

# Miranda: Questioning After a “Technical” Violation

*“Mistakes are a fact of life. It is the response to error that counts.”*

Nikki Giovanni, American essayist

There is a certain sinking feeling that officers may experience when, having just elicited an ironclad confession or highly incriminating statement from a suspect, they realize it will be suppressed because they had inadvertently violated *Miranda*. And this unpleasant feeling will rapidly intensify into pure panic if the crime was serious and the suspect’s statement will be crucial. At such a moment, there can be only one thing on the officer’s mind: *Can I fix this?*

As we will explain in this article, the answer is oftentimes yes. In many cases, officers may simply start over and try it again, just as if the *Miranda* violation had never happened.

At this point, our more cynical readers are probably thinking this cannot be true. After all, they know that no judge has ever responded to a mistake by a law enforcement officer by patting him on the back and saying, “Don’t worry about it. Nobody’s perfect.” Quite the contrary, when officers obtain incriminating evidence by violating a suspect’s constitutional rights, judges always take a hard line and apply the punitive “fruit of the poisonous tree” rule which results in the suppression of *everything* that was obtained as the result—even evidence that was only slightly “tainted.”<sup>1</sup>

But *Miranda* rights are *not* constitutional rights.<sup>2</sup> They are court-created rights that serve only to *help prevent* violations of constitutional rights, namely the Fifth Amendment.

<sup>3</sup> So when a court rules that an officer violated a suspect’s *Miranda* rights, it is only ruling

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<sup>1</sup> See *Wong Sun v. United States* (1963) 371 U.S. 471, 487-8 [“[The issue] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”].

<sup>2</sup> See *Dickerson v. United States* (2000) 530 U.S. 428, 437, 440, fn.4, 442 [*Miranda* warnings are not “required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements.”]; *United States v. Patane* (2004) 542 U.S. 630, 640-1 [by characterizing *Miranda* as “a constitutional rule,” the Court in *Dickerson* did not somehow transform *Miranda* violations into constitutional violations]; *Michigan v. Tucker* (1974) 417 U.S. 433, 444 [“[The *Miranda* warnings] are not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination is protected.”]; *Oregon v. Elstad* (1985) 470 U.S. 298, 310 [“The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced”]; *Missouri v. Seibert* (2004) 542 U.S. 600, 612, fn.4 [“But the Court in *Elstad* rejected the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following an initial failure to administer the warnings required by *Miranda*.”]; *People v. Storm* (2002) 28 Cal.4<sup>th</sup> 1007, 1033, fn.11 [*Elstad* survived *Dickerson*, thus a *Miranda* violation is not a constitutional violation]. **NOTE:** The United States Supreme Court has described *Miranda* as a “constitutional rule,” a “constitutionally based” rule, a rule that has “constitutional character” and “constitutional underpinnings,” and a rule that provides “practical reinforcement” to Fifth Amendment rights—but *never a constitutional right*. See *Dickerson*, *supra*, at pp. 437, 439 fn.4, 440; *Missouri v. Seibert* (2004) 542 U.S. 600, 609; *New York v. Quarles* (1984) 467 U.S. 649, 654. ALSO SEE *Dickerson v. United States* (2000) 530 U.S. 428, 445 (dis. opn. of Scalia, J.) [“One will search today’s opinion in vain, however, for a statement (surely simple enough to make) that [the federal statute ostensibly overruling *Miranda*] violates the Constitution.”].

<sup>3</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 306, fn.1 [“A *Miranda* violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements.”]; *Missouri v. Seibert* (2004) 542 U.S. 600, 608 [*Miranda*’s objective was “to reduce the risk of a

that the officer failed to follow the *Miranda* procedure, not that he violated the Fifth Amendment by resorting to coercion.<sup>4</sup>

For this reason, the courts do not apply the “fruit of the poisonous tree” rule to *Miranda* violations that are merely “technical” in nature.<sup>5</sup> Instead, they suppress only the statement that was made immediately following the violation.<sup>6</sup> This is why an officer who obtains a statement in technical violation of *Miranda* may be able to repair the damage by simply obtaining a second statement in full compliance with *Miranda*.<sup>7</sup> As the California Supreme Court explained:

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coerced confession and to implement the Self-Incrimination Clause [of the Fifth Amendment].”]; *United States v. Patane* (2004) 542 U.S. 630, 643 [*Miranda* is a “judge-made rule” designed to protect the Self-Incrimination Clause of the Fifth Amendment]. **NOTE:** This is why the courts often say that *Miranda* rights are “prophylactic” in nature, meaning their role is to help prevent violations of the Fifth Amendment.

<sup>4</sup> See *United States v. Patane* (2004) 542 U.S. 630, 637 [“The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn.”].

<sup>5</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 318 [“[T]here is no warrant for presuming coercive effect where the suspect’s initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.”]; *Michigan v. Harvey* (1990) 494 U.S. 344, 351 [“We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are not themselves rights protected by the Constitution, but are instead measures designed to ensure that constitutional rights are protected.”]; *People v. Wash* (1993) 6 Cal.4th 215, 241 [“There is no evidence that the pre-*Miranda* statement was obtained through improper police tactics or coercion. Therefore, under [*Elstad*] . . . the confession need not be suppressed.”]; *People v. Brewer* (2000) 81 Cal.App.4th 442, 454, fn.8 [“In [*Dickerson*] the Supreme Court made clear that *Miranda* warnings are constitutionally based, and also reaffirmed the validity of the ruling in *Elstad* that the fruit of the poisonous tree doctrine developed in Fourth Amendment cases does not apply in cases involving noncoercive violations of *Miranda*”]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [“[W]e observe that admissions made pursuant to full *Miranda* waivers may not be suppressed because of prior *Miranda* violations unless the later admissions were in fact involuntary.”]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1409 [“*Dickerson* makes it clear that the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement follows a proper warning and waiver and is voluntary given the holding in *Elstad*.”]; *People v. Lewis* (1990) 50 Cal.3d 262, 275; *People v. Gastile* (1988) 205 Cal.App.3d 1376, 1385 [“The People contend and we agree that the line of California cases, which hold that a noncoerced, non-*Mirandized* confession presumptively taints a subsequent noncoerced, *Mirandized* confession, is no longer viable”].

<sup>6</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 307, fn.1 [although the *Miranda* violation results in an un rebuttable presumption that the first statement was coerced and is therefore inadmissible, this presumption does not mean the first statement was actually coerced or that the second statement was its suppressible “fruit.”]. **NOTE:** This explains why the courts will not suppress physical evidence obtained as the result of a *Miranda* violation, and why a statement obtained in violation of *Miranda* may be used to impeach the suspect. See *United States v. Patane* (2004) 542 U.S. 630; *Harris v. New York* (1971) 401 U.S. 222.

<sup>7</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 318 [“We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”]; *Michigan v. Harvey* (1990) 494 U.S. 344, 351 [“We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are not themselves rights protected by the Constitution, but are instead measures designed to ensure that constitutional rights are protected.”]; *People v. Wash* (1993) 6 Cal.4th 215, 241 [“There is no evidence that the pre-*Miranda* statement was obtained through improper police tactics or coercion. Therefore, under [*Elstad*], which we have adopted as the standard in California, the confession need not be suppressed.”]; *People v. Brewer* (2000) 81 Cal.App.4th 442, 454, fn.8 [“In [*Dickerson*] the Supreme Court made clear that *Miranda* warnings are constitutionally based, and also reaffirmed the validity of the ruling in *Elstad* that the fruit of the poisonous tree doctrine developed in Fourth Amendment cases does not apply in cases involving noncoercive violations of *Miranda*”]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [“[W]e observe that admissions made pursuant to full *Miranda* waivers may not be suppressed because of prior *Miranda* violations unless the later admissions were in fact involuntary.”]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1409 [“*Dickerson* makes it clear that the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the

Where a prior custodial statement, though obtained without *Miranda* warnings, was otherwise uncoerced, any taint upon a second statement is dissipated by a determination that the second statement was itself voluntary and obtained without a *Miranda* violation.<sup>8</sup>

Moreover, this rule applies even though the suspect probably would have not made the second statement if he had known his first one was inadmissible. In other words, it does not matter that the suspect mistakenly believed he had nothing to lose by making a second statement because he had already “let the cat out of the bag.”<sup>9</sup>

### How the rule works

To understand how this rule works in real life, it will be helpful to review the case that started it all: *Oregon v. Elstad*.<sup>10</sup> A sheriff's deputy arrested 18-year old Michael Elstad in his home on a burglary warrant. Without first obtaining a *Miranda* waiver, the deputy asked if he knew the victim of the burglary. Elstad said, yes. The deputy then said

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subsequent statement follows a proper warning and waiver and is voluntary given the holding in *Elstad*.”]; *People v. Lewis* (1990) 50 Cal.3d 262, 275; *People v. Gastile* (1988) 205 Cal.App.3d 1376, 1385 [“The People contend and we agree that the line of California cases, which hold that a noncoerced, non-*Mirandized* confession presumptively taints a subsequent noncoerced, *Mirandized* confession, is no longer viable”]; *People v. San Nicolas* (2005) 34 Cal.4<sup>th</sup> 614, 639 [“[T]here is nothing in the record to suggest that defendant’s [first statements] were involuntary”]; *People v. Bradford* (1997) 14 Cal.4<sup>th</sup> 1005, 1033, 1039; *People v. Lewis* (1990) 50 Cal.3d 262, 275; *People v. Rich* (1988) 45 Cal.3d 1036, 1080-1; *People v. Torres* (1989) 213 Cal.App.3d 1248, 1255 [“*Elstad* sets forth a two-step analysis: the trial court must determine (1) whether the statements obtained in violation of *Miranda* were otherwise voluntary; and (2) whether, under the totality of the circumstances, defendant’s subsequent statements were also voluntarily made. If both tests are met and the subsequent statements were not themselves directly in response to further non-*Miranda* interrogation, they are admissible against defendant.”]; *People v. Harris* (1989) 211 Cal.App.3d 640, 649-50; *People v. Thongvilay* (1998) 62 Cal.App.4<sup>th</sup> 71; *U.S. v. Williams* (9<sup>th</sup> Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] [“Thus, under *Elstad*, if the prewarning statement was voluntary . . . then the postwarning confession is admissible unless it was involuntarily made despite the *Miranda* warning.”]; *U.S. v. Garvin* (9<sup>th</sup> Cir. 2001) 258 F.3d 951, 956-8; *U.S. v. Byram* (1<sup>st</sup> Cir. 1998) 145 F.3d 405, 409 [“[In *Elstad*] the Supreme Court flatly forbade automatic application of the fruits doctrine for *Miranda* violations.”]; *Tankleff v. Senkowski* (2<sup>nd</sup> Cir. 1998) 135 F.3d 235 [statement admissible, but “close” case]; *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1095 [“Because the *Miranda* warnings give the suspect the information he needs to choose whether to exercise his right to remain silent, the suspect’s choice to speak after receiving *Miranda* warnings is normally viewed as an act of free will.”]; *U.S. v. Mashburn* (4<sup>th</sup> Cir. 2005) 406 F.3d 303, 309 [“Here, the district court found no evidence that the agents’ failure to convey *Miranda* warnings to Mashburn was deliberate or intentional. Therefore, the admissibility of Mashburn’s statements is governed by *Elstad*.”].

<sup>8</sup> *People v. Storm* (2002) 28 Cal.4<sup>th</sup> 1007, 1030.

<sup>9</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 312 [“This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver.”]; *People v. Beardslee* (1991) 53 Cal.3d 68-109 [“It is true that defendant’s knowledge that he had already confessed . . . gave him a false sense that he had nothing to lose in talking to the California authorities. This might have played a role in defendant’s decision to speak. . . . At most, however, this suggests that ‘but for’ the illegality, defendant would not have confessed in California. [But] that is not the test.”]; *People v. Storm* (2002) 28 Cal.4<sup>th</sup> 1007, 1028-30 [suspect who invoked the right to counsel was released from custody after “letting the cat out of the bag”; non-coercive questioning two days later at his home was not tainted]; *U.S. v. Carter* (1989) 884 F.2d 368, 372 [“The *Elstad* opinion rejected the ‘fruit of the poisonous tree’ and ‘cat out of the bag’ analogies with respect to *Miranda* violations.”]; *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1097, fn.2. **NOTE:** “Letting the cat out of the bag”—which essentially means revealing a secret—is an expression that comes from an old scam whereby crooked pig merchants would put a stray cat in a customer’s bag instead of a baby pig. The scam would be exposed when the buyer got home and opened the bag, at which point the cat would jump out. See *The American Heritage Dictionary of Idioms* (1997), p. 381.

<sup>10</sup> (1985) 470 U.S. 298. **NOTE:** *Elstad* is “the standard in California.” See *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 241.

he believed that Elstad “was involved” in the break-in, at which point Elstad admitted, “I was there.” Later at the sheriff’s office, Elstad waived his *Miranda* rights and confessed.

It was undisputed that Elstad’s pre-waiver admissions were obtained in violation of *Miranda* and were therefore properly suppressed. Thus, the only issue was whether his subsequent confession should also have been suppressed as the “tainted” product of the violation. As noted, the answer would have been yes if a failure to warn amounted to a constitutional violation. But the Court rejected that idea, pointing out that a failure to warn—which it termed a “technical” violation—“differs in significant respects” from constitutional violations which “have traditionally mandated a broad application of the ‘fruits’ doctrine.”

Accordingly, the Court ruled that unless the *Miranda* violation was accompanied by the types of coercive influences that transgress the Fifth Amendment, the “fruits” rule does not apply and therefore a subsequent statement obtained in compliance with *Miranda* will not be suppressed. Said the Court, “We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”

### **What’s a “technical” *Miranda* violation?**

Although the Court ruled the “fruits” doctrine does not apply to “technical” *Miranda* violations, it did not define the term “technical,” except to indicate it is “procedural” in nature.<sup>11</sup> So, what kinds of violations fall into this category?

There is surprisingly little law on the subject. That might be because run-of-the-mill *Miranda* violations seldom generate any coercion whatsoever. In any event, because an outright failure to provide any warnings is only a “technical” violation, so should the inadvertent delivery of inaccurate warnings. It might even apply when a court rules the suspect’s waiver was not “knowing and intelligent” because, for example, he was high on drugs.

It is also possible that an officer’s failure to stop questioning a suspect who has invoked may be deemed a “technical” violation if, (1) the officer was not deliberately ignoring the invocation (e.g., by employing the “outside *Miranda*” maneuver), and (2) the failure to stop questioning the suspect did not generate coercion. For example in *People v. Harris*,<sup>12</sup> a Contra Costa County sheriff’s investigator arrested Harris for murder, brought him into an interview room and asked if he wanted to talk about the case, he replied, “Not really,” which the investigator took as an invocation. Consequently, he asked no further questions.

Before leaving the room, however, he started thinking that Harris might not have actually intended to invoke. This was because, just two days earlier when Harris was still at large, he had phoned another deputy and said he was going to come in and get the matter resolved. This led the investigator to say, “I thought you were going to come back

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<sup>11</sup> See *People v. Montano* (1991) 226 Cal.App.3d 914, 932-3 [“The term ‘technical’ is of more than passing interest because it has become something akin to a term of art in this field”].

<sup>12</sup> (1989) 211 Cal.App.3d 640, 649. ALSO SEE *People v. Bradford* (1997) 14 Cal.4th 1005, 1033, 1039 [“However, just as a failure to give *Miranda* warnings does not in and of itself constitute coercion, neither does continued interrogation after a defendant has invoked his right to counsel”]; *U.S. v. Byram* (1<sup>st</sup> Cir. 1998) 145 F.3d 405, 409 [“Our own view, highly tentative in the absence of more guidance from the Supreme Court, is that *Elstad* would be hard to confine to technical violations; its language emphasizing the voluntariness test as the prime safeguard is too powerful for that.”].

and straighten it out.” Harris said he still wanted to, but the investigator told him it was too late because he had invoked.

Still unsure whether Harris had invoked, the investigator conferred with his lieutenant who suggested he check back with Harris to clear up the matter. So he returned to the interview room and said, “Okay, Terry, you indicated to me that you might be wanting to change your mind and talk. Is that true or not?” Harris said “yes” and, after waiving his rights, he made an incriminating statement. Two days later, the investigator sought another interview; Harris waived his rights and confessed.

The Court of Appeal ruled that Harris’s first statement should have been suppressed because, under the law at that time, his comment (“Not really”) was considered an invocation of his right to remain silent.<sup>12</sup> For that reason, the court reversed Harris’s conviction. But it also ruled, citing *Elstad*, that the confession Harris gave two days later might be admissible on retrial. This was essentially because it appeared that the confession was made voluntarily.

Harris had argued that *Elstad* did not apply to his case because an officer’s failure to honor an invocation should not be considered a mere “technical” *Miranda* violation. But the court rejected the argument, noting that the U.S. Supreme Court “has found no valid distinction between a defective warning and a proper one whose negative response is not heeded.”<sup>13</sup>

## THE “TWO STEP” AND OTHER INTENTIONAL VIOLATIONS

*Elstad* was a good case for law enforcement. But, as sometimes happens, a few crime fighters thought they could make it “better.” So they came up with this idea: When interrogating suspects who are in custody, officers should *never* begin by seeking a *Miranda* waiver. Instead, they should ignore *Miranda* and try to get the suspect to confess or at least make a damaging admission. If he does, *then* they should seek a waiver and urge him to repeat his incriminating statement, and maybe elaborate on it. This tactic became known as “The Two Step” or “Question First. Warn Later.”

It was an inspired idea. After all, the United States Supreme Court in *Elstad* had specifically ruled that a voluntary statement obtained in compliance with *Miranda* will be admissible even though the officers had previously questioned the suspect without first obtaining a waiver. Furthermore, suspects who are “two stepped” will almost always waive their rights and repeat their incriminating statement because, having no idea that their first statement was inadmissible, they will figure they had already “let the cat out of the bag” and had nothing left to lose. In other words, the suspect would waive, not because he wanted to, but because it didn’t matter anymore.

“The Two Step” came to the attention of the United States Supreme Court in the case of *Missouri v. Seibert*.<sup>14</sup> The facts were straightforward: After arresting Patrice Seibert for murder, officers in Rolla, Missouri put her in an interview room and, without seeking a *Miranda* waiver, started asking questions about how the slaying occurred. After about 30 minutes, she admitted to some involvement. The officers then gave her a “20-minute coffee and cigarette break” after which they obtained a *Miranda* waiver and succeeded in getting her to elaborate on her admission. The trial court suppressed the first statement

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<sup>13</sup> Citing *Oregon v. Hass* (1974) 420 U.S. 714, 722.

<sup>14</sup> (2004) 542 U.S. 600.

but admitted the second, citing *Elstad*. Seibert was convicted and the case went to the Supreme Court.

From the start, it was apparent that “The Two Step” was finished. As the plurality pointed out, the tactic was developed by “[s]trategists dedicated to draining the substance out of *Miranda*.” Furthermore, it tends to corrupt the criminal justice system because it gives officers an incentive to intentionally violate the law. For example, the officer who had questioned Seibert admitted he had made a “conscious decision” to withhold the *Miranda* warnings as a prelude to a two-step interrogation. In fact, there was even testimony that some law enforcement administrators were encouraging their officers to employ “The Two Step,” and that a national police training organization was conducting “how to” classes.

As the result, four of the nine justices wanted the Court to rule that whenever officers utilize a two-step procedure, the second statement must be suppressed regardless of whether it was done intentionally (as in *Seibert*) or inadvertently (as in *Elstad*). But they could not get the needed fifth vote, which was a good thing because it would have effectively overturned *Elstad*.

In the end, a majority of the Court could only agree that when the “Two Step” is employed deliberately as a means of undermining *Miranda* protections, the second statement must be suppressed unless a court determines it was not the tainted “fruit of the poisonous tree” rule.<sup>15</sup> On the other hand, if a court finds that the officers’ failure to obtain a waiver at the start of the interview was inadvertent, *Elstad* applies and the second statement will be admissible if it was made voluntarily.<sup>16</sup>

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<sup>15</sup> **NOTE:** Because none of the views in *Seibert* garnered the votes of five justices, the holding of the Court “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” See *Marks v. United States* (1977) 430 U.S. 188, 193. Because Justice Kennedy concurred in the judgment of the plurality on the narrowest grounds (he rejected the plurality’s position that a “fruits” analysis should be applied to both intentional and unintentional violations), his opinion represents the holding of the Court. See *U.S. v. Mashburn* (4<sup>th</sup> Cir. 2005) 406 F.3d 303, 308-9 [“Justice Kennedy’s concurring opinion set forth a narrowed test applicable only in the infrequent case in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning. Justice Kennedy’s opinion therefore represents the holding of the *Seibert* Court.”]; *U.S. v. Williams* (9<sup>th</sup> Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] [“This narrower test—which excludes confessions made after a deliberate, objectively ineffective midstream warning—represents *Seibert*’s holding.”]; *U.S. v. Stewart* (7<sup>th</sup> Cir. 2004) 388 F.3d 1079, 1090 [“What emerges from the split opinions in *Seibert* is this: at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second.”]; *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 525 [“[Justice Kennedy’s test] requires that the confession will be excluded when the two-step interrogation is used in a calculated way to undermine the *Miranda* warning.”]; *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1098 [“Under Justice Kennedy’s framework, the *Elstad* rule applies in the Fifth Amendment context only in the absence of a deliberate law enforcement strategy designed to obtain incriminating statements in violation of *Miranda*.”].

<sup>16</sup> See *U.S. v. Terry* (8<sup>th</sup> Cir. 2005) 400 F.3d 575, 582 [two-step analysis not applicable when the violation was unintentional]; *U.S. v. Hernandez-Hernandez* (8<sup>th</sup> Cir. 2004) 384 F.3d 562, 566 [“Our case is more like *Elstad* than *Seibert*. It does not appear that [the officers] used a multi-step interrogation in a calculated way to undermine the *Miranda* warning.”]; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 91 [“[The officer’s] initial failure to read Reinert his *Miranda* rights, though unfortunate and unexplained, seems much more likely to have been a simple failure to administer the warnings rather than an intentional withholding that was part of a larger, nefarious plot.”]; *U.S. v. Stewart* (7<sup>th</sup> Cir. 2004) 388 F.3d 1079, 1090; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) 399 F.3d 1118, 1129-30 [two-step analysis unnecessary because there was no *Miranda* violation; the *Miranda* warning given to the defendant the day before was reasonably contemporaneous with the unwarned interview the next day].

Two questions remain. First, how can the courts determine whether officers intentionally engaged in a two-stepped interview? Second, how can prosecutors prove that a statement obtained by means of a deliberate two-step was not “tainted?”

### Was it “intentional?”

It should not be difficult for the courts to determine whether officers intentionally employed a two-step procedure. This is because it is basic police procedure that a waiver is required before officers may “interrogate” a suspect who is in custody. Thus, the more an officer’s pre-waiver questioning resembled a full-blown interrogation, the more likely a court will rule that the officer had made a tactical decision to obtain an unwarned statement as a prelude to a two-step. Consequently, the following circumstances will be important:<sup>17</sup>

**LENGTH AND SCOPE OF THE UNWARNED INTERROGATION:** The length, scope, and intensity of the pre-waiver interview is critical because it will demonstrate the extent to which the officers were pressing for an incriminating statement. For example, a brief, off-the-cuff interview would not ordinarily indicate an intent to launch the two-step.

**INTERROGATION TECHNIQUES:** The officers’ objective may also be revealed if they confronted the suspect with evidence of his guilt or if they utilized interrogation techniques, such as “good cop/bad cop.”

For example, the *Seibert* plurality thought the officers had employed the two-step intentionally because their pre-waiver questioning was lengthy, “systematic, exhaustive, and managed with psychological skill” and that, when the officers were finished with part one, “there was little, if anything, of incriminating potential left unsaid.” In reaching the same conclusion in *U.S. v. Aguilar*, the Eighth Circuit noted, “[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police.”<sup>18</sup>

In contrast, in *U.S. v. Mashburn*<sup>19</sup> federal agents went to Mashburn’s home where they arrested him and executed a warrant to search the premises for drugs. After finding methamphetamine and a gun, they sat him down on a couch in the living room and explained that “he was facing 10 years in prison for the drug and firearm offenses” and that the only way that he could help himself was to provide the agents with “substantial assistance.” The agents then asked him a few questions about his drug-dealing activities. Mashburn answered freely and apparently candidly. As one of the agents later testified, Mashburn’s answers “pretty well told us what we wanted to know.”

At about this time, the agents realized that Mashburn had not yet waived his *Miranda* rights. So they promptly stopped questioning him while an agent went retrieved a waiver form from his car. After Mashburn signed it, he provided the agents with a complete picture of his drug sales operation. As the court observed, when the interview was over, Mashburn had “detailed the extent of his involvement with drug trafficking, including the amounts and sources of his purchases.”

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<sup>17</sup> See *Missouri v. Seibert* (2004) 542 U.S. 600, 616; *U.S. v. Williams* (9<sup>th</sup> Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] [relevant circumstances include the “completeness of the prewarning interrogation”]; *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 525 [“[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police.”]; *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 525 [unwarned interrogation “lasted approximately ninety minutes” and “included some good cop/bad cop questioning tactics”].

<sup>18</sup> (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 525.

<sup>19</sup> (4<sup>th</sup> Cir. 2005) 406 F.3d 303. ALSO SEE *People v. San Nicolas* (2005) 34 Cal.4<sup>th</sup> 614, 639 [in rejecting an argument that officers had engaged in “The Two Step,” the court pointed out, “[D]efendant answered a few questions posed by the Nevada police officer concerning the location of his car and his duffel bag. Defendant did not speak about the crime itself.”].

Although the court was required to suppress Mashburn's initial statement, it ruled his post-waiver statement was admissible because it was voluntary and there was "no evidence that the agents' failure to convey *Miranda* warnings to Mashburn was deliberate or intentional."

### Was the second statement tainted?

If a judge finds that officers deliberately engaged in a two-step interview, it may be difficult for prosecutors to prove the second statement was not tainted. This is because the courts tend to find that evidence was contaminated by officer-misconduct when the officer engaged in the misconduct for the express purpose of obtaining the evidence.<sup>20</sup>

Still, prosecutors may be able to prevail if they can present evidence that, at the moment the suspect waived his rights, he knew he had not sealed his fate when he made the first statement. To put it another way, the second statement may be admissible if prosecutors can prove the suspect knew he had a "genuine choice whether to follow up on [his] earlier admission."<sup>21</sup> Conversely, the taint would not be eliminated if the suspect reasonably believed that it no longer mattered whether or not he waived his rights—he had already provided the officers with everything they needed to prove he was guilty.

Conversely, the taint would not be eliminated if a reasonable person in the suspect's position would have believed that his fate was sealed when he made the pre-waiver statement and, therefore, his decision to waive his rights was unimportant.<sup>22</sup> As Justice Kennedy put it, "Curative measures should be 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."<sup>23</sup>

The following circumstances and "curative" measures would be relevant in establishing that the suspect waived his rights freely and that he knew his decision to waive was significant:<sup>24</sup>

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<sup>20</sup> See *Brown v. Illinois* (1975) 422 U.S. 590; *Kaupp v. Texas* (2003) 538 U.S. 626, 633.

<sup>21</sup> *Missouri v. Seibert* (2004) 542 U.S. 600, 616.

<sup>22</sup> See *Missouri v. Seibert* (2004) 542 U.S. 600, 612, fn.4. ["In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective."]; *U.S. v. Williams* (9<sup>th</sup> Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] ["When an interrogator has deliberately employed the two-step strategy, Seibert requires the court then to evaluate the effectiveness of the midstream *Miranda* warning to determine whether the postwarning statement is admissible."]; *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 524 ["In 'question-first' cases, the courts must determine whether the use of the tactic inhibits the effectiveness of the *Miranda* warnings and the concerns addressed in *Miranda*. In order to validate the use of the tactic, the defendants must believe they have a real choice regarding the decision to continue speaking to police."]; *Wong Sun v. United States* (1963) 371 U.S. 471, 487-8 ["[The issue] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."].

<sup>23</sup> *Missouri v. Seibert* (2004) 542 U.S. 600, 622 [conc. opn. of Kennedy, J.].

<sup>24</sup> See *Missouri v. Seibert* (2004) 542 U.S. 600, 615-6 [the officers "did not advise that her prior statement could not be used"]; *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 524-5 ["[N]o curative steps were taken to warn or notify defendant that his first statement would probably [not] be admissible in court"; "the method and timing of the two interrogations establish intentional, calculated conduct by the police"; unwarned interrogation "lasted approximately ninety minutes" and "included some good cop/bad cop questioning tactics."]; *U.S. v. Williams* (9<sup>th</sup> Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] [relevant circumstances include "the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements."]; *People v. San Nicolas* (2005) 34 Cal.4th 614, 639; *U.S. v. Carter* (8<sup>th</sup> Cir. 1989) 884 F.2d 368, 373 ["[T]he second confession came almost directly on the heels of the first." A prescient pre-*Seibert* case.]; *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1095-6



**“YOUR EARLIER STATEMENT IS INADMISSIBLE”:** Did officers inform the suspect that his pre-waiver statement could not be used against him in court? If so, this would be important because the suspect would know that he had not “let the cat out of the bag” when he made the first statement and, therefore, his decision to waive his rights and repeat his pre-waiver statement had serious consequences.

**SCOPE, INTENSITY, AND LENGTH OF UNWARNED INTERROGATION:** While the scope, intensity and length of the pre-waiver interrogation are relevant in determining whether the two-step was employed deliberately, they are also circumstances that the courts may use to determine whether the second statement was tainted. This is because the likelihood that the pre-waiver interview had tainted the second statement would be reduced if the pre-waiver interview was, for example, brief and not confrontational. Accordingly, the *Seibert* plurality cited “the completeness and detail of the questions and answers in the first round of interrogation” as indications that the *Miranda* warning would have failed to eliminate the taint. It also repeatedly noted that the pre-waiver interview in *Elstad* was very short, while the pre-waiver interview in *Seibert* was quite lengthy.

**UNWARNED STATEMENT EXPLOITED:** Did the officers utilize information obtained during the pre-waiver interrogation to provoke the suspect into making the post-waiver statement? This occurred in *Seibert* when, during the post-waiver interview, the officer said, “Trice, didn’t you tell me that he was supposed to die in his sleep?”

**CHANGED CIRCUMSTANCES:** If the circumstances surrounding the pre- and post-waiver interrogations were substantially the same, a court might conclude that, from the suspect’s viewpoint, there was really only one interrogation, and that the *Miranda* warning given midstream was a meaningless formality. Thus, the courts will take note of any circumstances that demonstrate a difference or similarity between the two interrogations, such as the following:<sup>25</sup>

**RECESS:** A break between the pre- and post-waiver interviews might allow the suspect “to distinguish the two contexts and appreciate that the interrogation has taken a new turn.”<sup>26</sup>

**DIFFERENT TOPICS, OFFICERS, SURROUNDINGS:** The suspect might also view the *Miranda* waiver as signaling a “new turn” if the topics covered in the pre- and

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[“[T]here is no indication that the interrogating officers made any reference to Fellers’s prior uncounseled statements in order to prompt him into making new incriminating statements.”].

<sup>25</sup> See *Missouri v. Seibert* (2004) 542 U.S. 600, 615-6 [plurality noted the following: “the overlapping content of the two statements”; the “continuity of police personnel”; the “setting of the first and second” interviews was the same; the officer “set the scene [for the warned interrogation] by saying ‘we’ve been talking for a little while about what happened on Wednesday the twelfth, haven’t we?’”; and the degree to which the interrogator’s questions treated the second round as continuous with the first.”]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 524-5 [“[T]he two interrogations “occurred in the same interrogation room, and the same officers participated in the questioning”; “Aguilar’s two interrogations were not separated in time”]; *U.S. v. Williams* (9th Cir. 2006) \_\_ F.3d \_\_ [2006 WL 213852] [relevant circumstances include the continuity of police personnel and the overlapping content of the pre- and postwarning statements.”]; *People v. San Nicolas* (2005) 34 Cal.4th 614, 639; *U.S. v. Stewart* (7th Cir. 2004) 388 F.3d 1079, 1091 [insufficient change in circumstances and insufficient “separation in time”]; *U.S. v. Fellers* (8th Cir. 2005) 397 F.3d 1090, 1095-6 [“[T]here is no indication that the interrogating officers made any reference to Fellers’s prior uncounseled statements in order to prompt him into making new incriminating statements.”].

<sup>26</sup> Quote from *Missouri v. Seibert* (2004) 542 U.S. 600, 622 [conc. opn. of Kennedy, J.]. ALSO SEE *Missouri v. Seibert*, *supra*, at p. 616.

post-waiver interrogations were different, and if the post-waiver interview occurred at a different location with different officers.<sup>27</sup> POV

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<sup>27</sup> See *Missouri v. Seibert* (2004) 542 U.S. 600, 615 [plurality noted “the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel”].