IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, :

Petitioner :

v. : No. 02-1371

PATRICE SEIBERT. :

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Washington, D.C.

Tuesday, December 9, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

KAREN K. MITCHELL, ESQ., Chief Deputy Attorney General, Jefferson City, Missouri; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

AMY M. BARTHOLOW, ESQ., Assistant Public Defender, Columbia, Missouri; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1371, Missouri v. Seibert.

Ms. Mitchell.

ORAL ARGUMENT OF KAREN K. MITCHELL

ON BEHALF OF THE PETITIONER

MS. MITCHELL: Mr. Chief Justice, and may it please the Court:

Miranda's core ruling is that an unwarned statement may not be used in the prosecution's case in chief to prove guilt. In this case, the prosecution did not seek to admit an unwarned statement, rather the statement that was offered was preceded by a meticulous recitation of Miranda warnings, an express waiver of rights, and was the product of non-coercive questioning.

A fully warned and otherwise voluntary statement is not tainted by the existence of a prior unwarned statement even if the officer intentionally initiated questioning without warning and that is true for two reasons.

First, because an officer's intent does not render the unwarned statement actually involuntary. The unwarned statement is merely presumptively compelled, and once warnings are administered, that presumption ends and

the suspect has the information necessary to make a knowing and intelligent decision about waiver.

QUESTION: May I just interrupt? You say the second warning removes the presumption as to the earlier unwarned statement. Why?

MS. MITCHELL: Going forward, Your Honor, yes.

QUESTION: Going forward, but not going backward.

MS. MITCHELL: No. No, Your Honor. Only going -- it -- it ends the presumption at that --

QUESTION: So that you still have the presumption that the earlier statement was involuntary.

MS. MITCHELL: Yes, Your Honor. It ends the presumption that that -- at that point going forward because it provides the --

QUESTION: And is that true if the -- if the conversation after the warnings includes interrogation about what he said before?

MS. MITCHELL: It would depend on how that happened, but under the facts of this case, yes, it would still remain true.

There are essentially -- under Miranda, there are two elements that we have to look at in determining whether a statement is admissible, and that is whether you have a knowing, intelligent, voluntary waiver and whether

the statement is in fact voluntary. If there is a reference back, as there was in this case to the previous statement, it could be a problem if that is part of the waiver element. And I believe that's what this Court indicated in Elstad itself. If the officer used that in a way that affected the knowing nature then of what the -- the information that was imparted and made the waiver therefore defective, it may be problematic. However, as in this case, where there's simply a reference back during the -- the questioning, after there is a waiver and a decision to go forward, that alone does not affect the voluntariness of that subsequent statement.

QUESTION: Would it -- would it affect it if the officer said, now, an hour ago you told me X? Were you correct in saying that or not? Would that be permissible?

MS. MITCHELL: I think so. After the decision has been made to waive and the individual has decided to proceed forward and talk, I believe that's correct, Your Honor, because --

QUESTION: No, please finish.

MS. MITCHELL: -- because it does not -- it is not sufficient to overbore the individual's will, which is the question at that point because we're at the voluntary analysis at that point.

QUESTION: The difficulty I have with the

argument is the premise that you state -- is in accepting the premise that you state, and that is that a second interrogation that falls on the heels of the first -- here, I think there was a 20-minute break -- can really be separated as a matter of simple psychology. I -- I have difficulty in accepting the plausibility of a conclusion that the -- that the ostensible waiver in the second case is really a free waiver as distinct from sort of throwing up one's hands and saying it's too late to say no now. It's the -- it -- there's a basic implausibility in your case. What -- what can you offer on that point?

MS. MITCHELL: Well, first, Elstad addressed that exact issue and came to the opposite conclusion.

QUESTION: But -- but Elstad -- I mean, let me -- and maybe that's the way I should have focused the case. In -- in Elstad, you did not have a -- let's say, a -- a systematic questioning of the -- of the sort that went on here. Here the -- the police did, indeed, engage in a kind of first-round interrogation, and the -- the intensity of their pressure to get answers in this case seems to me qualitatively different from Elstad.

MS. MITCHELL: It is different, Your Honor. There clearly is a continuum. But the appropriate question is whether the first statement was involuntary or not. If in fact that questioning and that pressure had

been great enough to make that first statement involuntary, then absolutely it would create the kind of taint that could carry forward even after subsequent warnings were given. I think that is the lesson of Elstad.

But Elstad draws that distinction between actual coercion and presumptive coercion, and where it is merely presumptive -- it does not rise to the level of actual -- then that does not carry forward.

QUESTION: But that's -- comparatively speaking, I -- I think maybe that was -- that was relatively easy to tell in Elstad. Here, it's going to be a serious issue, and it seems to me that in order to litigate this issue as the threshold issue to determining whether the second waiver or as part of the litigation as to whether the -- the ostensible waiver really is a waiver and the second statement really is voluntary, we're right back in the morass of litigation, which is one of the principal objects of Miranda to avoid in the first place. We -- we said, look, this -- this litigation is very difficult. It's difficult to engage in this litigation and produce a -- a clear and reliable answer. It seems to me that -- that the position you take forces us right back into that litigation position that we tried to get away from in Miranda itself.

MS. MITCHELL: Well, two observations on that, Your Honor.

First, the Court has not really ever gotten away from the totality of the circumstances analysis. The Court has continued to employ it as the primary analysis --

QUESTION: But you want us to wade deeper. You're -- you're absolutely right. There's -- there's no -- there's no easy way. But your way would make it more difficult. Your -- your way would promote litigation, wouldn't it?

MS. MITCHELL: I -- I don't know that I agree with that because I don't see this as different from where you are in Harris where you still have to do a full-blown analysis of voluntariness. It is somewhat different than the two-prong analysis that is done in every case where voluntariness is at issue because you have the warnings and then, arguably, the totality of the circumstances analysis is somewhat easier. But, nevertheless, in a situation such as Harris, where you're making on the front end a determination on voluntariness, I think it is very, very similar to what -- what we are suggesting here.

QUESTION: Ms. Mitchell, do you take the position that we have to conduct a voluntariness inquiry in -- as to the second statement --

MS. MITCHELL: Yes.

QUESTION: -- after the warnings were given?

MS. MITCHELL: Yes.

QUESTION: You agree with that.

MS. MITCHELL: Absolutely.

QUESTION: And in doing that, do you think that the officer's use of the initial confession to get the defendant to admit what went on is irrelevant to that voluntariness inquiry --

MS. MITCHELL: I would not --

QUESTION: -- or just that it isn't sufficient to determine the outcome?

MS. MITCHELL: I think it --

QUESTION: What -- what is your position exactly?

MS. MITCHELL: I think it is not sufficient to determine the outcome. I would not say it is irrelevant.

QUESTION: But it is relevant in the inquiry.

MS. MITCHELL: I would not say it's irrelevant because I think, as the Court has looked at totality of the circumstances and what is necessary to show coercion, basically the Court has looked, I believe, at two elements: the conduct of the officer and if it is coercive, and the effect on the individual considering their personality, character traits, and so forth. In

Elstad, when -- in talking about the effect of the cat out of the bag on the individual, the Court talked about some subjective disadvantage that the individual might have, and so I suppose that type of analysis could lump that within the characteristics of the individual that the Court would look at in determining a totality of the circumstances analysis.

QUESTION: I -- I don't -- I don't understand your -- your position on that point. It -- it seems to me that if there has been no coercion in the first confession, how could -- how could it possibly be relevant to whether the second confession is voluntary, whether there had been a prior admission?

MS. MITCHELL: I don't think it can control, Your Honor, and I don't --

QUESTION: I didn't say control. How could it possibly be relevant? Unless you're saying what is relevant is whether Miranda was observed, which has nothing to do with whether it was necessarily involuntary.

MS. MITCHELL: And I suppose I would draw the distinction between the questioning and the answer, which I think is a distinction this Court drew in Elstad as well. I don't think the questioning is relevant at all to the subsequent statement, and certainly I would agree with what you're saying. When there's no coercion, it should

not -- there's no taint that carries forward.

But if it is to be considered at all -- and perhaps it shouldn't be, but in a totality of the circumstances analysis, if there is a reference back and the Court wants to consider that as part of the totality, it seems to me the Court might look at from the perspective of whether it in some way affects the individual.

QUESTION: What -- what you're inviting courts to do is to say, well, he wouldn't have made the second confession had he not made the first one which was unwarned under Miranda and therefore the second one is also presumptively -- that's what you're inviting.

MS. MITCHELL: I don't think so. That -- that fact alone could never carry the day, and I think that was made very, very clear in Elstad where that was --

QUESTION: Of course, it can't carry the day, but it's -- it's one of the totality of the circumstances. Right?

MS. MITCHELL: Correct. But just the reference back I don't believe makes it any -- really affects it or makes it any -- any different than the fact that the cat has already been let out of the bag --

QUESTION: May I ask you just a broader question? Is there anything -- if your submission is

correct, is there any reason why a police department should not adopt a policy that said, never give Miranda warnings until a suspect confesses?

MS. MITCHELL: I think -- I think there are lots of reasons why -- why police departments would not do that.

QUESTION: Why not?

MS. MITCHELL: There is a risk associated with taking this type of an approach, and as our officer indicated here, he was rolling the dice. He did not indicate that he did this in every single interrogation he -- he --

QUESTION: So what has he got to lose is what I have to understand. Because if the -- if he doesn't confess anyway, you haven't lost anything. He wouldn't have confessed with the Miranda warning. If he does confess, then you've got a shot at getting it in after giving him the Miranda warning.

MS. MITCHELL: What --

QUESTION: Why would you not -- why would you not always adopt that policy?

MS. MITCHELL: Well, what officers want when they do an interrogation generally is an admissible statement for all purposes, not for some limited purpose. And so what they are looking for is to maximize that

possibility, and they know that -- that the vast majority of people, according to studies, percentage-wise do in fact waive and give a statement. What they risk then is, by not giving the warnings on the front end, is that that alone will become a factor in the analysis in determining whether or not that first statement was voluntary. If the --

QUESTION: But not if you get the rule that -- that you're asking for here, other than this factor.

And then that gets back to the question I want to ask and I think it bears on what you're telling Justice Stevens. Can you tell me what relevance, what weight, what significance do we attach to an earlier unwarned statement?

MS. MITCHELL: In and of --

QUESTION: It is a factor in the totality of the circumstances? Is that -- is that what you're telling us?

MS. MITCHELL: No. What I'm saying is in this -- as in this case, where there is a reference back, I think the Court could look at that as one factor when it's determining totality of the circumstances and whether the statement is voluntary or not. Just the fact that there had been previous interrogation or previous questioning without warnings in and of itself I do not believe, under any circumstances, could carry forward.

QUESTION: When you say reference back, Ms. Mitchell, you mean the interrogator refers back to the --

MS. MITCHELL: Yes.

QUESTION: -- earlier statement.

MS. MITCHELL: As occurred in this case.

QUESTION: And the reference back could cause it -- could cause the later statement to be involuntary because?

MS. MITCHELL: Well, I don't think it would cause the -- the statement to be involuntary in and of itself, but --

QUESTION: I know not in and of itself, but it -- it tends to show that the prior statement -- that the later statement is involuntary. Unless it tends to show that, it's irrelevant. Now, why is it that it tends to show that?

MS. MITCHELL: I think if the Court were to consider that, it would be one factor bearing on how the other circumstances or other parts of the police conduct affected that individual because in the analysis in Elstad, the Court looked at this question of the effect on the individual of having spoken before. So it would not be the -- the previous questioning because that --

QUESTION: The -- the only way it could have any bearing, it seems to me, is that the person would have

said, what the heck, I've already coughed it up, I may as well -- I may as well do it again. And you think that that makes the second one involuntary.

MS. MITCHELL: I don't think that makes the second --

QUESTION: Well, I don't think it does either.

MS. MITCHELL: I don't --

QUESTION: And if it doesn't, I don't see how it can at all be relevant.

MS. MITCHELL: Well, Your Honor, if the Court is looking at the totality of the circumstances, what we're saying is that may be one circumstance the --

QUESTION: When we said totality of the circumstances, I -- I had always thought we meant totality of the relevant circumstances, you know, not whether it's a Tuesday afternoon or not.

QUESTION: Is time relevant? Suppose as soon as the officers got what they wanted from Mrs. Seibert, they didn't give her a 20-minute break to have a cigarette, they said, fine, we got it. Now we're going to redo your Miranda rights nice and slow and then go right on with the questions. Is there any significance to the time and place? That is, she was -- she was in the same room with the same officers.

MS. MITCHELL: Correct.

QUESTION: Suppose it had been one continuous episode, but in the middle of it, they gave her Miranda warnings.

MS. MITCHELL: We do not believe that that would make any difference, Your Honor. As this Court indicated in Elstad, a waiver that is otherwise voluntary and knowing is not ineffective for some specific period of time simply because there was prior interrogation.

QUESTION: It's -- it's simply that the closer the interrogation, the less likely that there is in fact a voluntary waiver.

MS. MITCHELL: I don't believe so, Your Honor, because what -- what you're looking at to determine if there's a voluntary waiver is whether the individual had the information, specifically the legal information, they needed to make a decision. That is giving them their warnings and -- and in a way that clearly communicates their rights to them, and then they have an opportunity to make a decision.

QUESTION: No, but it's -- it's more than simply a -- I mean, there's -- there's no question that the -- that the crucial element is a decision made with appreciation of legal rights. But the other crucial element is that the decision to waive them be voluntary.

MS. MITCHELL: Correct.

QUESTION: And it seems to me the closer you are to the prior statement, the closer you are to saying to yourself, what have I got left to waive? Sure, I'll go ahead. I've already done it.

MS. MITCHELL: I think --

QUESTION: And -- and that's not a -- that's not a function of -- of knowledge of law. It's a function of proximity to the prior statement.

MS. MITCHELL: Well, two things on that. I think Elstad indicated strongly that time was not relevant. It would be relevant if we were doing an attenuation analysis, but we're not because there wasn't underlying coercive conduct, one.

Two, I think if you look at cases such as Bayer, this Court has indicated that, you know, once the cat is out of the bag, the cat is out of the bag. And perhaps, if you want to look at it that way, it always has some lingering effect, but that is not sufficient to make the second statement involuntary. So how long that break is --

QUESTION: Do you know -- do you know why we -- we have the common phrase, I think I'll sleep on it? We have that phrase because we're -- we're likely to make a -- a more intelligent decision if we have more time. Isn't that true?

MS. MITCHELL: But on the other hand, Your Honor, I think this could be more equated to buyer remorse where someone has done something and they thought, wow, I wish I hadn't done that. And then they're told exactly what their rights are, and it's like, wow, okay, I have an opportunity to change what I have just done. And that's what I think really is going on here when the warnings are read to the individual, and so, no, I do not believe that the passage of time is relevant.

If there are no other questions at this time.

QUESTION: That -- you're reserving your time, Ms. Mitchell?

MS. MITCHELL: Yes.

QUESTION: Very well.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. GORNSTEIN: Mr. Chief Justice, and may it please the Court:

An officer's failure to give Miranda warnings before taking an initial statement does not presumptively taint the admissibility of a subsequent statement that has been preceded by Miranda warnings and an express waiver of Miranda rights. And the reason is that the risk of

compulsion that is inherent in unwarned custodial interrogation and that makes the first statement inadmissible is counteracted once Miranda warnings have been given.

QUESTION: May I ask whether you -- you to comment on one -- what if we required that the second warning include a statement that you realize what you said up to now would be inadmissible in your trial?

MR. GORNSTEIN: That is exactly the requirement that this Court rejected in Elstad, and the only difference between this case and in Elstad identified by the Missouri Supreme Court is that here the initial failure to warn was intentional. And the -- the fact of intentionality adds nothing to the level of compulsion that is experienced by the suspect during the initial interrogation. It adds nothing to the psychological force that operates on the suspect who has confessed once as a result of unwarned -- during unwarned questioning and the giving and subsequent administration of Miranda warnings is no less effective in providing the information that is necessary to make a knowing and voluntary decision --

QUESTION: That's -- that's what's not clear to me, that -- that -- it seems to me you're absolutely on the right track in saying that Miranda has, as one of its basic purposes, dealing with cases where there may or may

not be compulsion. We're not sure. And this gets rid of the risk, so that that's a very good way of describing it.

And then it seems to me in this kind of case we have two risks. One was the risk that really it was compelled -- the first statement. And second is the risk that really that first statement does lead to the second confession.

And so to obviate those risks, would it make sense to say in any case where the police knowingly or reasonably should have known they're supposed to give Miranda warnings in the first case, you can use the second statement but only if the government shows that, first of all, that first one wasn't compelled? Second, it shows that the Miranda warning was given before the second. And third, it shows that a time has to have elapsed sufficient to make that Miranda warning reasonable, reasonably cutting the causal connection that you want it to cut.

MR. GORNSTEIN: No, Justice Breyer.

QUESTION: Because?

MR. GORNSTEIN: Because start with Elstad which rejected any requirement of a break. And -- and Elstad also said that the risk of compulsion that is inherent in the initial interrogation and that makes that inadmissible is counteracted once the Miranda warnings have been given, whether or not there has been a significant break between

the initial and the second interrogation.

Now let me address your question about reasonable and knowing and whether that should make a difference. The fact that the warnings were known, that -- that this was a custodial interrogation situation, the fact that the officer may have been unreasonable in thinking it was not -- neither of those adds anything to the level of compulsion that is experienced by the suspect during the initial --

QUESTION: It does not. You're right, but what it does do is provide a tremendous incentive for the police to run around the Miranda warning, and when they run around it, we could get back, if they do it enough, into the circumstances before Miranda that were bad circumstances and called for Miranda.

MR. GORNSTEIN: But the difference between this situation and Miranda is that what Miranda addressed was a situation where you were relying solely on a voluntariness inquiry to determine whether the statements that were admitted were compelled. And the Court has determined that there is an unacceptable risk in that situation when all you're relying on is the totality of the circumstances that a compelled statement will be admitted. In this situation, you are not relying --

QUESTION: Mr. Gornstein, I --

MR. GORNSTEIN: -- totally on the --

QUESTION: Mr. Gornstein, I -- Miranda, whatever it has become, has all over it inform at once, and what we're talking now is, no, Miranda isn't inform at once at all. It's -- it can be. Don't inform until, until you've gotten enough, and then. Now, that seems to me quite a different thing. Anyone reading the Miranda decision says, oh, yes, these are the things the police are supposed to say up front. And now you're saying, no, it doesn't really mean that at all. It means don't inform of your rights until, somewhere in midstream.

MR. GORNSTEIN: Justice Ginsburg, how I -- how I would describe it is that you are required to give Miranda warnings if the government is going to be able to introduce this -- the statements as substantive evidence of the defendant's guilt.

QUESTION: But, Mr. Gornstein, you're just making a different compelled inquiry. Now you're not asking whether the warned statement was compelled, but you're asking in every case whether the earlier statement was compelled so that you'd have the police have a policy of always refusing to give warning, but say, well, don't question him for more than 8 or 9 hours or something like that because you run the risk of compulsion. But it seems to me you're going to get that same factual inquiry with

respect to the earlier statement that Miranda was designed to prevent -- to avoid with respect to the later statement.

MR. GORNSTEIN: But the difference, Justice Stevens, is that -- that yes, there will be inquiry into the voluntariness of the first statement and the second statement, but the difference is that the only statement that is being admitted is the second statement. And that's --

QUESTION: But you -- you agree that's inadmissible if the earlier one was compelled.

MR. GORNSTEIN: Well, not automatically inadmissible if it was compelled, Justice Stevens. There would be a --

QUESTION: Oh, I misunderstood you.

MR. GORNSTEIN: No. That would be presumptively taint -- it would presumptively taint the subsequent statement and then you would look to the --

QUESTION: No. I'm -- I'm assuming it's clear from the evidence the first statement was not merely presumptively compelled but actually compelled.

MR. GORNSTEIN: No. What I'm saying --

QUESTION: Would it not automatically follow the second would be inadmissible?

MR. GORNSTEIN: No. Then -- then the situation,

Justice Stevens, is you would look to a taint analysis to see whether other additional factors cured the initial compulsion and made the second statement voluntary.

QUESTION: Mr. Gornstein --

MR. GORNSTEIN: But what -- what I -- I'm sorry.

QUESTION: No. Please finish your answer.

MR. GORNSTEIN: I -- I just wanted to get this one -- one thing answered which is that when you are looking at the second statement and admitting it, you -- it is a statement that has been preceded by Miranda warnings. There is an express waiver of Miranda rights. There's a finding of voluntariness of the first, a finding of voluntariness of the second, and as to that statement at that point, there simply is not an unacceptable risk that that statement has been compelled.

And on the other hand, there is a serious cost to the administration of justice when you exclude from the jury's consideration what -- a statement that is warned and voluntary and very highly probative evidence of the defendant's guilt.

QUESTION: Mr. Gornstein, you in -- in the answer you just finished giving and I think throughout your argument, you were making -- I think you were making the assumption that there are two inquiries that should be made in the situation that you envision. One is the

voluntariness of the first statement, the unwarned statement. Second is the voluntariness of the second statement, following the warnings. Do you agree that there is a third inquiry and that is the voluntariness of the waiver?

MR. GORNSTEIN: Yes.

QUESTION: Okay.

MR. GORNSTEIN: There has to be an inquiry into the -- there has to be a knowing and intelligent waiver. That is for sure. And if the officer does anything to pressure the suspect, as the Court said in Elstad, to force a waiver, then that would invalidate the subsequent statement.

QUESTION: And -- and don't you think that the -- the situation presented by this kind of case -- for purposes of -- of judging the voluntariness of the waiver, don't you think that the situation presented by this kind of case is significantly different from the situation presented by Elstad? Because Elstad did not involve a systematic interrogation. This did. Isn't it fairly true to say as a general rule that following a systematic interrogation, there is less likelihood of a truly voluntary waiver of the right to silence than in the Elstad situation?

MR. GORNSTEIN: Well, I -- I think what is fair

to say is if it has crossed over into compulsion, yes. But if all there is is a risk of compulsion and -- and that's what makes the first statement inadmissible, then whether or not there's a greater risk in the second situation of compulsion than the first --

QUESTION: I'm trying to keep it simpler. I -- I grant you that if there was compulsion, the risk is greater. I'm -- I'm suggesting that without having to get into the question and making a final determination of whether we're going to label the first statement a subject of compulsion or not, isn't the very fact that there has been a systematic interrogation in a case like this a fact that makes it less likely, not more likely, that the -- that the Miranda waiver, when it comes, will not be a voluntary waiver?

MR. GORNSTEIN: The longer the interrogation, that makes it relevant to the inquiry. But once Miranda warnings have been given, that is sufficient to cure any risk of compulsion no matter how high.

QUESTION: It's -- it's -- but that's -- you're -- you're getting to question three again. I'm talking about question two --

MR. GORNSTEIN: I'm sorry. Then I think that the --

QUESTION: -- the likelihood of a voluntary

waiver.

MR. GORNSTEIN: No. I --

QUESTION: We've got to -- we've got to touch that base before we ask the question about compulsion.

QUESTION: Thank you, Mr. Gornstein.

Ms. Bartholow. Is that correct?

MS. BARTHOLOW: Yes, it is, Your Honor.

QUESTION: We'll hear from you.

ORAL ARGUMENT OF AMY M. BARTHOLOW

ON BEHALF OF THE RESPONDENT

MS. BARTHOLOW: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to get directly to what Justice Souter just mentioned, that when there's a systematic interrogation, things are different.

QUESTION: What do you mean by a systematic interrogation?

MS. BARTHOLOW: Well, I think what Elstad said and why this situation is so much different from Elstad is that it cited cases where there had been a systematic interrogation where there was a deliberate elicitation of questions --

QUESTION: I -- I realize there may be cases, but how about you defining what you mean by a systematic interrogation?

MS. BARTHOLOW: When police officers deliberately elicit incriminating statements from a suspect, then --

QUESTION: In other -- it -- it doesn't have to go over any period of time?

MS. BARTHOLOW: I don't believe -- I don't believe time is the critical factor.

QUESTION: Isn't that the whole point of interrogation, is to elicit statements?

MS. BARTHOLOW: Not in all circumstances, and I -- I think sometimes, especially what the Missouri Supreme Court said there's a risk to this practice. For instance, when officers engage in this practice to locate physical evidence, that wouldn't necessarily be à problem for the Missouri Supreme Court.

But in Elstad, this Court cited, for instance, United States v. Pierce out of the Fourth Circuit and for the proposition that the more in the without more test of Elstad -- the more would be a thorough custodial interrogation at the station house. That would provide more, where there's a simple failure to administer warnings without more --

QUESTION: And -- and why should that be? It seems to me that perhaps underlying your position is that you want us to say that there's simply more likelihood

that there's going to be a statement after the Miranda warning if there's been a -- for your -- to use your term, a systematic interrogation before. I'm -- I'm not sure that we have the empirical data to say that the defendant would be more likely to talk after he's been questioned and the Miranda warning comes late.

Is that what is behind your -- your argument? And if so, is -- is that something on which we can act? Suppose that he is more likely to give a statement after there's been a systematic interrogation. So what, if it's not coerced?

MS. BARTHOLOW: Well, Your Honor, the -- in Elstad, this Court cited Westover which the cardinal fact of Westover, as you said in Mosley, was that the failure of police officers to give any warnings whatsoever to the person in custody before embarking on an intense and prolonged interrogation of him would result in coercion.

QUESTION: So -- so what we're -- so what we're concerned about is the fact of coercion. Nothing -- nothing more?

MS. BARTHOLOW: I think in this case you have coercion, but I think --

QUESTION: Let's talk about the -- as a general rule.

MS. BARTHOLOW: No.

QUESTION: So all we're talking about is the risk of coercion, or are we talking about preserving the -- the integrity of Miranda by not circumventing it, et cetera?

MS. BARTHOLOW: All of those. I think you're concerned about the risk of coercion.

QUESTION: Well, but I thought Miranda was only concerned with coercion.

MS. BARTHOLOW: No. The -- Miranda was --

QUESTION: As an end -- as an end result. Obviously, it's a prophylactic rule.

MS. BARTHOLOW: Miranda was certainly concerned about the risk of compelling statements being -- and also being admitted at trial. That was a main concern of Miranda.

But I -- I think what we're talking about here is whether the waiver was voluntary and whether the second statement was voluntary and the risk of subjecting a suspect to lengthy, intense custodial interrogation. We cannot presume that the waiver and subsequent statement was --

QUESTION: But -- but can you tell me why that is? Is he afraid that he'll be beaten -- or she in this case -- or has the will be broken down so that the decision is a little more clouded and -- and it would have

been clearer to the person if the warning had been given at the outset? These are -- these are matters of psychology that Elstad told us that we really should not be speculating about.

MS. BARTHOLOW: Well, Miranda -- and in Dickerson it cited this portion of Miranda where it said custodial interrogations by their very nature generate compelling pressures which work to undermine the individual's will to resist and compel him to speak when he wouldn't otherwise do so freely.

QUESTION: The question I think -- or at least mine is that if you're talking psychology, the policeman who knows from nothing, never heard of Miranda, accidentally says, did you commit the fire? Yes. Okay? That statement doesn't come in. And then later on he asks it again after the right warning. That's case one.

Case two. The policeman, knowing everything about Miranda, thinks to himself, ha, ha, ha, I've got a great trick here. Did you commit the crime, the fire? Yes. And then later on he asks him the question again after warnings.

In terms of the psychology of the defendant answering the second time, whether that policeman was a fool or a knave seems beside the point. And so if your -- if -- if your whole argument is one of psychology, I don't

get it. Now, that's -- maybe there's more to your argument than just the psychology of the -- the criminal or the defendant -- the criminal defendant the second time. And if so, I want you to respond to that.

MS. BARTHOLOW: Well, Your Honor, I think we're worried about suspects being coerced and compelled into giving statements that aren't according to their free will. We're --

QUESTION: Which statements are you talking about? The first or the second?

MS. BARTHOLOW: Both.

QUESTION: Both, okay. How does the first work?

MS. BARTHOLOW: I'm not sure I understand the question, Your Honor.

QUESTION: If in fact you're worried about policemen subtly coercing the first statement, why do you have to stop admission of the second statement?

MS. BARTHOLOW: Well, the first statement is automatically excluded pursuant to Miranda. The reason why we need to exclude the second statement as well is because by using the first statement, by referring back to the first statement, also by pressuring the waiver to get the second statement, it's not as clear as it would normally be that the second statement is voluntary after the suspect has been subjected to the lengthy

interrogation before.

I mean, police officers wouldn't roll the dice if they knew it didn't work. This officer had used this tactic for 8 to 10 years because he knows it works.

QUESTION: Work to do what? To coerce or to persuade or something else? That's -- that's what I'm trying to get from you.

MS. BARTHOLOW: Well, it undermines the free will. It's -- it -- the tactic is used to prevent the exercise of free will. Had she been given the warnings at the outset, she may well have invoked or asked for an attorney when pressure was too intense on her. What we're leaving --

QUESTION: Well, could you argue that once you know what questioning is like for, say, an hour and then you get the warning, you have a better idea of whether you want to go through with this or not? Again, these are empirical things that I'm -- I'm not sure we're qualified to judge. Maybe -- maybe we must.

MS. BARTHOLOW: I think, Your Honor, once -- once she had been subjected to the lengthy interrogation and they got that statement from her that they had pressured out of her, then when she -- they said, you know, for -- for instance, they would have an incentive to say, okay, now what you just told us we're going to put on

tape and I will be back here with a tape recorder and we will put it on tape. This is what a judge and a jury is going to hear.

QUESTION: It's true if -- if we accept that -- that the first statement was pressured out of her. I mean, I assume -- I assume that what we're proceeding on here is the belief that it was not coercion in the first instance. I think everybody agrees if it was coerced in the first instance, the case is over. Is that what you mean by pressured out of her, or -- or the mere -- the mere failure to give Miranda warning constitutes pressure?

MS. BARTHOLOW: I don't think the mere failure to administer the warning may create the pressure, but it's when the officer embarks upon the -- the specific questioning and interrogation to get -- deliberately elicit an incriminating response, then you have this type of coercive environment or coercive manner of questioning that Elstad was concerned with. And I think that's why Elstad's opinion cited Pierce and Westover for the types of questioning that would necessarily or -- or run the great risk of coercing the defendant into confessing.

QUESTION: Well, and -- and if it did coerce, then -- then Elstad said its rule would not apply. Wasn't Elstad only saying that when this exists, there may be possible a finding of actual coercion, but it's -- it's

not assuming that there is actual coercion whenever that exists or -- or making a total exception from the rule that it laid down for situations in which there was what you call -- what -- what do you call it? Orderly interrogation or programmed interrogation?

MS. BARTHOLOW: I'm just looking at the language of Elstad and when it said it's an unwarranted extension of Miranda, it was saying just the simple failure to administer the warnings unaccompanied by the actual coercive tactics or the manner of questioning when that is coercive or if -- if the environment that it's being done in is coercive, such as the, you know, station house, then -- then there would be no presumption, then the second statement wouldn't be compelled. But when you have those factors, when there's the great risk that it's being -- that the statement is being made under the threat of coercion or pressure or where the environment is -- is coercive, then you do have the presumption.

QUESTION: Well, when it speaks of coercive environment or coercive tactics, I -- I assumed that what it meant is that the prior confession was coerced.

MS. BARTHOLOW: Well, Your Honor, I -- I believe that under Miranda when the Court said that the custodial -- custodial interrogation exerts inherently coercive pressure, I think that means when they question and

deliberately elicit an incriminating response that is compelling, and --

QUESTION: Well then, why have we allowed admission of so many statements, you know, impeachment, public -- public interest, that sort of thing, that result from a situation where there weren't Miranda warnings given if -- if simply station house interrogation always produces coercion?

MS. BARTHOLOW: Because there, Your Honor, I think that the Court was balancing the interest of law enforcement against the interest of allowing a suspect to get on the stand and later lie at trial. It affected the truth-seeking function of the trial, which is greatly impacted here because here --

QUESTION: We -- we would not balance if there were actual coercion. I mean, once you find actual coercion, the game is over. You don't bend the law into balance.

MS. BARTHOLOW: In -- in terms of whether you're going to admit the second statement, in the presence of the potential for coercion or actual coercion, then the burden needs to shift to the State. When they've employed these tactics that generate the risk of compulsion, they need to show that that risk never manifested itself.

QUESTION: But you're -- you -- you -- in what

you just said, you say, you know, potential for -- for coercion, coercion. Those are different things. Coercion, in -- in the sense we've used it in the Fifth Amendment cases, means that the confession is involuntary, and as Justice Scalia says, there's -- there's no balancing there. But you're using it in a different sense, aren't you?

MS. BARTHOLOW: I'm saying that if in this context where it was actually coerced, then no, her statement would not have been admissible to impeach her at -- at all if she had been -- testified at trial.

QUESTION: But -- but no lower court has found that the statement was actually coerced or that the confession -- the statement was involuntary because of tactics of the government.

MS. BARTHOLOW: Well, I believe the Missouri Supreme Court found that only in circumstances other than these would that first statement have been found voluntary. That's the language of the opinion. They also found the waiver involuntary in citing the Westover-type analysis. The two cases that they relied on --

QUESTION: Well, I thought what the court did was make its decision on the basis that the Miranda warning was intentionally not given and that that was the reason that the supreme court found that the statement

could not be admitted. It -- it didn't turn on actual coercion, did it? What did the trial court find on that?

MS. BARTHOLOW: The --

QUESTION: No actual coercion.

MS. BARTHOLOW: The trial court didn't make any specific fact-findings about voluntariness. The -- all it was concerned was -- with that Miranda wasn't given.

QUESTION: Wasn't given, and the reason that the supreme court felt that it had to be suppressed was because the decision not to give Miranda was an intentional decision by the officer.

MS. BARTHOLOW: I believe that was part of the analysis, but the reason they found the waiver involuntary was because of the continuous nature of the interrogation, and it cited the Westover-type cases for that.

QUESTION: What about -- suppose our reason --

QUESTION: We took the -- we took the case to answer the question of whether or not Oregon v. Elstad is -- is abrogated when the initial failure to give the Miranda warnings was intentional. I mean, we -- that's -- that's what we're here to decide.

MS. BARTHOLOW: And I think, Your Honor, when a police officer deliberately embarks upon a tactic to undermine the free will of a suspect in a coercive setting that Miranda acknowledges is a coercive setting, that that

does make a difference because it -- it impels the police officer into using tactics that otherwise wouldn't be permissible, such as referring to the unwarned statement to get a waiver --

QUESTION: Well, I would have thought you'd look at what happened in the second discussion after Miranda warnings were given to determine whether it was voluntary -- a voluntary statement or not. Was there a knowing and voluntary waiver of those rights given at the second statement? Isn't that the proper inquiry?

MS. BARTHOLOW: I believe it is, Your Honor. I -- and that's why I -- I went back to the Missouri Supreme Court's opinion where they found that the waiver was involuntary based on the totality of the circumstances in the interrogation, that the --

QUESTION: But -- but the question presented is based on Oregon v. Elstad. It quotes it. Is the rule that a suspect who has once responded to an unwarned yet uncoercive questioning is not thereby disabled from waiving his rights? I mean, that's -- that's what we're here to decide.

MS. BARTHOLOW: Well, Your Honor, maybe the premise of the question presented was incorrect that there was no --

QUESTION: Did you -- in -- did you in your

brief in opposition make the point that you thought that it was -- it was coerced?

MS. BARTHOLOW: Yes, Your Honor, we did. We cited Westover.

QUESTION: You're talking about the second one now. Sorry. Is what you -- were you finished? Go ahead. Finish it.

MS. BARTHOLOW: Well, I don't want to --

QUESTION: Finish the Chief Justice's --

MS. BARTHOLOW: I don't want to leave any doubt that I -- that the first statement we are asserting in the first instance was actually coerced. I mean, we disagree that --

QUESTION: Well, as I -- may Ì interrupt you and ask you to -- whether this distinction captures your case? I -- I have understood you to be saying that the -- the first statement was -- was coercive in the sense that Miranda spoke of a custodial interrogation as being inherently coercive. It was not, on the other hand, coerced in the sense that it was the product of beating him over the head with a 2 by 4. And as I understand it, you have been saying, look, any unwarned Miranda -- unwarned statement that is given in custody shares the -- the character that Miranda said it had, inherently coercive atmosphere. But that doesn't mean the same thing

as -- as coercion carried to the point of hitting him over the head. Is that the distinction that -- that underlies your argument, or am I putting words in your mouth?

MS. BARTHOLOW: I don't believe that what the police officers did here would have rise -- rose to the level of Fourth Amendment due process involuntariness, no. But I do believe it violated the Fifth Amendment bar on coerced, compelled testimony.

QUESTION: To go to the question that I think was presented, let's make my assumptions and let me overstate a little bit.

My first assumption is it's intolerable to have policemen going around purposely -- purposely -- violating the Miranda rule. Now, assume that conclusion, though I know it's arguable.

Now, if that happens, if they deliberately and purposely have not given these warnings when they knew they should, that would create a situation where they might do it a lot and we'd have a lot of coerced confessions we couldn't ever prove. Okay? So I consider that -- let's call it bad.

(Laughter.)

QUESTION: All right. Now, if -- if we make that assumption, then the question is, well, can the police, nonetheless, introduce a second statement that was

done after warnings? Now, there are three possible positions: always, never, and sometimes.

So I'm exploring the sometimes. Now, I want to know if -- what kind of a rule might you think was okay on the sometimes.

Now, one thing I thought of is if they can show -- not you, but the prosecutor can show that that first statement taken was not coerced and that, second, they really gave the warnings the second time, and that, third, something happened to cut that causal connection because the average person would think, of course, I've got to say what I said before, otherwise they're going to do something really terrible to me. All right? So -- so what -- now, I'm looking for passage of time, I'm looking for something else to cut the causal connection.

But I'm looking really for your view on this. If the answer is sometimes, if the answer is never, but if it is sometimes, what kind of a sometimes?

MS. BARTHOLOW: I believe that sometimes the second statement may be admitted, and that's what Elstad said. Even in the presence of actual coercion, they said that it could be dispelled. And --

QUESTION: Okay. Sometimes you say it could. Now, what kinds of things would dispel it and what isn't dispelled about your case?

MS. BARTHOLOW: I think if there was a passage of time, it would dispel it, and that certainly didn't occur here. Even in Westover, there was a 15- to 20-minute break by the time the police stopped questioning and the FBI started questioning, and that came out at oral argument. Solicitor General Thurgood Marshall said there was a break. So there was no break here.

QUESTION: Is that enough? If -- if there's an interval, same place, same officers, but it -- is everything -- everything turn on how much time there is in between the two?

MS. BARTHOLOW: I'm not sure it could entirely turn on that, but for instance, if questioning had occurred the next day, I believe that would be a -- a sufficient break. And I think the Missouri Supreme Court cited another of our State cases, State v. Wright, where this exact thing happened, questioning occurred and then a day passed, and then questioning occurred again, and that was sufficient to break the causal link.

I think if officers embarking on this type of calculated, unwarned questioning then add to their warnings, when they finally give them, that what you said can't be used against you, if they would have added that, that might have helped an attenuation analysis. But I think clearly none of that occurred here.

I think the -- another problem with this case and this type of tactic is that it affects the truth-seeking function of the trial, the jury, and what it's finding because the first thing the jury hears is when the tape is played and they hear immediately a waiver of rights and --

QUESTION: Let -- let me interrupt you for just a minute, Ms. -- is -- is it agreed that the break here was 20 minutes? That's what the Supreme Court of Missouri majority opinion says.

MS. BARTHOLOW: I believe it was 15 to 20 minutes. 20 minutes, if according to the court, yes.

QUESTION: Thank you.

MS. BARTHOLOW: Going back to the truth-seeking function of the jury, when the jury is listening to the statement, they are presuming that she immediately waived her rights. They know nothing of what occurred before, and the only way that we can challenge that and show that maybe this confession shouldn't be given the weight that it -- it otherwise would have is that she underwent this lengthy interrogation. And the only way we can bring that for the -- before the jury is to show them that she, in fact, made an unwarned statement. And that -- it precludes our ability to defend her by not being able to show under what circumstances she ultimately made that

waiver.

It also allows the -- the unwarned statement to come in because on that tape recording you have the officer mentioning that she made an unwarned statement, and the jury is never supposed to hear that. So here you have the jury thinking, well, she made two statements. It must be the truth.

QUESTION: Well, it's not a complete answer to your argument. Of course, you can have an initial suppression motion before the court. I -- I see the --

MS. BARTHOLOW: Right. I mean, and when that's denied we are still able to show the circumstances under which the confession was made are relevant to the weight to be given to it. I mean, the jury can always weigh the credibility of the suspect and -- in assessing the weight to be given to her confession. And we cannot challenge that here without referring to the unwarned questioning.

If there's no --

QUESTION: Of course, your argument would still be the same if this was all coercive, and to the extent the statements are repetitive, it's just cumulative. I -- I do see your point.

Let me -- let me ask you this. In response to Justice Stevens' question -- and then we got off on some other matters -- opposing counsel -- Justice Stevens

said, well, why won't police do this all the time and why would they have the incentive to make this standard procedure? And the answer I thought was that if you're going to waive your rights, you're going to waive your rights, so it doesn't make any difference. But that seems to me to actually help your side.

MS. BARTHOLOW: Yes, Your Honor. And -- and I guarantee you that if this Court says that this practice is okay, it will become embedded in police procedure just like Miranda has been because the police --

QUESTION: If -- if the answer is if they're going to waive, they're going to waive, then there's no reason why not they don't give the warning at the outset.

MS. BARTHOLOW: Exactly. I mean, they have more incentive not to warn, especially because they talked to her before on two occasions. They -- and I think they tape recorded her interview with them on the -- February 14th, hoping that she would make some sort of incriminating statement, and when she didn't, then they engaged in this practice to subject her to the intense custodial interrogation to try and get the -- the warning from her. But they weren't -- I mean -- excuse me -- the confession from her. But they weren't going to warn her because they were afraid she might invoke. And I think this Court in Escobedo said, you know, we shouldn't fear

that a suspect is going to assert her rights if she knew about them.

QUESTION: Escobedo was pretty much overruled by Miranda, wasn't it?

MS. BARTHOLOW: Yes, Your Honor, but I think the -- that specific principle would remain and that this Court would agree with that we should not have to fear that a suspect will invoke their rights. I mean, that was the whole premise of Miranda is that they have to be made aware of their rights so that they have the free will to invoke them if -- if they are not willing to be subjected to the intense pressure of the custodial interrogation.

QUESTION: Ms. Bartholow, you -- you've asserted that the question presented is not -- is not really accurate, that -- that the Missouri court, in fact, had found that given the totality of the circumstances, one of which was the intentional failure to give Miranda warnings, the second statement was -- was coerced. And I find that in fact that your brief in opposition did make that point.

Now, if -- if the question presented as set forth in the petitioner's brief is not accurate, what do you think would be accurate? Would -- do you think it presents the question at least of whether the intentional failure to give a Miranda warning is one of the factors

properly considered in determining whether the second confession is voluntary or not? It at least presents that question, doesn't it?

MS. BARTHOLOW: I think it presents that question. I don't -- I don't think the Court should proceed on the assumption that the initial statement was voluntary, and that is -- that's always been our first line of defense, is that this wasn't a voluntary statement because under Elstad -- under Elstad the Court said that when a suspect is being subjected to a coercive environment or where the manner of the questioning in the case is coercive, then the standard Elstad rule doesn't apply.

And -- and especially because when Justice Brennan tried to posit this two-step interrogation that it would become all the rage and specifically -- I mean, the description of Justice Brennan's two-step interrogation mirrors this -- this exactly. This Court said that's apocalyptic. We are not encouraging that. We do not want police officers or prosecutors to -- to use that tactic. And -- and unfortunately, I believe law enforcement took the invitation of Justice Brennan's dissent perhaps and didn't listen to what you said in the majority opinion.

I think this tactic is bad for the police. It is bad for suspects, and it is bad for courts. It's got

three strikes against it. And the test that we would ask you to apply is that when police officers deliberately withhold Miranda in order to elicit an incriminating response when they knew or should have known that Miranda was required, then the second statement will be presumed compelled unless and until the State can show that it has been attenuated from the first.

And if there --

QUESTION: Why does the intentionality or not of the failure to give the Miranda warning have anything to do with whether the second confession is voluntary or not? I mean, I can understand why it's -- it's a nasty thing and you don't want the -- you don't want the State to do an end run around Miranda, as you understand Miranda, but why does it have anything whatever to do with the coercive -- with the coerced or non-coerced nature of the second confession? The -- the woman would feel just as coerced whether the failure to give it was -- was intentional or non-intentional it seems to me.

MS. BARTHOLOW: I -- I think the subjective intent of the officers will inform what the officers feel they are allowed to do during the questioning session. The -- the FBI itself required warnings long before Miranda and it was because it made the -- the interrogators respect the person's rights, and that's why

the warnings were required. If the officer intends to disrespect those rights and leave the Fifth Amendment unprotected, then I think there's a grave danger that they will use tactics that they used here, that they will refer to the unwarned statement to pressure the waiver, that they will refer to the unwarned statement to get the second statement, and that there will never be an exercise of the suspect's free will.

QUESTION: Well, but Justice Scalia's question, if you have the officer in good faith makes a mistake, what difference does it make to the defendant?

MS. BARTHOLOW: Well, I think in the absence -- well, when there's a good faith mistake, I don't think you're going to run into the types of coercive pressures that were applied, and that's what Elstad was. You had one or two questions at the suspect's house. You know, we're here to talk about a burglary. Do you know these people? Yes. Well, we think you were involved in that. Yes, I was there. Period. You know.

There was a question whether there was custody or not. I don't think this Court would have found custody in the first instance. And there was a real question about whether that constituted an interrogation at all. And I think in those circumstances -- or -- or if an officer just didn't know that they hadn't been Mirandized

by the first officer or something, when there's clearly a good faith error on the part of the police, then this test would not be required.

Thank you.

QUESTION: Thank you, Ms. Bartholow.

Ms. Mitchell, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF KAREN K. MITCHELL

ON BEHALF OF THE PETITIONER

MS. MITCHELL: Thank you, Your Honor.

On the issue of systematic interrogation that came up several times during the argument, that is relevant only if it rises to the level of making that first statement actually involuntary. And I think that's clear from the Elstad opinion itself. At one point during the Elstad opinion, specifically in footnote 2 of the majority opinion, the Court is talking about lower court decisions where the -- the lower court did not apply the attenuation-type doctrine. And referring to some of those cases as involving, quote, clearly voluntary, unwarned admissions, the Court then goes on and cites a number of cases that involve actual station house interrogations, in many cases much longer than the interrogation we have here. Specifically, I'd point the Court to the Derrico decision cited in Elstad.

So just the idea that you have a traditional

station house-type interrogation is not enough. The question is, does it render the first statement involuntary and therefore capable of tainting the second statement?

In this case the question of voluntariness of each statement was raised in the initial motion to suppress, and even though there were not extensive findings by the trial court, they denied those motions to suppress. And that issue was not raised again in either of the appellate courts in Missouri, and the Missouri Supreme Court did not reach that issue.

On the question of what the Missouri Supreme Court held, three points I think are very important. The court starts out by phrasing or -- or characterizing its decision as such. Essential to the inquiry is whether the presumption that the first statement was involuntary carries over to the second statement. The court then goes on and throughout the opinion makes the decision to, in fact, carry that presumption forward. It focuses on intent and finds intent to be an improper tactic, as this Court used that phrase in Elstad, which is the predicate then for applying a fruits-type analysis and requiring attenuation, which is exactly what the Missouri Supreme Court does. And that is why we sought cert in this case.

As to this -- the -- the apocalyptic issue and

Justice Brennan's discussion in Elstad, Justice Brennan talked about a number of situations, including the application of Miranda to the Fourth Amendment, including the use of statements by police officers to garner a waiver which did not happen here, and other things that are simply inapplicable. This case is not that situation.

Finally, what we are asking this Court to do is to reverse the Missouri court decision that focused on intent, deterrence, and the carrying forward of the presumption to taint the subsequent statement because each of those findings are inconsistent with this Court's holding in Elstad, and instead to apply the framework of Elstad to this case and to reverse.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Mitchell.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)