addition, the Court avoided the deprecatory labels affixed to *Miranda* by *Elstad* and other opinions, not once referring to the safeguards as mere "prophylactic rules" or "procedural guidelines."[153]

The majority's refusal to follow what some believed to be the logical implications of *Elstad*'s core premises to their ultimate conclusion—the demise of *Miranda*—led some to conclude that at least the reasoning of *Elstad*, if not its holding, had been seriously undermined.[154] *Dickerson* was seen as not only *Miranda*'s savior,[155] but as a

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[150] *Dickerson*, 530 U.S. at 440–44. The Court observed that any alternative had to be "'at least as effective'" as the prescriptions of *Miranda* "'in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'" *Id.* at 440 (quoting *Miranda*, 384 U.S. at 467); *see also Dickerson*, 530 U.S. at 441 (stating that a substitute must "be equally as effective in preventing coerced confessions").

[151] *Dickerson*, 530 U.S. at 441.

[152] *Id.* at 438.

[153] Justice Scalia noted that the majority had "not mentioned" that *Miranda* constituted an "adopti[on of] prophylactic rules to buttress constitutional rights," and "applaud[ed] . . . the refusal . . . to enunciate [that] boundless doctrine of judicial empowerment." *Id.* at 457, 461 (Scalia, J., dissenting). He asserted, however, that there was "in fact no other principle that [could] reconcile" the Court's "judgment with the post-*Miranda* cases that the Court refuses to abandon," and that the majority's decision would therefore "stand for" the proposition that the Court has "the power . . . to write a prophylactic, extraconstitutional Constitution." *Id.* at 461. There is much force to Justice Scalia's interpretation of the majority opinion in *Dickerson*. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 29 (2004) (expressing surprise that not one Justice thought "Justice Scalia's condemnation of prophylactic rules" in his *Dickerson* dissent "important enough to warrant rebuttal"); Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to . . .*, 99 MICH. L. REV. 879, 893 (2001) (suggesting that no one responded to Scalia's dissent for fear that it would have "splintered" the 7–2 majority).

[154] *See, e.g.*, United States v. Patane, 304 F.3d 1013, 1019 (10th Cir. 2002) (noting that *Dickerson*'s declaration that *Miranda* "articulated a constitutional rule . . . undermined the logic underlying *Tucker* and *Elstad*"), *rev'd*, 542 U.S. 630 (2004); Kirsten Lela Ambach, Note, Miranda*'s Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757, 773 (2003) ("[T]he *Dickerson* opinion greatly undermined the principal reasoning underlying . . . *Elstad* . . . ."); Benjamin D. Cunningham, Comment, *A Deep Breath Before the Plunge: Undoing* Miranda*'s Failure Before It's Too Late*, 55 MERCER L. REV. 1375, 1411 (2004) (predicting that, when deciding *Patane* and *Seibert*, "the Court will necessarily have to consider the continued viability of *Elstad* in light of *Dickerson*").

[155] *See* George M. Dery III, *The "Illegitimate Exercise of Raw Judicial Power:" The Supreme Court's Turf Battle in* Dickerson v. United States, 40 BRANDEIS L.J. 47, 77 (2001) ("*Dickerson*

potential repudiation of the foundational erosion precipitated by *Elstad* and other precedents that had appeared to weaken *Miranda*'s constitutional moorings.[156]

3. *Elstad* Revived and Explained: The Later Opinions in *Seibert* and *Patane*

Elstad proved much more resilient than its opponents and critics hoped. In 2004, two significant opinions made it unmistakably clear that neither *Withrow* nor *Dickerson* had robbed *Elstad* of any force. Although *Elstad*'s *holding* sustained a modest limitation, its *reasoning* emerged unscathed.

The decision in *Missouri v. Seibert*[157] imposed the limitation. Therein, the Court addressed a "question-first" technique in which officers deliberately omitted *Miranda* warnings, secured confessions, then recited warnings and exploited the earlier, unwarned session to secure successive confessions.[158] A bare, five-Justice majority concluded that *Elstad* did not dictate admissibility in *every* situation involving initial failures to warn, subsequent compliance with *Miranda*, and successive admissions.[159] Instead, in *some* successive confession situations the warnings given after an initial interrogation could not effectively serve the compulsion dispelling function contemplated by the *Miranda* doctrine.[160] According to the Court, when the circumstances are such that it is not "reasonable to find that" midstream "warnings could function 'effectively'" to convey the substance of the *Miranda* rights to a suspect, a successive confession is inadmissible.[161] In those situations, the two stages of interrogation cannot be viewed

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saved *Miranda* from a brink of the Court's own making, but not because the [J]ustices demonstrated any faith in the constitutional basis of the *Miranda* warnings.").

[156] *See* Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1121 (2001) (noting that after the "Supreme Court allowed *Miranda*'s foundation to erode," the Court "placed *Miranda* upon a more secure, constitutional footing" in *Dickerson*). For a thorough, thoughtful discussion of *Dickerson*, see Yale Kamisar, Dickerson v. United States*: The Case That Disappointed* Miranda*'s Critics—and then Its Supporters*, *in* THE REHNQUIST LEGACY 106 (Craig M. Bradley ed., 2006).

[157] 542 U.S. 600 (2004).

[158] *Id.* at 609–10. There was evidence that some law enforcement agencies had adopted this approach as a matter of policy—i.e., that they were deliberately exploiting what they perceived to be the *Elstad* endorsed option of questioning first without warnings, obtaining inadmissible statements, then securing second statements after *Miranda* compliance. As they saw it, *Elstad* entitled them to use the latter statements at trial. *Id.* at 610.

[159] *Id.* at 614–15.

[160] *Id.* at 616.

[161] *Id.* at 611–12. Although the quotations are taken from the plurality's opinion, it is fair to say there is majority support for the general proposition that in *some* settings intervening warnings cannot accomplish their purpose. *See id.* at 618, 621 (Kennedy, J., concurring in the judgment) (observing that the question-first "interrogation technique" is problematic because it "undermines the *Miranda* warning and obscures its meaning" and that it "simply creates too high a risk that postwarning statements will be obtained when a suspect [is] deprived" of essential knowledge and is unable to understand his rights).

as "distinct."[162] Both the initial statements and those that follow the warnings are deemed inadmissible because officers have at no point complied with *Miranda*'s most basic prerequisite—effective warnings.[163]

The four Justices in the plurality seemed inclined to restrict *Elstad*'s reach fairly severely. Their opinion evinces a distinct hostility to the question-first tactic and appears to view the *Elstad* approach as applicable only in exceptional situations. Some of the plurality's generalizations,[164] its explanation of the reasons why the warnings in *Elstad* could have been effective while those in *Seibert* could not, and its specification of the variables that should determine whether warnings can be effective after an initial, unwarned interrogation[165] might well have led to a regime in which admission under *Elstad* was the exception and exclusion under *Seibert* was the rule. At the very least, the plurality's doctrine would have empowered lower courts to find warnings to be ineffective in a sizeable number of question-first cases.

The plurality's approach, however, is not the controlling law. Justice Kennedy furnished the essential fifth vote for the result. While he professed "agree[ment] with much in the careful and convincing opinion for the plurality,"[166] he refused to join that opinion. Instead, he concurred *only* in the judgment, endorsing a standard that clearly

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[162] *Id.* at 612–13 (plurality opinion).

[163] *Id.* at 617.

[164] In his opinion for the plurality, Justice Souter observed that "it is *likely* that if . . . interrogators . . . withhold[] warnings until after interrogation succeeds . . ., the *warnings will be ineffective* in preparing the suspect *for successive interrogation, close in time and similar in content.*" *Id.* at 613 (emphasis added). Justice Souter added that when "warnings are inserted in the midst of coordinated and continuing interrogation, they are *likely* to mislead and 'depriv[e] a [suspect] of knowledge essential to his ability to understand . . . his rights'" and that "two spates of integrated and proximately conducted questioning" should not "*ordinarily*" be treated "as independent . . . simply because *Miranda* warnings formally punctuate them in the middle." *Id.* at 613–14 (emphasis added) (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)).

[165] In contrasting *Elstad* with *Seibert*, the plurality opinion identified and highlighted a number of "relevant facts that bear on" the efficacy of "midstream" warnings. *Id.* at 615. The factors specified included: the "completeness and detail" of the initial questions and answers, the degree to which the content of the two statements overlapped, the closeness in timing and the similarity in setting of each session, the continuity of the officers involved, and the extent to which the questioning "treated the second round [of interrogation] as continuous with the first." *Id.* In *Elstad*, virtually every factor supported the effectiveness of the warnings, while in *Seibert*, a case at "the opposite extreme," every variable weighed against efficacy. *Id.* at 616. Moreover, *Elstad* involved "a good-faith *Miranda* mistake," while *Seibert* involved a deliberate "police strategy adapted to undermine the *Miranda* warnings." *Id.* at 615–16. Because the facts of *Elstad* and those of *Seibert* placed the cases at opposite ends of the spectrum, the Court did not address situations in which some of the relevant variables pointed in one direction and some pointed in the other. It seems unlikely, however, that many cases would involve facts as innocuous as those in *Elstad*. To the contrary, under the plurality's approach, many successive confession cases would probably involve enough *Seibert*-like variables to militate against a holding that warnings were able to serve their purpose.

[166] *Id.* at 618 (Kennedy, J., concurring in the judgment).

envisions *Elstad* as the general rule and *Seibert* the relatively rare exception.[167] According to Justice Kennedy, warnings ought to be deemed ineffective *only* if officers have employed a "deliberate, two-step strategy"—that is, *only* if there is an "intentional" choice not to warn as part of a scheme "to obscure both the practical and legal significance of the [*Miranda*] admonition."[168] If a violation is shown to have been intentional, then post-warning statements are inadmissible *only* if they are "related to the substance of prewarning statements."[169] Moreover, even related statements are admissible *if* officers have employed "[c]urative measures . . . designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."[170] In sum, the *only* instances in which Justice Kennedy would deem the warnings ineffective are those in which *deliberate*, *uncured* failures to warn yield successive statements *related to* the initial statements. If any one of these three criteria is not satisfied—that is, if the violation is not intentional, if curative steps are taken, or if the content of the successive confession is sufficiently unrelated to the content of the initial confession—warnings are presumptively effective and *Elstad*'s rule of admissibility governs.[171]

Justice Kennedy's opinion reflects the governing rule of law because the cases encompassed by his criteria are the only cases in which there is a majority for the proposition that warnings were ineffective and statements must be excluded.[172] Looked at from the other direction, four dissenting Justices asserted that *Elstad* governs *all* successive confession cases.[173] In their view, post-warning successive confessions are

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[167] There is no need to infer this view. Justice Kennedy explicitly declared *Elstad* to be the norm. *See id.* at 620.

[168] *Id.* at 620–21.

[169] *Id.* at 621.

[170] *Id.* at 622. Curative measures could include a "substantial break in time and circumstances" or an "additional warning that explains the likely inadmissibility" of the initial statement. *Id.*

[171] Justice Kennedy's approach requires an assessment of subjective intent. Moreover, it harbors at least two ambiguities. First, he did not specify precisely the steps that ought to be deemed sufficiently curative, observing that "a substantial break in time and circumstances . . . *may* suffice in *most* circumstances" and that "an additional warning that explains the likely inadmissibility of the prewarning . . . statement *may be* sufficient." *Id.* (emphasis added). In addition, it is uncertain how "related" two statements must be to meet the third element of his standard.

[172] In Justice Kennedy's view, a "deliberate" violation of *Miranda* is essential to render warnings ineffective. *Id.* Although the plurality acknowledged that an officer's intent "is likely to determine the conduct of the interrogation," it refused to focus on "the intent of the officer" because such intent "will rarely be as candidly admitted as it was" in the *Seibert* case. *Id.* at 616 n.6 (plurality opinion). The plurality instead prescribed an "objective" approach in which "the focus is on facts apart from intent that show the question-first tactic at work." *Id.* Despite this significant difference, it seems almost certain that the four plurality Justices would find warnings inefficacious in every case where Justice Kennedy's approach would dictate that conclusion. In other words, it is difficult, if not impossible, to imagine a case in which Justice Kennedy would find the warnings ineffective, but the plurality would deem them adequate to perform their expected functions.

[173] *Id.* at 622–23 (O'Connor, J., dissenting).

inadmissible *only* in cases where a first statement is actually coerced and the coercion has carried over[174] or in the undoubtedly rare situations where a second statement is shown to be "involuntary despite the *Miranda* warnings."[175] Consequently, five Justices consider *Elstad* controlling in *all* cases *except* the quite limited number of instances carved out by Justice Kennedy's *Seibert* concurrence.[176]

Seibert, therefore, imposes a relatively modest restriction on the scope of *Elstad*'s rule of admissibility for post-warning confessions following initial failures to warn. Moreover, eight Justices endorsed a significant foundational premise of *Elstad*—that the fruit of the poisonous tree doctrine is *not relevant* "for analyzing the admissibility of a subsequent warned confession following 'an initial failure . . . to administer the warnings required by *Miranda*.'"[177] There was widespread agreement in *Seibert* that the *only* pertinent inquiry is whether the circumstances undermine the efficacy of the warnings. If second stage warnings function effectively, *Elstad*'s conclusion that an initial failure to warn furnishes no predicate for excluding a post-warnings confession is controlling.

Finally, *Seibert* shed light on another very significant aspect of *Elstad*'s reasoning. In her dissent, Justice O'Connor (*Elstad*'s author) observed that the *Elstad* majority had rejected the "theory" that successive confessions were subject to exclusion because of the "'coercive impact'" of the suspect's awareness that he had "let the 'cat out

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[174] The government would apparently have the burden of showing that initial coercion did not carry over to a subsequent confession. *See* Oregon v. Elstad, 470 U.S. 298, 344 (1985) (Brennan, J., dissenting) (stating that derivative evidence principle requires that when the authorities act illegally they bear the burden of proving the taint has not carried over to subsequently acquired evidence).

[175] *Seibert*, 542 U.S. at 628 (O'Connor, J., dissenting) (noting, for example, that an officer's reference to a pre-warning statement to put pressure on a suspect to speak might compromise the voluntariness of the second statement despite *Miranda* warnings).

[176] *See* United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1135–36 (11th Cir. 2006) (applying the standards from Justice Kennedy's *Seibert* concurrence), *cert. denied*, 127 S. Ct. 146 (2006); United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005) (declaring Kennedy's opinion to be "the holding of the *Seibert* Court"); Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert, *the 2004* Miranda *"Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97, 112 (2004) (observing that Kennedy held "the decisive vote"); Gary T. Kelder, *Criminal Procedure*, 55 SYRACUSE L. REV. 889, 911 (2005) (noting that Kennedy's concurring opinion is the "controlling" law); Joelle Anne Moreno, *Faith-Based Miranda?: Why the New* Missouri v. Seibert *Police "Bad Faith" Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 396 (2005) (recognizing Kennedy's concurrence as the governing test).

[177] *Seibert*, 542 U.S. at 612 n.4 (plurality opinion) (quoting *Elstad*, 470 U.S. at 300). The only Justice about which there is doubt on this score is Justice Breyer. He joined the plurality opinion, but he also authored a concurrence that endorsed a fruits analysis. *Id.* at 617–18 (Breyer, J., concurring). Justice Kennedy indicated no disagreement with the plurality's disavowal of a "fruits" analysis in successive confession situations. And the dissenting Justices explicitly agreed with the plurality's reaffirmation of *Elstad*'s rejection of the "fruits" approach in successive confession settings. *Id.* at 623 (O'Connor, J., dissenting).

of the bag.'"[178] She further explained that the reason for this "outright" rejection was *not* a refusal "to recognize the 'psychological impact of the suspect's conviction that he has let the cat out of the bag,'" but instead a refusal "to 'endo[w]' those 'psychological effects' with 'constitutional implications.'"[179] That refusal was based on a balancing of the interest in preventing compelled self-incrimination against the interest in promoting legitimate "law enforcement interests."[180] In other words, the *Elstad* majority had not rejected the *fact* of a psychological connection between an unwarned confession and a suspect's decision to make a post-warning statement. Rather, it had concluded that despite this connection, there was little, if any, risk that the post-warning statement was compelled and, consequently, insufficient justification for the injury to effective crime control inflicted by its exclusion.[181]

United States v. Patane[182] provides even more evidence that a majority of the Court remains convinced of the merits of *Elstad*'s characterization of *Miranda*'s underpinnings. *Patane* not only reiterated and relied upon core premises of *Elstad*, it converted that opinion's most significant dictum into law and laid the groundwork for possible further erosion of the justifications for *Miranda* suppression.[183]

Patane was a truly simple case. Without reciting *Miranda* warnings, an officer asked an arrestee about the location of a firearm he was suspected of possessing.[184] The man replied that the gun was in his bedroom, whereupon the officer entered the man's home, found the weapon where he had indicated it would be, and seized it.[185]

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[178] *Id.* at 627.

[179] *Id.* (alteration in original).

[180] *Id.* at 628.

[181] In *Elstad*, Justice Brennan accused the majority of ignoring widely recognized psychological realities about the interrogation process. *See Elstad*, 470 U.S. at 324 (Brennan, J., dissenting). In *Seibert*, Justice O'Connor responded to this accusation, asserting that the *Elstad* majority had not meant to deny the existence of the cat out of the bag phenomenon—i.e., had not intended to deny that it operated psychologically to affect a suspect's willingness to confess a second time. *Seibert*, 542 U.S. at 627 (O'Connor, J., dissenting). Instead, the majority had decided that this connection between an unwarned and a warned confession should have no significance as a matter of constitutional law. This explanation is somewhat reminiscent of Justice O'Connor's explanation in *J.E.B. v. Alabama* that the Court was not denying the influence gender has upon a person's attitudes and perspectives as a matter of *fact*, but instead was declaring, as a matter of constitutional *law*, that assumed gender influence was not a legitimate ground for exercising peremptory juror challenges. *See* 511 U.S. 127, 149–51 (1994) (O'Connor, J., concurring).

Although Justice O'Connor's *Seibert* dissent represented the views of only four Justices, it seems virtually certain—in light of his concurring opinion in *United States v. Patane*—that Justice Kennedy would subscribe to these views. *See* United States v. Patane, 542 U.S. 630, 644–45 (2004) (Kennedy, J., concurring). It is even possible, perhaps even likely, that one or more members of the *Seibert* plurality would concur with this characterization of *Elstad*.

[182] 542 U.S. 630.

[183] *See infra* text accompanying notes 193–209.

[184] *Patane*, 542 U.S. at 635.

[185] *Id.*

The sole issue was whether *Miranda*'s exclusionary rule extended to such evidentiary "fruits."[186] Put otherwise, the question was whether *Miranda* exclusion encompasses derivative evidence—evidence acquired as a result of statements secured in violation of *Miranda*.[187]

The majority's answer was also simple: the *Miranda* exclusionary rule extends *only* to the *statements initially made* as a result of a violation and bars *no derivative evidence*.[188] Although the logical trail that led to this conclusion was quite complex, a majority of the Court did reaffirm the vitality of *Elstad and* its reasoning.[189]

The *Patane* Court confirmed the core *Elstad* premise that statements obtained in violation of *Miranda* are presumed to be compelled but are, in fact, voluntary.[190] The conclusion that derivative evidence is beyond *Miranda*'s ambit rested squarely, and primarily, on that foundation. Justice Thomas conceded that the Fifth Amendment bars from trial evidence derived from *actual* compulsion.[191] He found no constitutional bar to evidence acquired from *Miranda* violations, however, because "the Self-Incrimination Clause . . . is *not* implicated by the introduction at trial of physical evidence resulting from *voluntary* statements," and statements resulting from mere *Miranda* transgressions are "not actually compelled."[192]

Patane reaffirmed another basic underpinning of *Elstad*—that the *Wong Sun* derivative evidence principle (or "fruits" doctrine), which was developed in response to *actual* Fourth Amendment violations, is entirely inapplicable to *Miranda* violations because failures to follow *Miranda*'s rules are *not* Fifth Amendment violations.[193] Powerful dictum in *Elstad* had indicated that the *Miranda* exclusionary rule did not

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[186] *Id.* at 633–34.

[187] By not treating this issue as settled by *Elstad*, the Court, in essence, acknowledged that the potent indications that *Miranda* lacked a "fruits" doctrine were, in fact, dicta, and that the question had remained unsettled for the nearly forty years that *Miranda* had been on the books.

[188] *Patane*, 542 U.S. at 634.

[189] Only three members of the Court—Justices Thomas, Rehnquist, and Scalia—joined the plurality opinion. *Id.* at 633. The other two Justices who subscribed to the holding—Justices Kennedy and O'Connor—concurred only in the result. *Id.* at 644 (Kennedy, J., concurring in the judgment). They highlighted elements of the plurality's reasoning that they could not endorse but expressed agreement with the plurality's understanding of *Miranda*'s constitutional foundations. *Id.* at 644–45.

[190] *Id.* at 636, 639, 644 (plurality opinion). *Elstad*, of course, was not the only precedent to have relied upon this explanation of *Miranda*. *See* New York v. Quarles, 467 U.S. 649, 654, 655 n.5 (1984).

[191] *Patane*, 542 U.S. at 640 (plurality opinion) ("[T]he Self-Incrimination Clause is self-executing," and, therefore, "'those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from [those] statements) in any subsequent criminal trial.'" (quoting Chavez v. Martinez, 538 U.S. 760, 769 (2003) (plurality opinion))); *id.* at 644 ("[I]t is true that the Court requires the exclusion of the physical fruit of actually coerced statements.").

[192] *Id.* at 634, 639 (emphasis added).

[193] *Id.* at 641–42.

prohibit the introduction of derivative evidence.[194] *Elstad*'s sole holding, however, was that a second, post-warning confession was not subject to exclusion merely because of an initial failure to warn.[195] In arriving at that conclusion, the *Elstad* Court relied somewhat heavily upon the fact that compliance with *Miranda* established voluntariness and "cured" the condition that dictates exclusion of the initial, unwarned statement.[196] *Patane* confirmed that the *Wong Sun* doctrine is wholly irrelevant under *Miranda*.[197] Five Justices agreed that derivative physical evidence is *not* subject to suppression even though there is no intervening compliance with *Miranda* and, thus, no voluntary choice to weaken the causal connection between the *Miranda* violation, the inadmissible confession, and the evidence that it has yielded. By so doing, the Court turned broad dictum into controlling law and dramatically narrowed the ambit of *Miranda* exclusion.

Elstad and other cases eroded *Miranda*'s force in part by characterizing its scheme as "prophylactic."[198] The *Dickerson* Court's avoidance of that pejorative in describing the *Miranda* doctrine and its emphasis upon *Miranda*'s "constitutional" character had generated some doubt about the validity of *Elstad*'s understanding of *Miranda*.[199] By describing *Miranda* as a "prophylactic rule[]" that "necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause,"[200] *Patane* proved that the Court had abandoned neither *Elstad*'s terminology nor the conception of *Miranda* reflected by that terminology. According to Justice Thomas, the *Elstad* Court's view that *Miranda*'s protection is constitutionally overbroad had not been undermined by *Dickerson*'s announcement that *Miranda* is "a constitutional rule."[201] Instead, by relying on precedents like *Elstad*, the *Dickerson* Court had actually "demonstrate[d] the[ir] continuing validity."[202]

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[194] *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (suggesting that whether the "alleged 'fruit' of a noncoercive *Miranda* violation is . . . a witness, . . . an article of evidence, [or] . . . the accused's own voluntary testimony," the "twin rationales" for exclusion under *Miranda* are not implicated).

[195] *Id.* at 318.

[196] *Id.* at 310–11.

[197] *Patane*, 542 U.S. at 637.

[198] *See, e.g.*, *Elstad*, 470 U.S. at 305 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)).

[199] *See supra* text accompanying notes 148–56.

[200] *Patane*, 542 U.S. at 639 (plurality opinion).

[201] *See id.* at 640.

[202] *Id.* Implicit in the plurality's opinion and explicit in Justice Kennedy's concurrence were endorsements of the notion that *Miranda* doctrine is rooted in interest-balancing—i.e., that it rests upon a weighing of the interest in protecting against violations of the Fifth Amendment against the interest in effective law enforcement. *See id.* at 644–45 (Kennedy, J., concurring in the judgment). Although that balancing theme was not explicitly developed in *Elstad*, there can be little doubt that the *Elstad* majority's opinion reflected an interest-balancing analysis. *See Elstad*, 470 U.S. at 312 (observing that the "immunity" that would result from a bar to successive, warned confessions would "come[] at a high cost to legitimate law enforcement

In the conclusion of his *Patane* opinion, Justice Thomas announced two new premises designed to further diminish *Miranda* and its exclusionary rule. First, he opined that mere failures to warn not only do not violate the Fifth Amendment rights of suspects, they do not "even" violate "the *Miranda* rule."[203] In his view, violation of the *Miranda* rule can only occur in the courtroom, for *Miranda*'s core concern is the admission of evidence.[204] In addition, going beyond where *Elstad* had ventured, Justice Thomas asserted that "there is, with respect to mere failures to warn, *nothing* to deter."[205] *The Elstad* majority assumed that *Miranda*-based exclusion rested on two rationales, deterrence and trustworthiness,[206] but had indicated that deterrence was a less important objective than it was under the Fourth Amendment because the improprieties sought to be discouraged do not violate a constitutional right.[207] The *Patane* plurality sought to completely eliminate deterrence as a justification for *Miranda* exclusion.[208] Neither of these new premises, however, could gain majority support. Justices Kennedy and O'Connor refused to join the plurality opinion *because* they believed it was "unnecessary to decide whether" a failure to warn "should be characterized as a violation of the *Miranda* rule," or whether, with respect to *Miranda* violations, "there is '[any]thing to deter.'"[209]

4. The Admissibility of Successive Confessions Under *Miranda*: An Explanatory Summary

Seibert and *Patane* dispel any doubts about *Elstad*'s health generated by the deliberately opaque opinion in *Dickerson*. Together, *Seibert* and *Patane* confirm and illuminate *Elstad*'s holding. More important, they endorse and expand its underlying reasoning. After *Seibert* and *Patane*, a number of generalizations about *Miranda* seem fair.

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activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself"). The fullest explanation of the interest-balancing process that underlies *Miranda* itself and that should inform the resolution of *Miranda* doctrine issues is *Quarles*, 467 U.S. at 654–57. Not all Justices believe that this is an accurate description of Chief Justice Warren's reasoning in *Miranda*. *See id.* at 681 (Marshall, J., dissenting) (asserting that the "majority's error stems from a serious misunderstanding of *Miranda*" which "consisted of... more than a judicial balancing act" and accusing the majority of "misread[ing] *Miranda*").

[203] *Patane*, 542 U.S. at 641 (plurality opinion).

[204] *Id.*

[205] *Id.* at 642 (emphasis added).

[206] This notion did not originate in *Elstad* but was a premise of *Michigan v. Tucker*, 417 U.S. 433, 449 (1974).

[207] *See Elstad*, 470 U.S. at 306–07.

[208] *See Patane*, 542 U.S. at 639–40 (plurality opinion).

[209] *Id.* at 645 (Kennedy, J., concurring in the judgment). These were the only specific aspects of the plurality's reasoning that the concurring Justices expressly disavowed. Moreover, they did not declare that the plurality was wrong in these respects. Instead, they merely asserted that it was not necessary to resolve those questions at this time. *Id.*

First, statements obtained in violation of *Miranda* are inadmissible because of the unacceptably great risk that they are compelled and that their introduction could therefore violate the Fifth Amendment privilege.[210] The primary focus and concern of the doctrine is on the trial process, not the out of court conduct of the authorities.[211] The use of compelled statements to convict is forbidden by the Fifth Amendment in part because they may be untrustworthy and lead to the conviction of innocent persons, but also because conviction based on compelled admissions conflicts with fundamental values of our accusatorial system.[212] *Miranda*'s exclusionary rule bars statements from trial in order to enforce the explicit command of the privilege against self-incrimination. *Miranda* exclusion *may* also be justified by deterrence—i.e., a desire to remove incentives for law enforcement to ignore or neglect *Miranda*'s restrictions on custodial interrogation and thereby to ensure compliance with its out-of-court dictates. It seems evident, however, that deterrence is, at best, a secondary rationale.

Successive statements following compliance with *Miranda* are not subject to exclusion because neither rationale for that doctrine's exclusionary rule can support suppression. There is no cognizable risk that successive confessions are themselves compelled. Both initial and successive statements are the products of custodial interrogation. At the second session, however, effective *Miranda* warnings and a valid waiver "cure" the condition that render the initial statement inadmissible by dispelling the compulsion inherent in custodial interrogation and eliminating the basis for presuming involuntariness.[213] Moreover, unlike the situation involving actual compulsion

[210] *See id.* at 639 (plurality opinion); Dickerson v. United States, 530 U.S. 428, 434–35 (2000).

[211] *See Patane*, 542 U.S. at 641; Chavez v. Martinez, 538 U.S. 760, 766 (2003); Withrow v. Williams, 507 U.S. 680, 692 (1993).

[212] *See Withrow*, 507 U.S. at 688, 692; Miranda v. Arizona, 384 U.S. 436, 469–70 (1966). In my view, the Court's assertion in both *Tucker* and *Elstad* that "trustworthiness" and "deterrence" are the twin justifications for exclusion under *Miranda* is misleadingly narrow. The Fifth Amendment protection against compulsory self-incrimination surely does provide shelter against inaccurate convictions resulting from untrustworthy admissions given to escape official pressures. The Fifth Amendment, however, also serves other fundamental values by prohibiting convictions based upon compelled confessions, values that are jeopardized even when confessions or other evidence *are* trustworthy. *See supra* note 145 and accompanying text. The constitutional bar to *reliable* physical evidence causally connected to *actually* compelled statements is a clear illustration of this constitutional premise in operation. *See Patane*, 542 U.S. at 644.

Consequently, I characterize the first (and primary) justification for the *Miranda* exclusionary rule as the prevention of conviction based on compelled statements not merely the prevention of untrustworthiness. I believe this reformulation of the rationales for exclusion under *Miranda* is theoretically important. However, it is not critical to proper analysis and resolution of the questions addressed in this Article. If I were to accept the *Tucker* and *Elstad* Courts' myopic portrayal of *Miranda*'s rationales, the reasoning and conclusion concerning *Massiah*'s exclusionary rule would be no different.

[213] Of course, if the circumstances demonstrate that the warnings were ineffective, as in *Seibert*, then the second confession is excluded because it harbors the same risks as the first.

at the initial session, there is insufficient reason to believe that official compulsion has carried over—through the warnings and waiver—to the second interrogation. This is not to say that successive confession cases are identical to cases in which there is no initial statement resulting from a *Miranda* violation. In fact, a suspect might well be induced to confess again by the realization that he has already divulged incriminating information to the authorities.[214] This "inducement" to speak, however, does not support a conclusion that a successive statement has been compelled within the meaning of the Fifth Amendment. Internal psychological pressure generated by an inculpatory admission that was not actually compelled does not constitute official compulsion.[215]

Although they are not compelled *testimony* themselves, the evidentiary fruits of *actual* compulsion are forbidden because their use violates Fifth Amendment values.[216] It is arguable that a successive confession following a *Miranda* violation must be excluded to serve *Miranda*'s goal of preventing compulsory self-incrimination because the successive confession is, in fact, the evidentiary fruit of compulsion. The *Elstad* majority suggested two possible reasons why this argument lacks merit. First, there were intimations that the Court doubted whether the cat out of the bag phenomenon was real as a matter of fact and that it meant to reject the premise that an initial admission prompts a suspect to confess a second time.[217] If that were the case, successive

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See, e.g., Missouri v. Seibert, 542 U.S. 600, 617 (2004).

[214] As noted earlier, the Court has acknowledged the reality of this process and the factual connection between the first and second confessions. In the words of the majority in *Brown v. Illinois*, the suspect's realization that he has already confessed his guilt once "bolster[s] the pressures for him to" do so a second time, "or at least vitiate[s] any incentive on his part to avoid self-incrimination." 422 U.S. 590, 605 n.12 (1975).

[215] If the first statement is actually compelled, the second statement is presumed to be the product of that compulsion and the burden is put on the government to demonstrate that it is not. *See supra* note 117 and accompanying text. The apparent reason for a presumption of continuing compulsion, despite *Miranda* compliance, is the likelihood that a suspect will continue to be effected and motivated by pressures that were initially brought to bear upon him. *See* Oregon v. Elstad, 470 U.S. 298, 310 (1985) (suggesting that the concern is with "coercion . . . carr[ying] over into the second confession"). It is unclear whether the psychological disability and the resulting pressures to speak are considered to be official compulsion when they result from actual compulsion. *See id.* at 312 ("[T]he psychological impact of *voluntary disclosure* of a guilty secret [does not] qualif[y] as state compulsion." (emphasis added)). In any case, when the cat has been driven out of the bag by actual compulsion, any statement made as a result would seem to be derivative of the actual compulsion and, thus, forbidden by the Fifth Amendment's bar to all extorted evidence.

[216] *See Patane*, 542 U.S. at 639 (citing New Jersey v. Portash, 440 U.S. 450, 458–59 (1979)). Thus, Justice O'Connor's suggestion in *New York v. Quarles*, 467 U.S. 649, 666–71 (1984) (O'Connor, J., dissenting), that non-testimonial fruits are not barred by the Fifth Amendment because that guarantee is concerned only with compelled testimonial evidence, was misguided.

[217] *Elstad*, 470 U.S. at 312–14. The Court described the connection in Elstad's case as "*speculative* and attenuated at best." *Id.* at 313–14 (emphasis added). The majority also noted, more generally, that it "is difficult to tell with certainty what motivates a suspect to speak." *Id.* at 314. One can hear at least a suggestion that the Court might have been unwilling, in general, to presume the existence of a "psychological disability" or any influence on a

confessions would not constitute the "fruits" of compulsion because there would be *no causal link* between the presumptively compelled statements and the later admissions. Subsequently, however, it has become clear that the Court did not mean to deny the existence of the "psychological disability" and motivation generated by an initial confession.[218] As a matter of *fact*, a causal connection does exist.

The other reason, one which has withstood the test of time, is that statements obtained in violation of *Miranda* are presumptively, but *not actually*, compelled.[219] The Fifth Amendment's concern with the fruits of compulsion is not implicated and its values are not threatened by the use of evidence derived from a *Miranda* violation—in this case, a successive confession—*because* that evidence is the product of a *voluntary* statement. If physical evidence with an undeniably strong connection to unwarned statements is admissible at trial because the Fifth Amendment "cannot be violated by the introduction of . . . evidence obtained as a result of voluntary statements"[220]—and *Patane* clearly so holds—then a successive confession, whose causal connection is arguably weakened by intervening compliance with *Miranda*, must be admissible for the very same reason.[221]

In sum, *Miranda*'s goal of guarding against conviction based on compulsory self-incrimination does not support the exclusion of a successive confession because compliance with *Miranda* dispels the compulsion arising from custodial interrogation, because there is no initial actual compulsion that could be influencing the suspect to confess again, because the pressure to speak generated by the awareness one has already confessed is not state compulsion, and because the successive confession is the "fruit" of a voluntary statement.

Patane raises doubts about whether deterrence truly is a justification for *Miranda* exclusion. Even if it remains a legitimate objective of *Miranda* exclusion, however, deterrence does not justify the exclusion of a successive confession. Because a failure to follow *Miranda*'s dictates for custodial interrogation is *not* a violation of a

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suspect's decision to confess a second time. Justice Brennan apparently interpreted the majority's opinion that way, arguing that it had swept "aside [the] common-sense approach" of prior cases "as 'speculative,'" had held that compliance with *Miranda* "serves to break any causal connection" between statements, and had employed "marble-palace psychoanalysis," possibly on the basis of its "grasp[of] some psychological truth that ha[d] eluded" others. *Id.* at 324 (Brennan, J., dissenting).

[218] *See supra* text accompanying notes 178–81.

[219] *See supra* text accompanying notes 101–04.

[220] *Patane*, 542 U.S. at 637.

[221] Surely it is arguable that the same risks of compelled self-incrimination that justify the presumption that unwarned statements are compelled and that lead to their exclusion from the government's case-in-chief are present in evidence derived from those statements and should lead to the exclusion of derivative evidence. The Court's disagreement with this position reflects a conclusion that the additional costs to law enforcement from suppressing derivative evidence tips the balance against any further expansion of *Miranda*'s already constitutionally overbroad prophylactic barrier.

constitutional right but merely the transgression of a prophylactic rule,[222] the interest in discouraging *Miranda* violations (or in encouraging compliance with the *Miranda* scheme) is less weighty than the interest in safeguarding constitutional rights. That interest is sufficient to counterbalance the harm to law enforcement inflicted by suppressing statements obtained in violation of *Miranda.*

The scales, however, tip the other way when derivative evidence is placed in the balance. Sufficient deterrence is achieved by the prospect of losing the initial statements for the government's case-in-chief. Additional, incremental deterrence that might be gained by excluding *any* derivative evidence—including a successive confession—is outweighed by the interests in effective law enforcement promoted by admitting the evidentiary products of voluntary statements.[223] Put simply, when enforcement of an overbroad prophylactic scheme is the aim, the cost-benefit analysis that underlies the deterrent rationale for excluding evidence justifies only the suppression of the primary products—statements obtained in violation of *Miranda.* It does not justify additional losses of probative evidence.

These are the logical premises that have led the Court to adopt and adhere to the *Elstad* rule—a general rule of admissibility for successive confessions that follow mere *Miranda* violations. Whether these or other premises support the extension of that rule to right to counsel deprivations—as the Eighth Circuit held on remand in *Fellers*—hinges on the justifications for exclusion under the Sixth Amendment.[224] The next section addresses that subject.

C. The Underpinnings of the Sixth Amendment Exclusionary Rule[225]

The question here is whether the Sixth Amendment exclusionary rule is a deterrent safeguard designed to discourage future out-of-court deprivations of counsel, an integral part of the constitutional right to assistance, a constitutionally rooted prophylactic that guards against courtroom deprivations of the right to counsel, or some combination of the above. A definitive answer cannot be found in Supreme Court opinions. The Court has rarely discussed the nature of Sixth Amendment suppression and has provided astoundingly little insight into the bases for excluding evidence obtained in violation of the *Massiah* doctrine. After reading the scant tea leaves provided by the

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[222] *Patane*, 542 U.S. at 641.

[223] Moreover, the *Miranda* violation provides no basis for questioning the trustworthiness of any derivative evidence. Neither physical evidence nor successive statements can be rendered unreliable or misleading by a preceding *Miranda* violation.

[224] United States v. Fellers, 397 F.3d 1090, 1095 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005).

[225] A number of years ago, I wrote at length about this topic. *See* James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751 (1989) [hereinafter Tomkovicz, Massiah *Right to Exclusion*]. *Fellers* has furnished an occasion to revisit and reconsider the subject.

precedents, I offer what I find to be the most, indeed the only, defensible explanation for Sixth Amendment exclusion.

1. The Supreme Court's Sketchy, Equivocal Intimations

The *Massiah* majority did not discuss the justifications for Sixth Amendment exclusion. Nonetheless, its landmark opinion provides powerful indicia of the reason for suppressing statements deliberately elicited from an uncounseled accused.[226] The Court's express holding was that Massiah "was denied the basic protections of [the Sixth Amendment] *when there was used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[227] Moreover, responding to the argument that the government "had the right, if not indeed the duty" to continue to investigate Massiah's criminal activities, the majority indicated that "it was entirely proper to continue an investigation" despite the indictment.[228] According to the Court, the Sixth Amendment commanded but one consequence: the accused's "own incriminating statements . . . *could not constitutionally be used* by the prosecution as evidence *against him at his trial*."[229]

The import of these declarations is unmistakable. The *Massiah* majority believed that the right to counsel was violated *not* by deliberate elicitation but by the entry of the accused's admissions into the courtroom.[230] The Sixth Amendment violation was not completed, and no constitutional harm occurred during the government's extrajudicial confrontation of the defendant.[231] Instead, both the wrong and the harm were realized when the accused's incriminating statements were used at trial to secure a conviction.[232] At *Massiah*'s birth, exclusion was understood to be an integral part of the constitutional right to a lawyer's assistance.[233] A constitutional transgression occurred when, and *only* when, the government used disclosures to the accused's disadvantage.[234] Moreover, the Court's endorsement of deliberate elicitation of information from an accused for investigatory purposes makes it evident that the *Massiah*

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[226] *Massiah* is a landmark because it was the Court's first attempt to deal with the frustrations and inefficacy of the sole prior constraint on official efforts to secure confessions—the Due Process Clause's coerced confession doctrine. *Massiah* predated the Court's much more notable and noticed effort in *Miranda* by two years. Moreover, *Massiah* remains a landmark because it provides the only meaningful constitutional protection against government efforts to employ undercover agents to secure evidence of guilt and because the Court has diminished *Miranda*'s protection in numerous opinions issued over the past thirty-five years.

[227] Massiah v. United States, 377 U.S. 201, 206 (1964) (emphasis added).

[228] *Id.* at 206–07.

[229] *Id.* at 207 (emphasis added in part).

[230] *Id.* at 206–07.

[231] *Id.* at 207.

[232] *Id.*

[233] *Id.* at 204 (citing Spano v. New York, 360 U.S. 315, 327 (1959)).

[234] *See id.* at 206–07.

Court did not think of exclusion as a deterrent measure.[235] The object was not to discourage uncounseled elicitation, which, by itself, was constitutionally unobjectionable.

Later opinions have not been as direct or definitive about the underpinnings of Sixth Amendment exclusion. There have been some additional indications that the right to counsel is violated in court when evidence is introduced.[236] On the other hand, the Court has muddied the waters with suggestions that a constitutional violation occurs *when* agents engage in pretrial elicitation.[237] Still, the Court has *never* denied that the enjoyment of the right to counsel defined by *Massiah* requires that the government be prohibited from using improperly obtained statements against an accused at trial—i.e., that exclusion is an indivisible part of the entitlement to assistance.

The Court has addressed Sixth Amendment exclusion directly in two cases. In *Nix v. Williams*,[238] the question was whether evidence derived from statements secured in violation of *Massiah* was admissible if it "ultimately or inevitably would have been discovered by lawful means."[239] The Court held that such evidence is admissible under the "inevitable discovery doctrine,"[240] reasoning first that the doctrine was fully consistent with the *deterrent* objectives of exclusion because it puts the government in no "better position than it would have been in if no illegality had transpired."[241]

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[235] *See id.* at 207.

[236] *See* Maine v. Moulton, 474 U.S. 159, 161 (1985) (characterizing the issue as whether the Sixth Amendment right of the accused was violated by admission of statements elicited in counsel's absence); *id.* at 179 (reaffirming *the Massiah* Court's declaration that it was legitimate to continue to investigate but not to use the fruits of that investigation against the accused at trial); *see also* Brewer v. Williams, 430 U.S. 387, 422–23 (1977) (Burger, C.J., dissenting) (indicating that the majority apparently perceived the function of Sixth Amendment exclusion as different from the function of Fourth Amendment exclusion).

[237] *See, e.g.*, *Moulton*, 474 U.S. at 176 (observing that the Sixth Amendment is violated "when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent"); *id.* at 177 n.13 (recognizing a "constitutional right not to reveal"); *id.* at 178 n.14 (stating that the "Sixth Amendment protects the right of the accused not to be confronted by an agent of the State" and that the right to counsel "was violated as soon as the State's agent engaged [the accused] in conversation"); United States v. Henry, 447 U.S. 264, 274 (1980) (holding that the intentional creation of a situation likely to induce incriminating statements violated the defendant's right to counsel). As will be seen, I believe these statements are the result of careless phraseology. It is noteworthy that the *Fellers* Court studiously avoided assertions that a constitutional violation occurred when officers elicited information from the accused. *See* Fellers v. United States, 540 U.S. 519, 525 (2004). Instead, the Court consistently described the officers' actions as a "violation of Sixth Amendment *standards*." *Id.* (emphasis added). It is entirely possible that the Court's phrasing was not accidental but was a deliberate effort to avoid the suggestion that rights are violated at the moment of elicitation. The *Fellers* Court may have been attempting to reaffirm *Massiah*'s original conception of the Sixth Amendment entitlement.

[238] 467 U.S. 431 (1984).

[239] *Id.* at 444.

[240] *Id.* at 440–43.

[241] *Id.* at 443–44.

Excluding evidence that would inevitably have been obtained lawfully would instead put the government in a "*worse* position simply because of some earlier police error or misconduct," a result thought inconsistent with "derivative evidence analysis."[242] Moreover, to satisfy the inevitable discovery doctrine the government need not prove an "absence of bad faith."[243] When evidence that would have been discovered lawfully is at issue, "the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce."[244] Thus, while the *Nix* Court did not expressly assert that deterrence is a legitimate rationale for Sixth Amendment exclusion and certainly did not endeavor to explain why that might be a constitutionally defensible conclusion, its opinion was premised on an assumption that *Massiah* exclusion seeks to discourage out-of-court conduct.

The *Nix* majority, however, did entertain the possibility that there is an additional justification for Sixth Amendment suppression. The defendant argued that "the Court may not balance competing values" because "the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the factfinding process."[245] The contention, in essence, was that exclusion was an inseparable part of the entitlement to assistance.[246] Intriguingly, the Court neither rejected nor explicitly endorsed this understanding of *Massiah* suppression. Instead, the Court explained why the introduction of evidence that would inevitably have been lawfully discovered was fully compatible with the rationale posited by the defendant.[247] First, reliable physical evidence can hardly jeopardize the "integrity or fairness of a criminal trial."[248] In addition, the admission of evidence that would have appeared at trial without any impropriety cannot undermine "the adversary system of justice" because "[f]airness [is] assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place."[249]

In sum, *Nix* did not explicitly endorse *any* rationale for Sixth Amendment exclusion. The Court assumed that deterrence was an objective, but did not explain the logic of that assumption or reconcile it with the *Massiah* Court's approval of elicitation without use.[250] The Court also entertained, but did not approve of, the notion that exclusion might be a constitutional entitlement of the accused—i.e., part and parcel of

[242] *Id.*

[243] *Id.* at 445.

[244] *Id.* at 446.

[245] *Id.*

[246] *Id.* at 446–47.

[247] *See id.*

[248] *Id.* at 446. This part of the Court's response was focused purely on the question of substantive fairness—i.e., whether there was any risk of inaccuracy that could unfairly lead a fact-finder to convict an innocent person.

[249] *Id.* at 447. This part of the Court's response targeted procedural fairness—i.e., whether the accused might be convicted due to an advantage the government had secured by confronting an unaided, unequal adversary.

[250] *Id.* at 444–46.

the entitlement to a fair trial, the core objective of the Sixth Amendment.[251] As a result, *Nix* offers no definitive insights into the premises underlying *Massiah* exclusion.

The Court had another occasion to address Sixth Amendment exclusion in *Michigan v. Harvey*,[252] a case in which officers had violated the rule of *Michigan v. Jackson*.[253] According to *Jackson*, once an accused requests a lawyer, no waiver of the right to counsel is valid unless the suspect initiates further communications with the police.[254] Because officers in *Harvey* had initiated communications after the defendant's request for assistance, his waiver was invalid and the statements elicited from him without counsel could not be used to prove guilt.[255] The question, however, was whether the accused's trial testimony could be *impeached* with statements secured in violation of the *Jackson* rule.[256]

Logical resolution of this issue seemed to require identification of the justifications for exclusion under *Massiah*. In prior cases, the Court had made it clear that if exclusion is a constitutional right, even limited use for impeachment is impermissible.[257] On the other hand, if exclusion is not a right but a deterrent safeguard[258] or part of a prophylactic scheme designed to prevent constitutional violations,[259] impeachment use may be permissible. A five Justice majority, however, managed to find a way to resolve the narrow issue in *Harvey* without identifying the general rationales for Sixth Amendment exclusion.

The *Harvey* Court held that impeachment use of the defendant's statements was constitutionally acceptable[260] but pointedly confined its holding and the supporting reasoning to violations of the special safeguard against invalid waivers provided by

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[251] *Id.* at 446.

[252] 494 U.S. 344 (1990).

[253] 475 U.S. 625 (1986).

[254] *Id.* at 636. This rule originated in *Edwards v. Arizona*, 451 U.S. 477 (1981), to govern invocations of the Fifth Amendment-based entitlement to counsel afforded by *Miranda*. The *Jackson* Court decided that the *Edwards* rule was equally applicable when the Sixth Amendment right to counsel was at issue. *Jackson*, 475 U.S. at 636. That decision remains controversial. *See* Texas v. Cobb, 532 U.S. 162, 174–77 (2001) (Kennedy, J., concurring) (questioning the legitimacy of the *Jackson* doctrine).

[255] *Harvey*, 494 U.S. at 345–48.

[256] *Id.* at 345–46.

[257] Mincey v. Arizona, 437 U.S. 385, 397–98 (1978) (concluding that the use at trial of a coerced confession not only for substantive purposes, but for *any* purpose, including impeachment, violates due process).

[258] *See* United States v. Havens, 446 U.S. 620, 626–28 (1980) (holding that impeachment of an accused's testimony with evidence secured in violation of his Fourth Amendment right is consistent with the deterrent goals of suppression).

[259] *See* Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that impeachment of the accused's testimony with statements obtained in violation of *Miranda* is consistent with that doctrine's aims).

[260] *Harvey*, 494 U.S. at 348.

Michigan v. Jackson.[261] According to the majority, the *Jackson* branch of the *Massiah* doctrine is a constitutionally overbroad prophylactic rule cut from the same mold as *Miranda*'s entire Fifth Amendment scheme.[262] When officers initiate communications and secure waivers and statements contrary to the mandate of *Jackson*, they do not necessarily deprive an accused of his Sixth Amendment entitlement to assistance.[263] Instead, they generate risks of invalid waivers.[264] To guard against these risks—and, thus, to prevent the deprivations of counsel that could result—the *Jackson* doctrine deems any waiver resulting from an official initiation invalid.[265] An accused has not necessarily been denied his constitutional entitlement in a *Jackson* setting because his waiver of assistance is *presumed*, but not proven, to be invalid.[266] As a result, a statement produced by a *Jackson* violation is not necessarily the result of a denial of assistance,[267] and there can be no constitutional *right* to have such a statement suppressed.

Harvey teaches us that statements secured in violation of *Jackson* are excluded to guard against the *risks* of Sixth Amendment violation, not because their admission would violate the right to counsel.[268] Because risk prevention is the justification for *Jackson* and its exclusionary rule, it is permissible to balance interests to decide whether suppression is justified in a particular situation.[269] In the majority's view, the law enforcement costs of barring impeachment use exceed any preventive gains produced by exclusion.[270]

Harvey obviously provides limited insights into Sixth Amendment exclusion. By restricting the analysis to *Jackson* violations and characterizing *Jackson* as a prophylactic rule—not an essential component of the constitutional entitlement to assistance—the majority managed once again to avoid explaining why statements secured

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[261] *Id.* at 349–54.

[262] *See id.* at 350 (asserting that the *Jackson* decision "simply superimposed the Fifth Amendment analysis of *Edwards* [*v. Arizona*]," a "prophylactic rule" that protects against involuntary waivers following requests for counsel under *Miranda* "onto the Sixth Amendment").

[263] *See id.* at 349, 352–53.

[264] *See id.* at 350–51.

[265] *Id.* at 349 (stating that after a request for counsel, "any waiver of Sixth Amendment rights . . . is presumed invalid . . . to help guarantee that waivers are truly voluntary").

[266] *Id.*

[267] *See id.* (observing that *Jackson*'s "presumption . . . renders invalid some waivers that would be considered voluntary, knowing, and intelligent under the traditional case-by-case inquiry").

[268] *Id.* The Court hinted that, like exclusion under *Miranda*, exclusion under *Jackson* may also promote deterrent purposes—i.e., it may also serve to induce officers to refrain from initiating communications and eliciting information after clear assertions of the right to counsel. *See id.* at 351–52 (stating that under *Miranda*, the Court concluded that the interest in promoting the search for truth can outweigh the speculative possibility that the "exclusion of evidence might deter future violations of rules not compelled directly by the Constitution in the first place").

[269] *Id.* at 351.

[270] *See id.* at 351–52.

in violation of *Massiah*'s core standards are inadmissible.[271] For other types of *Massiah* violations, the premises for exclusion were left unspecified.

2. A Sensible Constitutional Explanation

Since I first reflected upon Sixth Amendment exclusion over fifteen years ago, some of my views have evolved.[272] My most fundamental conclusion, however, is unchanged. I continue to believe that the original conception of Sixth Amendment exclusion that informed the *Massiah* decision is constitutionally sound. The bar to the use of deliberately elicited statements is an essential component of the constitutional right, not merely a deterrent sanction and not a prophylactic safeguard.[273] A sketch of the logic supporting that conclusion follows.

As is clear from the earlier discussion, there are a number of possible justifications for constitutionally-based exclusionary "rules." The Fourth Amendment exclusionary rule—the most prominent and frequently invoked rule—is rooted in deterrence.[274] It is neither a personal right of nor a compensatory remedy for one who has been the victim of an unreasonable search or seizure.[275] Rather, it is a creature of the judiciary, designed to eliminate incentives for *future* violations of the Fourth Amendment.[276]

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[271] The *Harvey* majority made it absolutely clear that it was not addressing the exclusionary consequences of *Massiah* violations that threaten a "'core value' of the Sixth Amendment's constitutional guarantee." *Id.* at 353. Such a violation would involve an actual deprivation of the entitlement to assistance, not the mere violation of a prophylactic safeguard. In conclusion, the majority observed: "[W]e need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." *Id.* at 354. This left open the distinct possibility that exclusion for other sorts of *Massiah* violations—surreptitious undercover agent elicitation and known officer elicitation in the absence of a valid waiver—is a Sixth Amendment right, and that impeachment use, like substantive use, violates that right.

[272] *See generally* Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225.

[273] The dissenters in *Harvey* espoused this understanding of Sixth Amendment exclusion. *See Harvey*, 494 U.S. at 361–65, 367–69 (Stevens, J., dissenting). It has also found support from other commentators. *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889–90 (1981); Silas J. Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 175 (1984).

[274] United States v. Leon, 468 U.S. 897, 916 (1984).

[275] United States v. Calandra, 414 U.S. 338, 348 (1974).

[276] *See Leon*, 468 U.S. at 919 (observing that the purpose of exclusion is to "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused" (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974))); *Calandra*, 414 U.S. at 347 ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . ."). The Court has acknowledged that preserving "[j]udicial integrity" is an ancillary goal of the Fourth Amendment rule but has explained that notion in a way that makes it coextensive with deterrence. *See Leon*, 468 U.S. at 921 n.22. The admission of illegally obtained evidence, according to the Court, only threatens judicial integrity when it disserves the deterrent aims of the Fourth Amendment exclusionary rule. *Id.*

Similarly, *Miranda*'s exclusionary doctrine is not a personal entitlement of an individual subjected to custodial interrogation; the admission of statements obtained in violation of *Miranda*'s dictates does not violate a defendant's Fifth Amendment privilege.[277] Instead, *Miranda*'s exclusionary rule is a constitutionally required "prophylactic" device that furnishes "enlarged," overbroad shelter against the risks of compelled self-incrimination generated by and inherent in custodial interrogation.[278] Its primary function, unlike the Fourth Amendment rule, is to *prevent* Fifth Amendment violations in the courtroom.[279] It *may* also serve to deter failures to abide by *Miranda*'s constraints on custodial interrogation.[280] In contrast, the exclusion of coerced statements mandated

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A majority of the Justices believe that the Fourth Amendment exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Calandra*, 414 U.S. at 348. Despite the fact that the judiciary has created this remedy, its imposition on the states suggests that, like the *Miranda* scheme, it is constitutionally required and can only be supplanted, if at all, by an equally effective alternative remedy.

By describing the views of a majority of the Court with regard to the rationales for Fourth Amendment exclusion, I do not mean to endorse them. Justice Brennan, dissenting in *Leon*, made a credible case for resurrecting the original conception of Fourth Amendment exclusion as an integral part of the constitutional guarantee of "security" against unreasonable searches and seizures. *See Leon*, 468 U.S. at 938–39 (Brennan, J., dissenting).

[277] *See* Oregon v. Elstad, 470 U.S. 298, 306–07 (1985) (stating that while the Fifth Amendment bars only compelled statements, *Miranda* creates a "presumption of compulsion" that leads to exclusion of voluntary statements and thereby provides a remedy to defendants suffering "no identifiable constitutional harm"); New York v. Quarles, 467 U.S. 649, 655 n.5 (1984) (noting that to allow introduction of statements obtained in violation of *Miranda* is not to sanction the use of compelled statements in violation of the Fifth Amendment); *id.* at 658 n.7 (recognizing that "absent actual coercion . . . there is no constitutional imperative requiring the exclusion of" statements). The decision to create a "'public safety' exception" to *Miranda*, *see id.* at 655–56, and the decision to allow the prosecution to use statements for impeachment purposes, *see* Harris v. New York, 401 U.S. 222, 226 (1971), demonstrate that there is no Fifth Amendment right to exclusion of statements obtained in violation of *Miranda*.

[278] *See* United States v. Patane, 542 U.S. 630, 639 (2004) (plurality opinion) (*Miranda* is a prophylactic rule that protects against the risk of compulsory self-incrimination but "necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause"); *see also Elstad*, 470 U.S. at 306–07 (*Miranda*'s "exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered . . . in the absence of a Fifth Amendment violation," providing a remedy to an accused "who has suffered no identifiable constitutional harm"); *cf. Quarles*, 467 U.S. at 655–57 (*Miranda* warnings are "procedural safeguards" that furnish "enlarged protection for the Fifth Amendment privilege").

[279] *Patane*, 542 U.S. at 637 (plurality opinion) (stating that the *Miranda* rule "focuses on the criminal trial"); *id.* at 641 (asserting that *Miranda* protects the Fifth Amendment privilege, a "*trial* right," and that violations occur only upon admission of statements at trial); Withrow v. Williams, 507 U.S. 680, 691 (1993) (concluding that *Miranda*'s exclusionary rule "safeguards 'a fundamental *trial* right.'" (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990))); *see also* Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) ("*Miranda* mandates a rule of exclusion" and, therefore, "identification of a *Miranda* violation and its consequences . . . ought to be determined at trial").

[280] *See Elstad*, 470 U.S. at 308 (acknowledging deterrence as one of the "twin rationales"

by the Due Process Clause and the bar to genuinely compelled admissions required by the Self-Incrimination Clause are constitutional entitlements of the accused.[281] Those two constitutional guarantees are violated by the use of such confessions at trial. Suppression is *not* the consequence of an exclusionary *rule*, but, instead, is an inextricable part of those constitutional entitlements. The deterrence of coercion or compulsion may also be an objective of suppression.[282] That future-oriented aim, however, is secondary at best, subsidiary to the immediate, primary goal of avoiding constitutional violations in the courtroom.

Any effort to identify the rationales for Sixth Amendment exclusion must be rooted in the nature and purposes of the *Massiah* right to counsel. The guarantee of legal assistance at trial—the Sixth Amendment's sole original objective[283]—is designed to equalize an accused and protect against the increased risks of conviction that result when a defendant must deal with the legal system or an expert adversary without a lawyer's guidance.[284] *Massiah* extended this very same trial guarantee into the pretrial,

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of the *Miranda* exclusionary rule); *Tucker*, 417 U.S. at 446–47 (recognizing deterrence as a goal of *Miranda* exclusion).

[281] *See Patane*, 542 U.S. at 640 (plurality opinion) (noting that the Fifth Amendment "Self-Incrimination Clause contains its own exclusionary rule" and "is self-executing"); *Chavez*, 538 U.S. at 769 (plurality opinion) (asserting that the Fifth Amendment affords defendants "an *automatic* protection from the use of their involuntary statements . . . in any subsequent criminal trial"); *id.* at 777 (Souter, J., concurring in the judgment) (declaring that the Fifth Amendment "focuses on courtroom use of . . . compelled, self-incriminating testimony, and the *core* of the guarantee . . . *is* the *exclusion* of any such evidence" (emphasis added)); *Withrow*, 507 U.S. at 691 (stating that the Fifth Amendment privilege is a "'*trial* right'"); *Verdugo-Urquidez*, 494 U.S. at 264 (opining that the Fifth Amendment privilege "is a fundamental trial right of criminal defendants" violation of which "occurs only at trial"); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (maintaining that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law").

[282] *See* Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 761–62 n.69 (deterrence may be an objective of the due process based exclusion of coerced confessions). The case supporting a deterrent rationale is stronger under the Due Process Clause than under the Self-Incrimination Clause. In *Chavez v. Martinez*, a majority of the Justices concluded that officers' mistreatment of a suspect cannot violate the Fifth Amendment privilege, which is solely a courtroom guarantee, but that sufficiently egregious coercion by officers can itself deprive a person of due process. *Chavez*, 538 U.S. at 766–67 (plurality opinion) (expressing, for four Justices, the conclusion that Fifth Amendment protection is confined to the courtroom); *id.* at 777 (Souter, J., concurring) (providing a majority for the view that the Fifth Amendment privilege is not violated by out-of-court compulsion); *id.* at 779–80 (Souter, J., concurring) (expressing the view of five Justices that a due process violation can be effected by officers' pretrial mistreatment of an individual). Thus, while the suppression of a coerced confession can deter out-of-court violations of the entitlement to due process of law, suppression cannot deter out-of-court violations of the privilege against compulsory self-incrimination.

[283] *See* United States v. Ash, 413 U.S. 300, 309 (1973) (asserting that the "core purpose of the counsel guarantee was to assure '[a]ssistance' at trial").

[284] *See* James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 26 (1988);

post-accusation period to prevent the government from circumventing and undermining Sixth Amendment protection by conducting adversarial confrontations before the formal trial starts.[285] The ultimate objectives of that pretrial extension must be the same as the objectives of assistance at trial. An accused is entitled to an equalizing assistant when the government seeks to elicit information to shield him from the eventual trial harms that are traceable to an unequal pretrial battle—i.e., the increased risks of conviction that can result from allowing the state to take advantage of an unaided accused. The *Massiah* entitlement to counsel guards against diminution of the opportunity for a favorable verdict caused by incriminating disclosures elicited from the defendant. In the pretrial setting defined by *Massiah*'s doctrine, legal assistance helps prevent an accused from providing the adversary with ammunition that can seal his fate.

When counsel is denied *and* disclosures are used to convict, a defendant is surely deprived of the most significant benefit of assistance. His opportunity to defend effectively against an accusation is damaged *because* the state has exploited his inequality. There are two ways to avoid depriving an accused of the core interests furthered by *Massiah*. The first, of course, is to honor the entitlement to assistance in the first place by either ensuring counsel's presence or securing a valid waiver of assistance. The second is to bar the products of improper, uncounseled encounters from trial. In either case, the accused will not be convicted on the basis of advantages the government has secured by denying adversarial equalization.

This conception of the right to counsel makes it clear that Sixth Amendment exclusion is quite unlike Fourth Amendment exclusion. In *Massiah* contexts, the constitutional harm is not completed at the time officers engage in their out of court elicitation. The primary, perhaps the exclusive, constitutional injury from the deprivation of assistance occurs in court when the state introduces evidence. The focus, therefore, *cannot* be solely on deterring future wrongs.

Massiah exclusion is also very unlike *Miranda* exclusion. The Court has never suggested that any part of the *Massiah* doctrine other than the special rule of *Michigan v. Jackson*[286] is a constitutionally overbroad scheme designed to guard against unacceptable risks of right to counsel violations.[287] From the start, the *Massiah* entitlement has been viewed as a necessary temporal extension of the actual right to trial assistance.[288] And it is difficult to imagine how the *Massiah* doctrine might be recast as mere prophylactic guidelines that guard against *presumed*, but not actual, right to

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Tomkovicz, *Pretrial Assistance*, *supra* note 7, at 521–22.

[285] Massiah v. United States, 377 U.S. 201, 205–06 (1964).

[286] 475 U.S. 625, 636 (1986) (holding that once an accused asserts the right to assistance "any waiver of the . . . right to counsel for . . . police-initiated interrogation is invalid").

[287] *See id.* at 636–37 (Burger, C.J., concurring) (asserting that the Court has gone too far by extending *Edwards* protections beyond coercive police action); *see also id.* at 637–38 (Rehnquist, J., dissenting) (explaining that the *Edwards* rule does not make sense in a Sixth Amendment context).

[288] *See Massiah*, 377 U.S. at 205–07.

counsel violations.[289] Deliberate elicitation without counsel or a waiver does not simply generate a *likelihood* that the accused will be deprived of the equalizing assistance counsel provides, it *actually* deprives the defendant of his entitlement to counsel's protective input.

In fact, *Massiah* exclusion is akin to the suppression of statements under the Due Process and Self-Incrimination Clauses. Like those two guarantees, the Sixth Amendment safeguards an interest in *not being convicted* as a result of government methods deemed unfair by our Constitution.[290] All three provisions are violated—and trials are unfair—when the evidentiary products of those methods are used to convict.[291] When the state's pretrial conduct is of a sort that would be forbidden at trial, all three guarantees are enforced by *constitutional rights to exclusion*, not judicially developed exclusionary rules or remedies designed to prevent future wrongs or to guard against risks of present wrongs.[292]

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[289] Of course, before the Burger and Rehnquist Courts set to work reimagining the premises underlying *Miranda*, it may have been difficult to conceive of that doctrine as an overbroad prophylactic scheme. Still, the reconception of *Miranda* that governs today is logically defensible. I cannot see how one can rationally explain the *Massiah* doctrine's core protections as overprotective prophylaxis against constitutional risks.

[290] The methods that are deemed unfair by each are different. The Fifth Amendment privilege and the Due Process Clause seek to ensure fidelity to the *accusatorial* nature of our system by targeting methods that force thoughts from the minds of suspects. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 167, 170 (1986) (concluding that "coercive police activity" is required to implicate the Due Process Clause protection against coerced confessions and to render a waiver of *Miranda*'s Fifth Amendment-based safeguards involuntary). Alternatively, the right to counsel preserves the *adversarial* character of our system of adjudication by focusing upon confrontations with the government or legal system in which lay defendants' deficiencies put them at a disadvantage. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

[291] Like the due process safeguard against unnecessarily suggestive identification procedures, these protections further "an evidentiary interest." *See* Manson v. Brathwaite, 432 U.S. 98, 113–14 n.14 (1977) (clarifying that due process does not protect the interest in not being identified by means of a suggestive process, but, rather, protects the "evidentiary interest" in not being unfairly convicted on the basis of evidence produced by an unnecessarily suggestive identification process).

[292] The reason that this part of the Sixth Amendment right has the appearance of an "exclusionary rule" is that in *Massiah* contexts the prohibited government conduct occurs outside the trial setting. If the government were to confront an unaided accused at trial in violation of his entitlement to assistance, it is clear that the accused would be entitled to elimination of the harm or injury caused by the fact-finder's exposure to disclosures stemming from this confrontation. "Exclusion" of this evidence from the trial would be part of the accused's constitutional entitlement. According to the *Massiah* doctrine's extension of the right to counsel, the entire period following formal accusation should be thought of as part of the trial. *See Massiah*, 377 U.S. at 205. Any harm resulting from unequal clashes staged during this period must be eliminated from the trial to ensure enjoyment of the benefits of the right to assistance.

It is arguable that an additional, secondary objective of *Massiah* exclusion is the deterrence of future uncounseled deliberate elicitations of admissions from accused persons.[293] There are at least three potential reasons why one might seek to discourage government agents from engaging in that conduct.[294] First, one might conceive of the assistance of counsel at pretrial confrontations as a *process* right. According to this view, the right to counsel serves not only the interest in avoiding damage to the chances for a favorable verdict, but also the *independent* interest in having an opportunity to face the government as an equal. A deprivation of this interest in fair process would occur at the time of the elicitation, and Sixth Amendment exclusion, like Fourth Amendment exclusion, would be aimed at preventing future deprivations.

It might also be desirable to discourage uncounseled deliberate elicitation in order to eliminate otherwise undetected *risks* of unfair conviction that it can generate. Exclusion of the identifiable products of an uncounseled elicitation—statements and their fruits—may not fully restore the status quo ante. The government might use the information it acquires to disadvantage an unequalized defendant in subtler ways. According to this argument, suppression would aim to prevent conduct that results in undetectable constitutional injuries.

Finally, deliberate elicitation without counsel might be seen as a threat to the "appearance of justice."[295] Whether or not cognizable interests in a fair process are at stake, official confrontations with an uncounseled accused might lead the public to believe, or fear, that the government takes unfair advantage of accused persons and fails to play by the rules. Suppression might seek to deter uncounseled elicitation in order to preserve the appearance of justice and public confidence in the criminal justice system.

In my view, the holding of *Strickland* lends support to the conclusion that exclusion is an integral part of the Sixth Amendment right to counsel. *Strickland*'s actual ineffectiveness doctrine requires a defendant to establish not only that his lawyer performed deficiently, but that prejudice—a reasonable probability of a different outcome—resulted from that deficient performance. *Strickland*, 466 U.S. at 691–92. In the Court's view, a defendant is not deprived of the right to counsel unless some injury to his chances for a favorable result occurs as a result of the deprivation of the assistance to which he is entitled. *Id.* According to *Strickland*, the right to counsel is made up of two components—a lawyer's competent aid and the advantages at trial that flow that aid. *See id.* Incompetence alone is not sufficient to deny the Sixth Amendment right. *Id.* Harm to one's chances for acquittal at trial is essential to deprivation of the right to counsel because counsel exists for the purpose of improving the accused's chances for a favorable outcome.

[293] The *Massiah* Court did not seem to think that deterrence was an objective. *See supra* note 235 and accompanying text (highlighting the Court's unhesitant approval of official elicitation of information from an accused in order to further an investigation).

[294] I have previously discussed the plausibility of and arguments that might support a deterrent rationale for *Massiah* exclusion. *See* Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 770–72 & n.120.

[295] *See* Wheat v. United States, 486 U.S. 153, 160 (1988) (referring to the "interest" of federal courts "in ensuring . . . that legal proceedings appear fair to all who observe them"); Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

In my earlier analysis, I found each of these possible bases for seeking to deter deliberate elicitation to be unpersuasive.[296] I am still inclined toward that position. In my view, the only *potentially* meritorious reason to seek deterrence is the first—the notion that fair process or fair treatment is also an interest furthered by the entitlement to pretrial counsel. I am convinced that assistance *at trial* does further both substantive and procedural goals—i.e., both interests in fair, reliable outcomes *and* interests in fair play and process.[297] I am still not persuaded, however, that these same "procedural" interests are extant or sufficiently weighty in *pretrial* settings. Moreover, the more nebulous concerns with potentially undetectable risks of substantive harm and with the appearance of injustice are, in my view, outweighed by the government's investigatory interests—i.e., society's legitimate interests in discovering what an accused knows in order to effectively prosecute crime.

In any event, while it is a theoretically interesting question and one worthy of attention, as a practical matter it is unnecessary to decide whether deterrence is a supplemental aim of Sixth Amendment exclusion. It is highly unlikely that a secondary deterrence rationale would increase the number of instances in which exclusion is justified, expanding Sixth Amendment exclusion beyond the scope dictated by the "rights" rationale. Put otherwise, if exclusion is not necessary to prevent a courtroom deprivation of the entitlement to counsel, it seems highly improbable that deterrent objectives—which must be balanced against competing governmental interests—would dictate suppression.

D. Should the Elstad *Doctrine Apply to Sixth Amendment Exclusionary Determinations?*

The question remanded in *Fellers* and subsequently resolved by the Eighth Circuit is whether the doctrine of *Oregon v. Elstad* applies to Sixth Amendment deprivations.[298]

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[296] Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 767–68.

[297] In this regard, I part company with the *Strickland* majority. According to the Court, a mere deprivation of assistance is not a violation of the right to counsel. An accused must also show "prejudice"—a sufficient likelihood that the missing assistance would have made a difference in terms of outcome. *See Strickland*, 466 U.S. at 691–92. In my view, because counsel is a process right, one who does not receive the assistance to which he is entitled does suffer a Sixth Amendment deprivation even if there is no negative impact on the outcome of the trial. *See id.* at 711 (Marshall, J., dissenting) (suggesting that deficient performance alone deprives an accused of the right to counsel promised by the Sixth Amendment because the "guarantee . . . functions to ensure that convictions are obtained only through fundamentally fair procedures" and that a proceeding in which an accused lacks "meaningful assistance in meeting the forces of the State does not . . . constitute due process").

[298] Fellers v. United States, 540 U.S. 519, 525 (2004). In my earlier piece, after positing that Sixth Amendment exclusion is primarily a constitutional right of the accused, I addressed a number of specific Sixth Amendment exclusionary rule questions. *See* Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 773–92. I did not, however, discuss the applicability

More specifically, the issue is whether *Elstad*'s general rule of admissibility for successive confessions following compliance with *Miranda* governs situations where officers first violate, then comply with, *Massiah*'s Sixth Amendment constraints. A defensible answer must account for the reasoning that supports *Elstad* and the justifications for Sixth Amendment exclusion.

The *Elstad* doctrine is inextricably rooted in the particular purposes of the prophylactic *Miranda* exclusionary rule—to provide adequate protection against the risks of compulsory self-incrimination and, possibly, to deter law enforcement failures to follow *Miranda*'s custodial interrogation guidelines. As already explained, neither of those objectives can justify exclusion of a successive confession because the risk that it is compelled is too low and because any deterrent gains are outweighed by the costs.[299]

The *Massiah* exclusionary rule is dramatically different in character from the *Miranda* rule. The differences should render *Elstad*'s general rule of admissibility entirely inapplicable to successive confessions following *Massiah* deprivations. *Massiah* exclusion is *not* concerned with *compulsion*, is *not* designed to guard against the *risks* of a constitutional violation, and is almost certainly *not* designed to *deter* out of court conduct. A statement secured in violation of *Massiah*'s Sixth Amendment standards is barred from the courtroom by the Constitution itself. To allow the government to use such a statement would be to permit a violation of the right to counsel to ripen in court. To preserve an accused's constitutional entitlement, the government must be deprived of statements obtained by uncounseled deliberate elicitation. The harvest of unequalized adversarial confrontations before trial must not be allowed to disadvantage the accused at trial.

At trial, the government must be denied every advantage it has acquired from improper, unequal confrontations prior to trial. Any evidentiary edge derived from and traceable to an encounter with an unassisted accused must be eliminated.[300] If there were no causal connection between an initial confession and a successive statement obtained after respecting *Massiah*'s commands, there would be no reason to exclude the latter, for it would not be an advantage gained from the uncounseled interaction. It is clear today, however, that the *Elstad* Court did not intend to deny the existence of a psychological connection between improperly obtained and subsequent admissions. Because of that causal link between the two statements, the Sixth Amendment requires that the successive confession be kept from the courtroom.

Under the Sixth Amendment, the *voluntariness* of a successive confession cannot determine its admissibility any more than it determines the admissibility of the initial confession. The guarantee of counsel protects defendants against more than compelled self-incrimination. It is different from and furnishes broader protection against

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of the *Elstad* issue on that occasion.

[299] *See, e.g.*, *supra* text accompanying notes 219–24.

[300] Of course, to trigger the right to pretrial assistance, the "encounter" must involve "deliberate elicitation" as defined by *Massiah* doctrine. *See* Tomkovicz, *Pretrial Assistance*, *supra* note 7, at 516.

inculpatory admissions than the Fifth Amendment. Under the Sixth Amendment, the strength or weakness of the link between the deprivation of assistance and an evidentiary item should not matter. Cost-benefit balancing is inappropriate because the deterrence of out-of-court misconduct is not the primary objective of exclusion and because an expansion of costly, constitutionally overbroad prophylaxis is not at stake.

What *is* at stake is the enforcement of perhaps the most fundamental constitutional right accorded an accused by our Bill of Rights.[301] Any profit, even profit that is remote and weakly linked to a denial of assistance threatens harm of a kind that the guarantee of counsel is designed to prevent. Consequently, a successive confession can be introduced without violating the Sixth Amendment *only* when it is shown to be the result of an entirely independent decision to cooperate, a decision with no causal relationship to the initial admission. The Constitution allows a successive confession to be used to convict *only* if the government demonstrates that the awareness that the cat was out of the bag had *no* influence in inducing the accused to make it.[302] Barring such a showing, exclusion is constitutionally required.[303]

For the same reasons, *Patane*'s rejection of a *Miranda* fruits doctrine should not be extended to Sixth Amendment settings. Physical or other evidence that is derived in fact from—that has *any* causal connection to—failures to honor the entitlement to an equalizing assistant cannot be admitted into evidence without inflicting constitutional damage. An accused has a fundamental trial right not to be convicted as a result of advantages the government gains from confrontations without counsel. The fact

[301] *See* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 45–46 (2002).

[302] The government's failure to respect the defendant's entitlement to counsel plus psychological realities justify requiring the government to carry the burden of proving no connection. In addition, it would be difficult, if not impossible, for an accused to demonstrate that he *was* influenced by an initial admission—unless there were comments by him or by the authorities during the second confrontation that evinced his motivation for confessing again. Of course, if officers in any way use an initial confession to induce a second confession, this will only serve to strengthen the presumption that there is a causal link. In such cases, it will be all the more difficult for the government to make the demonstration necessary to justify use of the successive confession.

[303] The Court could reach a contrary conclusion by refusing to assume any causal connection and putting the burden on an accused to prove that a psychological disability caused by the initial confession led him to confess again. This would be inconsistent with what Justice O'Connor implicitly acknowledged in her *Seibert* dissent—that suspects are likely to be affected by the awareness they have already admitted their guilt and that a factual connection between first and second admissions should generally be assumed to exist. Missouri v. Seibert, 542 U.S. 600, 628 (2004) (O'Connor, J., dissenting). It would also be inconsistent with pre-*Elstad* recognitions by the Court that there is, in fact, a likely connection between initial and subsequent admissions of guilt. *See* Brown v. Illinois, 422 U.S. 590, 605 n.12 (1975) (recognizing that initial admissions do operate psychologically to produce subsequent confessions); United States v. Bayer, 331 U.S. 532, 540 (1947) ("Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.").

that the confrontation of an unequalized adversary has occurred prior to trial cannot be allowed to undermine that trial right. To avoid circumvention of the right to assistance and ensure that the Sixth Amendment's promise is fulfilled, all incriminating evidence derived from statements secured in violation of *Massiah* must be excluded.[304]

Similarly, the prosecution must not be allowed to impeach the accused or any defense witnesses with any evidence—initial confessions, successive confessions, or other derivative evidence—that has been gained through a deprivation of pretrial assistance.[305] To protect the interest in not being convicted as a result of unequal adversarial encounters, the state must be stripped of every advantage it has reaped. The introduction of evidence for limited impeachment purposes may not be as incriminating or injurious as the introduction of the same inculpatory evidence to prove guilt directly.[306] Still, it affords the prosecution a trial edge to which it is not entitled, one that it never would have acquired had it honored the right to the assistance.[307]

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[304] For a fuller, pre-*Patane* discussion of this issue, see Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 781–82. As noted there, the Sixth Amendment derivative evidence principle must be more expansive than the Fourth Amendment derivative evidence principle. Because the latter is considered a mere deterrent safeguard, cost-benefit balancing is thought appropriate and justifies the introduction of evidence with an "attenuated" causal connection. Because the Sixth Amendment rule is an integral part of the right, balancing is inappropriate and an "attenuation exception" is illegitimate. The Framers did the balancing in granting a right to assistance which protects against all injuries resulting from imbalanced confrontations.

[305] The contention here is that there is a ban on impeachment use for the fruits of "core" *Massiah* violations. If the Court is correct that the rule of *Michigan v. Jackson* is an overbroad prophylactic protection for the right to counsel akin to *Miranda*'s safeguards—a questionable, but defensible conclusion—then the conclusion that impeachment use is permissible for evidence acquired in violation of the *Jackson* rule is defensible. *See supra* text accompanying notes 260–70. For evidence acquired from core *Massiah* violations, however, impeachment use would violate the Sixth Amendment.

[306] Of course, impeachment use *may* also be quite devastating, severely undermining testimony that otherwise would raise a reasonable doubt in jurors' minds. And it is hard to deny that jurors may have difficulty confining such evidence to its proper purpose. De facto substantive impacts seem likely even when jurors conscientiously try to avoid them. *See* Bruton v. United States, 391 U.S. 123, 132 (1968) ("'Limiting instructions to the jury may not in fact erase . . . prejudice.'" (quoting the Advisory Committee on the 1966 amendments to Rule 14 of the Federal Rules of Criminal Procedure)); *id.* at 135 ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital . . . that the practical and human limitations of the jury system cannot be ignored."); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 666 (2001) ("In general, limiting instructions have proven to be ineffective and have even been associated with a paradoxical increase in the targeted behavior."); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86 (1990) ("Admonishing jurors often provokes the opposite of the intended effect.").

[307] For a fuller discussion, see Tomkovicz, Massiah *Right to Exclusion*, *supra* note 225, at 787–89.

On remand in *Fellers*, the Eighth Circuit engaged in a remarkably thoughtful and thorough analysis of the remanded exclusionary rule issue,[308] but it arrived at the wrong conclusion. The court decided that *Elstad* has the same force in Sixth Amendment contexts that it has in *Miranda* settings, and, as a result, that Fellers's jailhouse statements were admissible despite the initial *Massiah* violation.[309] The aim here is to highlight some of the aspects of the court's reasoning that are analytically sound and to identify the missteps that led to a faulty outcome.[310]

The appellate court took several sound analytical steps. It recognized the need to attend to the purposes of the right to counsel, acknowledged that Sixth Amendment exclusion seeks to ensure trial fairness, and asserted that suppression is necessary if the government's improper pretrial conduct is causally linked to evidence at issue.[311] The court also perceptively observed that *Elstad* allows the admission of successive, post-warning confessions after initial *Miranda* violations because neither the aim of preventing compulsion nor the goal of deterrence support suppression.[312] The analysis went awry, however, when the Eighth Circuit sought to meld its understanding of *Elstad*'s Fifth Amendment doctrine with its conception of Sixth Amendment suppression.

According to the court, the introduction of the successive confession in *Fellers*—his jailhouse statements—was legitimate because a "knowing, intelligent, and voluntary [waiver of the] right to counsel constitutes an intervening act of free will that *breaks the causal link* between" the initial and the subsequent statements.[313] The court rejected the defendant's reliance on the psychological impact of knowing he had "'let the cat out of the bag,'" asserting that *Elstad* "squarely rejected" that premise under *Miranda* and that *Elstad*'s analysis was "equally applicable" to *Massiah* settings.[314] *As in Elstad*, the infirmity that made the initial statement inadmissible was eliminated—or "cured"—by the subsequent adherence to the Sixth Amendment's dictates.[315]

This reasoning is flawed because intervening warnings and a valid waiver do not negate the causal connection between an initial and a second admission. The *Elstad* Court did not deny the reality of the psychological disability that results from confessing once. It did not reject the premise that there may, in fact, be a psychological

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[308] United States v. Fellers, 397 F.3d 1090, 1094–97 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005).

[309] *Id.* at 1093.

[310] No attempt is made here to fully capture the court's reasoning. A complete description of the Eighth Circuit's reasoning appears earlier. *See supra* Part I.B.

[311] *See supra* text accompanying notes 42–61. The court's depiction of the underpinnings of Sixth Amendment exclusion was not flawless. It observed that the Supreme Court had established deterrence as the "core reason" for Sixth Amendment exclusion. This apparent acceptance of what I find to be an extremely misguided characterization of *Massiah*-based suppression does not seem to have contributed to the Court's ultimately erroneous conclusion about *Elstad*'s applicability.

[312] *Fellers*, 397 F.3d at 1095.

[313] *Id.* at 1096 (emphasis added).

[314] *Id.* at 1097 n.2.

[315] *Id.* at 1095.

link between an initial statement and a post-warning statement. Rather, the *Elstad* Court held that warnings and waiver eliminate the basis for presuming *compulsion* and that any resulting psychological disability does not qualify as official *compulsion*.[316] For those reasons, the primary rationale for *Miranda* exclusion does not call for exclusion of a second, post-warning confession. Warnings and waiver "cure" the problem for *Miranda* purposes because they dispel compulsion, minimizing the risk of a Fifth Amendment violation at trial.

As stated earlier, the absence of compulsion alone does not remedy the Sixth Amendment problem. The Sixth Amendment grants a broad right not to be convicted on the basis of evidentiary advantages gained from unequalized confrontations. Unlike *Miranda*, *Massiah*'s logic demands that there be *no* connection between the out of court deprivation and evidence the state wishes to introduce.[317] It is true that Sixth Amendment exclusion should not put the government in a *worse* evidentiary position than it would have occupied without improper conduct. An accused has no constitutional entitlement to have his adversary *disadvantaged* because of the failure to respect the entitlement to assistance. It is equally true, however, that the Sixth Amendment forbids the government from occupying a *better* evidentiary position as the result of an imbalanced adversarial confrontation. Because of the relationship between an initial *Massiah* violation and a successive confession, the Sixth Amendment commands exclusion.[318]

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[316] *Id.*

[317] Alternatively, the evidence is admissible if there is a connection, but the evidence would inevitably have been discovered lawfully. *See* Nix v. Williams, 467 U.S. 431, 444, 448 (1984). In that situation, the government is not actually benefitting from the counsel deprivation, and the accused is not disadvantaged at trial in any way that his entitlement to counsel would have prevented.

[318] In rejecting Fellers's claim for exclusion of his jailhouse statements, the Eighth Circuit also relied on the following facts: that officers did not use the first statement to prompt the second admission, that they would have had a basis for the questioning that led to the second statement without having obtained the first statement, and that the content of the second statement went well beyond the content of the first. *Fellers*, 397 F.3d at 1095–96. While these facts would seem *relevant* to a determination of whether there is any causal connection between first and second statements, they *do not* necessarily *break* the presumptive causal chain.

The Eighth Circuit attempted to bolster its reasoning by citing *Patterson v. Illinois*, 487 U.S. 285 (1988), which it characterized as a recognition that the usefulness of a lawyer is not significantly different in pre- and post-accusation settings. *See supra* text accompanying notes 62–64. This reliance on *Patterson* was misguided. The *Patterson* Court by no means suggested that the nature and objectives of *Miranda*'s protections and of the *Massiah* right to counsel are the same. In fact, the Court has made it very clear that Fifth and Sixth Amendment protections are different *because* "the policies underlying the two [provisions] are *quite* distinct." Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (emphasis added). The *Patterson* Court itself concluded that, even though a waiver of *Miranda* counsel is valid when a suspect is not informed that his attorney wishes to speak to him, a waiver of *Massiah* counsel in those circumstances would be invalid. *Patterson*, 487 U.S. at 296 n.9. This doctrinal distinction undoubtedly

CONCLUSION

United States v. Fellers raised an interesting and significant Sixth Amendment exclusionary rule issue that afforded the Supreme Court a chance to address long neglected subjects—the nature of and the objectives served by excluding evidence obtained in violation of the *Massiah* entitlement to pretrial assistance. Unfortunately, the Justices chose not to exploit the opportunity. They strained to construe the lower court's opinion in *Fellers* in a way that led to a remand of the exclusionary rule issue. Then, when the defendant sought review a second time, the Court refused to consider his claim.[319] As a consequence, the Court's views about Sixth Amendment exclusion and the applicability of *Oregon v. Elstad* to right to counsel deprivations remain uncertain.

In this Article, I have sought to illuminate the *Miranda* exclusionary rule and the reasoning that underlies the *Elstad* doctrine and to explain how *Elstad*'s limitation on exclusion can be reconciled with *Miranda*'s prophylactic Fifth Amendment scheme. I then offered what I consider to be the only sensible constitutional explanation for the Sixth Amendment exclusionary rule—that it is an inseparable part of the right to counsel and mandates a bar at trial to all evidence acquired before trial in violation of *Massiah*'s standards. Because a successive confession acquired after compliance with *Massiah*'s restrictions is presumptively connected to an initial confession that is the product of a right to counsel deprivation, *Elstad*'s general rule of admissibility should not be extended to the Sixth Amendment realm. Instead, an accused must have an entitlement to have successive confessions, along with all other derivative evidence, suppressed from his trial. Evidence acquired after the right to counsel has been denied

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rests on the differences in the characters and aims of the two guarantees. Moreover, the Court's unanimous holding in *Fellers v. United States*, 540 U.S. 519 (2004), that interrogation is *not* necessary to trigger the *Massiah* entitlement to assistance is clearly based on a recognition that the characters and purposes of Fifth and Sixth Amendment counsel are quite different. *See* Tomkovicz, *Pretrial Assistance*, *supra* note 7, at 518–24.

The Eighth Circuit also reasoned that the admission of Fellers's second confession was consistent with the standards announced in *Missouri v. Seibert*, 542 U.S. 600 (2004). *See supra* text accompanying notes 68–71. While that conclusion may be entirely correct, it has no relevance to the question of whether *Elstad* applies to *Massiah* violations. *Seibert* addresses the circumstances in which warnings given before successive confessions cannot effectively serve *Miranda*'s purposes. *See supra* text accompanying notes 157–76. Because successive confessions are not subject to exclusion as fruits of *Miranda* violations, the efficacy of the warnings is determinative of their admissibility. The fact that warnings are effective, however, does not mean that a successive confession is causally unconnected to an initial confession. Consequently, *Seibert* analysis cannot control the admissibility of a successive confession after a right to counsel deprivation. Of course, in a Sixth Amendment case, if the circumstances were such that warnings could not be effective there would be an additional reason for excluding a successive confession.

[319] Fellers v. United States, 126 S. Ct. 415 (2005).

may be admitted *only* if the government shows that it was in no part the product of that denial.

The hope is that this Article has done more than provide a logical answer to the narrow exclusionary rule question sidestepped by the Supreme Court and resolved incorrectly by the Court of Appeals. The aim here has been not only to "save *Massiah* from *Elstad*," but also to expose the true character of Sixth Amendment exclusion and thereby provide a solid foundation for the resolution of all Sixth Amendment exclusionary rule issues.

The *Miranda* and *Massiah* doctrines have dramatically different characters and purposes. With *Miranda*'s Fifth Amendment safeguards against official efforts to secure and use confessions in decline, it is vital to preserve the shelter provided by the right to counsel. That shelter can be threatened by inappropriately restrictive interpretations of the circumstances in which an accused is entitled to assistance. It can also be eroded by the facile, ill-considered transposition of irrelevant exclusionary rule reasoning and limitations—in particular, those underlying and applicable to *Miranda* suppression.

In an earlier piece concerning the Supreme Court's substantive Sixth Amendment holding in *Fellers*, I applauded the Court's unanimous decision that interrogation is not necessary to trigger the entitlement to assistance.[320] That holding reflected an implicit appreciation for the differences between the preventive constitutional *safeguards* provided by *Miranda* and the core constitutional *right* preserved by *Massiah*. When Sixth Amendment exclusion issues—including the question of *Elstad*'s applicability—do arrive on the Court's doorstep, one can only hope that the Justices will show the same appreciation for the fundamental constitutional right to the assistance of counsel.

[320] *See* Tomkovicz, *Pretrial Assistance*, *supra* note 7, at 530–31.