SUPREME COURT OF THE UNITED STATES

No. 02–1371

MISSOURI, PETITIONER *v.* PATRICE SEIBERT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

[June 28, 2004]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The plurality devours *Oregon* v. *Elstad,* 470 U. S. 298 (1985), even as it accuses petitioner's argument of "disfigur[ing]" that decision. *Ante*, at 12. I believe that we are bound by *Elstad* to reach a different result, and I would vacate the judgment of the Supreme Court of Missouri.

I

On two preliminary questions I am in full agreement with the plurality. First, the plurality appropriately follows *Elstad* in concluding that Seibert's statement cannot be held inadmissible under a "fruit of the poisonous tree" theory. *Ante*, at 10, n. 4. Second, the plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer.

A

This Court has made clear that there simply is no place for a robust deterrence doctrine with regard to violations of *Miranda* v. *Arizona,* 384 U. S. 436 (1966). See *Dickerson* v. *United States,* 530 U. S. 428, 441 (2000) ("Our decision in *[Elstad]*—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—. . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *El-*

stad, *supra,* at 306 (unlike the Fourth Amendment exclusionary rule, the "*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself"); see also *United States* v. *Patane*, *post,* at ___ (slip op., at 1) (KENNEDY, J., concurring in judgment) (refusal to suppress evidence obtained following an unwarned confession in *Elstad*, *New York* v. *Quarles,* 467 U. S. 649 (1984), and *Harris* v. *New York,* 401 U. S. 222 (1971), was based on "our recognition that the concerns underlying the *Miranda* . . . rule and other objectives of the criminal justice system must be accommodated"). Consistent with that view, the Court today refuses to apply the traditional "fruits" analysis to the physical fruit of a claimed *Miranda* violation. *Patane*, *post,* p. ___. The plurality correctly refuses to apply a similar analysis to testimonial fruits.

Although the analysis the plurality ultimately espouses examines the same facts and circumstances that a "fruits" analysis would consider (such as the lapse of time between the two interrogations and change of questioner or location), it does so for entirely different reasons. The fruits analysis would examine those factors because they are relevant to the balance of deterrence value versus the "drastic and socially costly course" of excluding reliable evidence. *Nix* v. *Williams,* 467 U. S. 431, 442–443 (1984). The plurality, by contrast, looks to those factors to inform the *psychological* judgment regarding whether the suspect has been informed effectively of her right to remain silent. The analytical underpinnings of the two approaches are thus entirely distinct, and they should not be conflated just because they function similarly in practice. Cf. *ante,* at 1–2 (concurring opinion).

B

The plurality's rejection of an intent-based test is also, in my view, correct. Freedom from compulsion lies at the

heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we focus our analysis on the way in which suspects experience interrogation. See generally *Miranda*, 384 U. S., at 455 (summarizing psychological tactics used by police that "undermin[e]" the suspect's "will to resist," and noting that "the very fact of custodial interrogation . . . trades on the weakness of individuals"); *id.,* at 467 ("[I]n-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").

Thoughts kept inside a police officer's head cannot affect that experience. See *Moran* v. *Burbine,* 475 U. S. 412, 422 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right"). In *Moran*, an attorney hired by the suspect's sister had been trying to contact the suspect and was told by the police, falsely, that they would not begin an interrogation that night. *Id.,* at 416–418. The suspect was not aware that an attorney had been hired for him. *Id.,* at 417. We rejected an analysis under which a different result would obtain for "the same defendant, armed with the same information and confronted with precisely the same police conduct" if something not known to the defendant—such as the fact that an attorney was attempting to contact him—had been different. *Id.,* at 422. The same principle applies here. A suspect who experienced the exact same interrogation as Seibert, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give *Miranda* warnings, would not experience the interrogation any differently. "[W]hether intentional or inadvertent, the

state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." 475 U. S., at 423. Cf. *Stansbury* v. *California,* 511 U. S. 318, 324–325 (1994) *(per curiam)* (police officer's subjective intent is irrelevant to whether suspect is in custody for *Miranda* purposes; "one cannot expect the person under interrogation to probe the officer's innermost thoughts").

Because the isolated fact of Officer Hanrahan's intent could not have had any bearing on Seibert's "capacity to comprehend and knowingly relinquish" her right to remain silent, *Moran*, *supra*, at 422, it could not by itself affect the voluntariness of her confession. Moreover, recognizing an exception to *Elstad* for intentional violations would require focusing constitutional analysis on a police officer's subjective intent, an unattractive proposition that we all but uniformly avoid. In general, "we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' " *United States* v. *Leon,* 468 U. S. 897, 922, n. 23 (1984) (quoting *Massachusetts* v. *Painten,* 389 U. S. 560, 565 (1968) *(per curiam)* (White, J., dissenting)). This case presents the uncommonly straightforward circumstance of an officer openly admitting that the violation was intentional. But the inquiry will be complicated in other situations probably more likely to occur. For example, different officers involved in an interrogation might claim different states of mind regarding the failure to give *Miranda* warnings. Even in the simple case of a single officer who claims that a failure to give *Miranda* warnings was inadvertent, the likelihood of error will be high. See W. LaFave, Search and Seizure §1.4(e), p. 124 (3d ed. 1996)

("[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive").

These evidentiary difficulties have led us to reject an intent-based test in several criminal procedure contexts. For example, in *New York* v. *Quarles,* 467 U. S. 649 (1984), one of the factors that led us to reject an inquiry into the subjective intent of the police officer in crafting a test for the "public safety" exception to *Miranda* was that officers' motives will be "largely unverifiable." 467 U. S., at 656. Similarly, our opinion in *Whren* v. *United States,* 517 U. S. 806, 813–814 (1996), made clear that "the evidentiary difficulty of establishing subjective intent" was one of the reasons (albeit not the principal one) for refusing to consider intent in Fourth Amendment challenges generally.

For these reasons, I believe that the approach espoused by JUSTICE KENNEDY is ill advised. JUSTICE KENNEDY would extend *Miranda*'s exclusionary rule to any case in which the use of the "two-step interrogation technique" was "deliberate" or "calculated." *Ante*, at 4–5 (opinion concurring in judgment). This approach untethers the analysis from facts knowable to, and therefore having any potential directly to affect, the suspect. Far from promoting "clarity," *ibid.*, the approach will add a third step to the suppression inquiry. In virtually every two-stage interrogation case, in addition to addressing the standard *Miranda* and voluntariness questions, courts will be forced to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid.

II

The plurality's adherence to *Elstad*, and mine to the plurality, end there. Our decision in *Elstad* rejected two lines of argument advanced in favor of suppression. The first was based on the "fruit of the poisonous tree" doctrine, discussed above. The second was the argument that

the "lingering compulsion" inherent in a defendant's having let the "cat out of the bag" required suppression. 470 U. S., at 311. The Court of Appeals of Oregon, in accepting the latter argument, had endorsed a theory indistinguishable from the one today's plurality adopts: "[T]he coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible." 61 Ore. App. 673, 677, 658 P. 2d 552, 554 (1983).

We rejected this theory outright. We did so not because we refused to recognize the "psychological impact of the suspect's conviction that he has let the cat out of the bag," but because we refused to "endo[w]" those "psychological effects" with "constitutional implications." 470 U. S., at 311. To do so, we said, would "effectively immuniz[e] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver," an immunity that "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.,* at 312. The plurality might very well think that we struck the balance between Fifth Amendment rights and law enforcement interests incorrectly in *Elstad;* but that is not normally a sufficient reason for ignoring the dictates of *stare decisis*.

I would analyze the two-step interrogation procedure under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*. *Elstad* commands that if Seibert's 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: "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 that coercion

has carried over into the second confession." 470 U. S., at 310 (citing *Westover* v. *United States*, decided with *Miranda*, 384 U. S., at 494). In addition, Seibert's second statement should be suppressed if she showed that it was involuntary despite the *Miranda* warnings. *Elstad*, *supra,* at 318 ("The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements"). Although I would leave this analysis for the Missouri courts to conduct on remand, I note that, unlike the officers in *Elstad*, Officer Hanrahan referred to Seibert's unwarned statement during the second part of the interrogation when she made a statement at odds with her unwarned confession. App. 70 ("'Trice, didn't you tell me that he was supposed to die in his sleep?"); cf. *Elstad*, *supra,* at 316 (officers did not "exploit the unwarned admission to pressure respondent into waiving his right to remain silent"). Such a tactic may bear on the voluntariness inquiry. Cf. *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969) (fact that police had falsely told a suspect that his accomplice had already confessed was "relevant" to the voluntariness inquiry); *Moran*, 475 U. S., at 423–424 (in discussing police deception, stating that simply withholding information is "relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them"); *Miranda*, *supra,* at 476.

* * *

Because I believe that the plurality gives insufficient deference to *Elstad* and that JUSTICE KENNEDY places improper weight on subjective intent, I respectfully dissent.