ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-773

TITLE OREGON, Petitioner v. MICHAEL JAMES ELSTAD

PLACE Washington, D. C.

DATE October 3, 1984

PAGES 1 - 52

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IN THE SUPREME COURT OF THE UNITED STATES

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OREGON, :

Petitioner : No. 83-773

v. :

MICHAEL JAMES ELSTAD :

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Washington, D.C.

Wednesday, October 3, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

DAVID B. FROHNMAYER, ESQ., Attorney General of Oregon; on behalf of Petitioner.

GARY D. BABCOCK, ESQ., Public Defender, Salem, Oregon; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in Oregon v. Elstad. Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.

ON BEHALF OF THE PETITIONER

MR. FROHNMAYER: Thank you, Mr. Chief Justice, and may it please the Court, this case requires close analysis of an extraordinary conclusion of a lower court.

The Oregon Court of Appeals used an extreme extension of the Miranda Doctrine to suppress a fully-advised, utterly voluntary, and clearly cuspirating confession of guilt. That court applied a per se exclusionary rule because of an earlier marginal violation of the outer perimeters of the Miranda Doctrine.

This circumstance gives rise to a question which this Court has never faced squarely before. The defendant was convicted of a burglary following a full confession of his complicity. The signed confession was scrupulously preceded by Miranda advice and by oral and written waivers of all rights, including the right to remain silent.

Defendant declared and exercised his desire to give a full accounting of his involvement in the

burglary, and the validity of his waiver was never challenged. Yet, at trial, the defendant sought unsuccessfully to suppress this fully voluntary confession on the basis of an earler limited admission which had not been preceded by Miranda advice which suggested his presence at the crime scene.

The trial court expressly found that the full confession was voluntary and that it was not tainted by his earlier limited statement.

This case is before this Court only because the Court of Appeals in Oregon accepted defendant's thecry that a per se rule of exclusion should govern the second statement and render it invalid because the "cat was out of the bag."

To suppress the confession in this case is not only without basis in the Fifth Amendment, it is fundamentally itself disrespectful of the importance and desired effect of the required Miranda warnings fashioned by this Court nearly two decades ago.

There is, in fact, no evidence on this record of a connection between the two statements. The Court of Appeals used no legal analysis to establish it, and instead applied a metaphor as a substitute for reasoning. The "cat out of the bag" metaphor is born of a context clearly different than that utilized in this

case because it was born from the involuntary or coereced confession cases.

When the violation at stake is a Miranda violation, the metaphor is psychologically simplistic, does not do justice to the facts or analysis of this case, it will not work a proper result, it disables the police from correcting mistakes, it imposes excessively high cost without deterring police misconduct or improper practices, and it undervalues the importance of Miranda warnings as well as the central core of informed consent which we believe lies at the heart of the Fifth Amendment to the United States Constitution.

The metaphors of the court are inadequate to provide guidance because under a proper analysis, and even pursuing the metaphor further, there is no evidence that "cat" was ever "in the bag at all." There's no evidence that the defendant really meant to or wanted to keep quiet. There is no evidence of compulsion which got in the way of his intention to make a clean breast of it.

QUESTION: Wouldn't it be more accurate, Mr. Attorney General, perhaps to say there was no cat let out of the bag, because it was not a full confession, was it?

MR. FROHNMAYER: It was not a full

confession. It was a --

QUESTION: It was an acknowledgment of presence.

MR. FROHNMAYER: That is correct. An acknowledgment which is ambiguous in the sense that it could mean that the individual was a witness to, rather than a participant in the crime.

In any event, it is a far cry from earlier cases which this Court has decided in which a later confession is admitted, even though the earlier statement is far more indicative of complicity.

For example --

QUESTION: What do you think the Oregon Court of Appeals meant when it used the phrase "the cat is out of the bag"?

MR. FROHNMAYER: We think that it simply misapplied the analysis that should apply to these cases. We believe that it used a figure of speech as a substitute for evidence of causation.

Even having done so, however, it's clear from this Court's decision, that causation is only one condition under which one suppresses evidence, and one still must have a fruit where deterrence justifies suppression as opposed to admitting highly probative evidence.

The second thing, Justice Rehnquist, is that the Court of Appeals may have believed that this bore on the defendant's waiver, the voluntariness of the waiver. But that conclusion, if that's what the court meant, flies in the face of an explicit finding of the trial court that there was, in fact, no taint, no connection between the two statements, and that the defendant's conclusion was fully voluntary.

It shows, in short, the worst possible example that we could bring to this Court of a metaphor substituting itself for legal reasoning, suggesting on one hand perhaps the existence of coercion, which is this record doesn't show, or suggesting the invalidity of a waiver, or suggesting causation which no record evidence otherwise would demonstrate between the existence of the first limited statement and the second.

QUESTION: General Frohnmayer, may I ask about the voluntariness of the confession after the Miranda warnings were given?

I gather the standard of voluntariness is whether he made a knowing waiver of his constitutional right not to speak at all.

MR. FROHNMAYER: That is correct.

QUESTION: Now, is there anything to indicate

that he knew that the first statement would be inadmissible if it were offered in trial?

MR. FROHNMAYER: There's nothing to show that he knew that the first amendment bore on anything he was to -- that the first admission bore on anything that he would say, Justice Stevens.

QUESTION: In order for it to be voluntary, I suppose he ought to have the same degree of knowledge as if he had the advice of counsel. Wouldn't you say that's right?

MR. FROHNMAYER: Not necessarily. All --

QUESTION: I suppose counsel would have told him, if he had counsel available, that that first confession is not admissible and now you decide whether you want to confess or not.

But he didn't know that, did he?

MR. FROHNMAYER: No. But his right to exercise the advice of his -- to invite the presence of counsel -- is clearly given to him in the course of the Miranda warnings. He also has the right not to have counsel present. If that is true under the Sixth Amendment, it's clearly true under the Fifth Amendment.

And in those cases where the police may not know that there's anything with --

QUESTION: Do you think his second confession

would be equally voluntary, whether or not he knew that the first confession of first inculpatory statement would be inadmissible?

MR. FROHNMAYER: Yes, we do.

QUESTION: You do? Even if he thought it was admissible, and he acted on that assumption, you'd still say it was a perfectly voluntary confession.

MR. FROHNMAYER: We'd say that it could be voluntary. There's no evidence to show that he had any knowledge of or that his first admission bore on his decision to make the second full confession in any event.

And I think some of the facts and circumstances to which I'll come in just a moment would further demonstrate that point.

QUESTION: Well, at trial, didn't you claim that there was no custody at the time of the first statement? I know that you don't claim that now, but wasn't it claimed at that time?

MR. FROHNMAYER: No, it was not. The --

QUESTION: So you conceded the Miranda violation from the outset?

MR. FROHNMAYER: Well, the Miranda -- I don't know that it was conceded so much because the prosecution never sought to admit the first statement, Justice White. In other words, the legality of the

circumstances surrcunding --

QUESTION: My question is, you wouldn't have advised him that the first statement was inadmissible because it may have been admissible if there was no custody.

MR. FROHNMAYER: Well, clearly, if there was no custody, there would have been no Miranda violation. But the point is, the defendant only -- the prosecution did not introduce the first statement in the course of this trial.

And in the second, it's only that the defendant challenged not the first statement, but the second statement because of the allegation not --

QUESTION: But we have to proceed on the basis that there was a Miranda violation in the first instance here.

MR. FROHNMAYER: I believe that that's the state of the record to which we're bound at this point.

QUESTION: It may not be important or significant in any way, but isn't there another factor here? Didn't the boy's -- the young man's father come in and have a talk with him after the first statement?

MR. FROHNMAYER: Yes. And, in fact, it's a very central factor, Justice Burger, because if one is to look at the circumstances objectively surrounding the

conditions under which this confession were offered, it reeks of voluntariness by the defendant or at least the conditions which give rise to the ultimate full confession may bear on circumstances entirely removed from police conduct.

He was not in custody at his own home. His mother was present when he was first briefly questioned by the officers. He had, in essence, a verbal altercation with his father in which his father reprimanded him, and that was immediately before he was transferred to the station house by yet another officer who was not present.

And, as Justice Stevens pointed out in his concurring opinion in the Dunaway case, perhaps under these circumstances the fact that one has just visited a minister is far more important in the elicitation of a full confession than is any activity of the police.

We think that fact is a very central and important one.

QUESTION: I gather that the expression "cat out of the bag" is not original with the Court of Appeals to argue?

MR. FROHNMAYER: No.

QUESTION: Indeed, you're familiar, I guess, with our Darwin decision back in 391 where Justice

Harlan, if he didn't actually use the expression, did say -- as I recall it in similar circumstaces -- that the problem with the second confession is that because of what he'd said the first time, the accused might think that he had little to lose by repetition.

And in that circumstance -- I think this was Justice Harlan -- that the State has to bear the burden of proving not only that the later confession was not itself a product of coercive conditions, but also that it was not directly produced by the existence of the earlier confession.

Now, that's the "cat out of the bag" analysis, isn't it?

MR. FROHNMAYER: Yes. I think the patrimony of the "cat out of the bag" is actually a phrase first written by Justice Frankfurter, then adopted by Justice Jackson in Bayer v. United States in about 1947.

QUESTION: Yes. I knew it had a rather ancient origin.

MR. FROHNMAYER: Interestingly enough, in a contest, it is always Bayer that is cited for the proposition, but what is seldom realized is that the second -- the ultimate confession was found admissible in the Bayer case.

QUESTION: Well, wasn't what Justice Harlan

said in Darwin? That was the law at that time, wasn't it?

MR. FROHNMAYER: Yes, but it doesn't control this case. And since that goes to the heart of one of our central propositions, let me suggest why it does not.

First, because it deals only with the causation factor. We contend that, in fact, there is no causation in this case and that relates to my response to Justice Burger -- Chief Justice Burger's question about the intervention of the father's anger.

But, second, even if there is causation, that is, a relationship between the first admission and the second confession, that does not perpetually disable the accused from confessing. And the reason that it doesn't is dealt with in the Bayer case.

Now, bear in mind a crucial distinction here because it's central to our argument and I wish to reiterate it. That is, that the Bayer case and the Darwin case in its progeny dealt with coerced confessions. They dealt with involuntary confessions. They dealt with a set of circumstances in which the individual is not free under his own concept of self-determination voluntarily to come forward and waive a Fifth Amendment right.

That is not and cannot be the case in a situation where the violation is of the prophylactic rules that surround the Miranda case, because in that case it is at best a presumption of police coercion, which it is the purpose of the warnings to dispel.

So we understand the meaning of the Bayer case to be simply this: that in order for the second confession to be admissible and usable against the defendant, those conditions which gave rise to the illegality must be cured in some form or another.

In the case of coerced confessions or involuntary confessions, it's not surprising that this Court's previous decisions suggest that the way to cure it is some lapse of time or some distance in circumstances or some release from custody, because those are the kinds of situations that would cure an actual atmosphere of duress or coercion.

But where, as in this case, the constitutional violation that exists lies in the failure to give the Miranda warnings such as the individual has not been restored to his ability to make an informed decision about waiver, then the cure for the violation, if it exists and if it in fact might have caused the second confession, is the giving of the Miranda warnings and a full and valid waiver after those warnings, because the

presumption then is that the illegal condition, the illegal thing, has been removed.

So we believe that, in fact, the flaw of the "cat out of the bag" metaphor is, first of all, its origins in the coereced confession cases and the failure of subsequent lower courts in this nation to recognize that other conditions may arise.

QUESTION: But it's still, tcc, isn't it, as Justice Stevens suggested to you earlier, that the accused might think -- he wouldn't know that his first statement was going to be -- was not admissible for failure to give Miranda viclaticns, and he went ahead and repeated it the second time because he thought he had nothing to use?

MR. FROHNMAYER: Well, it is always a possibility that a defendant's confession can be induced by things which he either knows or may believe that the police know about him.

In this case, Elstad clearly knew that the police had an arrest warrant, and were he aware of the law, would have to have understood that from independent evidence, not out of his mouth, the police possessed sufficient information for probable cause to detain him.

I believe this Court has never required that in the course of securing a valid confession, that the

defendant must have been in full possession of all knowledge as to what a trial court or an appellate court would later ratify as having been validly admissible items of evidence against that particular defendant.

QUESTION: Well, I guess the McMann case has some bearing on this discussion, does it not, where even a misunderstanding on the part of the defendant as to his initial confession did not invalidate his subsequent guilty plea?

MR. FROHNMAYER: Yes. I mean I think it's the same principle, Justice O'Connor, which is that this Court has never in the case of testimonial evidence -- and correctly so -- required trial court or prosecutors or police to insert themselves in the mind of the defendant and examine all possibilities and motivations of human conduct which give rise to that testimonial evidence.

In fact, we understand that to be one of the central thrusts of the Ceccolini case in connection with the question as to whether or not one should ordinarily admit testimonial evidence which is voluntary, or not admit it. And the thrust, we take it, is that no one can understand or expect to put himself or herself in the mind of the defendant.

There might be an exception to that. If the

defendant were to have affirmatively testified on his motion to suppress as to the overbearing impact, but there is no such --

QUESTION: What if there were a causal connection between the second statement and the first unwarned statement? What would your position be then?

MR. FROHNMAYER: Our position as to the conclusion of the case would be the same, for this reason: that in fruit of the poisonous tree cases, this Court has always said that there is a two-part analysis. Causation is only the beginning of the inquiry. If there's not causation, there's a fruit of the poisonous tree problem and there's never a voluntariness problem.

And we contend in this case, as we've tried to demonstrate, that there is, in fact, no causation, but even if there were, that does not answer the Wong Sun problem in the Fourth Amendment context, or at least analogously here, which is does -- is the value of deterrence of illegal conduct such that the statement should be suppressed, notwithstanding the fact that it bears some relationship to an earlier admission or confession of a defendant?

And so to suppress evidence purely on a causation theory alone, elusive as that is to find in

the case of testimonial evidence where people under their free will act, is to ignore the essential test that this Court has adopted.

QUESTION: Well, what would you say if the first statement was coerced? That wouldn't change your analysis any, would it?

MR. FROHNMAYER: Oh, if the first statement were coerced, that would raise a very different problem. That would --

QUESTION: Why would it in terms of your analysis?

MR. FROHNMAYER: Because that would raise a question as to whether the Miranda.

QUESTION: There would only be causation -- you might just that, arguably, there was causation then; that the first -- the threat of coercion carried over to the second statement.

MR. FROHNMAYER: Yes, but that's squarely within the thrust of the Westover case, the companion case to Miranda, where the waiver of the Miranda warning is invalid because the defendant -- the effects of the first confession had not warn off before the second.

And so it goes then to the voluntariness of the second confession. In this case, neither the first --

QUESTION: Well, what if the second confession were voluntary, but the first is coereced? Do you -- what action should be taken? Is it a due process problem or a Fifth Amendment problem?

MR. FROHNMAYER: It could be both, Justice O'Connor, but we take --

QUESTION: What are you going to do with Lyons v. Oklahoma?

MR. FROHNMAYER: Lyons v. Oklahoma is -- well, we believe --

QUESTION: A coerced confession, and a voluntary one followed, and the voluntary one was held perfectly valid by this Court.

MR. FROHNMAYER: But the Lyons case, the Bayer case, and the Westover case, the companion case to Miranda, are not successive statement cases in the sense that we are dealing with here. They are coerced confession, involuntary circumstances case and the analysis --

QUESTION: Why wouldn't you say that even if the first statement is coerced, the second one is admissible if you can honestly find it to be voluntary; and hence, that the prior coercion didn't carry over and induce the later --

MR. FROHNMAYER: I think that one can say

that, and I think that that's the analysis --

QUESTION: It wouldn't be under your analysis, which is voluntariness of the second statement is crucial to your analysis.

MR. FROHNMAYER: Voluntariness of the second -- yes, because that's the only one that's admitted.

QUESTION: As long as that's true, it shouldn't make any difference whether the first one is coerced.

MR. FROHNMAYER: Well, that may point up perhaps a slight difference between the position taken by the State of Oregon and that taken by the United States in this case, which is the position just advanced as a hypothetical by yourself, Justice White.

And the question is, I suppose, this: Is there -- because it is or perhaps might be a fruit of the poisonous tree problem -- is there any set of circumstances so egregious involving the securing of the first illegal confession or statement, that the subsequent confession, although voluntary in the traditional sense, ought to be suppressed for reasons of deterring police misconduct.

QUESTION: In the Lyons case, the facts in there were about as bad as you can get. They beat that man with three different kind of blackjacks. They had

ordinary blackjacks, a special-made blackjack, and a "nigger-beater" blackjack.

And they beat on him in teams for three days. You can't get much more coercive than that.

MR. FROHNMAYER: I agree with that, Justice Marshall, and --

QUESTION: And they admitted the second confession.

MR. FROHNMAYER: Our view is that in light of the Westover case, decided subsequently to Lyons, that it's questionable whether this Court would stand for that at any time.

And let me suggest that in passing -- it was either Justice Rehnquist or Justice O'Connor suggested that there may be some other constitutional provision that would bear on the admissibility of that kind of circumstance.

That might well be, instead of a Fifth Amendment problem, it may well be a pure due process problem arising some out of some other constitutional provision that independently would prohibit the courts from giving dignity to the continued prosecution of a defendant who had been maltreated under those circumstances?

QUESTION: Mr. Attorney General, getting back

just one second to the "cat out of the bag" analysis, I take it it's consequences could have been avoided here, at least before they gave him the second Miranda warrings, had said to him, look, forget what we said this morning; whatever you said this morning will not be admitted against -- and then they gave him warnings, then he went on and made the statement.

I gather that would have cured any taint under the "cat out of the bag" analysis, wouldn't it?

MR. FROHNMAYER: Well, it might have cured it at the peril, perhaps, of creating a mischief worse than that gratuitous piece of police legal advice might have created.

QUESTION: My next question was going to be, I suppose you think it's pretty impractical to ask the police to go around saying, look, fella, we treated you badly this morning; forget it all and we'll never offer that against you, it'll never be admitted. And he said I will start with a clean slate.

MR. FROHNMAYER: Well, we think it might well do a great deal of mischief, because it confuses the role of the police officer with that of the criminal defense lawyer, first.

Second, it may involve the police in second-guessing their own conduct.

QUESTION: Well, it would cure the taint, wouldn't it?

MR. FROHNMAYER: It could well confuse the defendant.

QUESTION: That still would cure the taint, whether it confused him or not.

MR. FROHNMAYER: Well, in the limited sense, yes. But this Court has always asked for bright line rules in the Miranda context, and we believe to create another gloss on the Miranda Doctrine which would suggest that in cases where police are in doubt as to the admissibility of any evidence with which they confront defendant, that they add another warning saying, and by the way, it may not count -- what we now know -- is simply to create an unadministrable rule.

And for that reason, we believe that the Miranda warning is fully adequate to cure the defect of the failure to give the Miranda warning, such that the second confession is fully allowable.

Any further gloss destroys whatever bright line advantages the Miranda rule has for police agencies around this nation, and we believe destructively and mischievously so.

We've argued, of course, that there is in fact no causation which gives rise to these circumstances in

the first place. We spoke to the fact that the father had berated his son, a condition which may be far more influential on this individual.

We pointed out that --

QUESTION: You could assume for your purposes, I take it, that the fact that the cat had been let out of the bag, to a degree, assuming that there was a cap involved there, and that that circumstances exerted some psycholcgical influence on the man, leading him to make the second statement more completely, and still stand on its admissibility.

MR. FROHNMAYER: Absolutely. Absolutely. Causation is a first precondition, but it is never the determinative factor.

That's what United States v. Bayer established, we believe, as early as 1947 by this Court. The key to admissibility is, first, you must establish causation as a floor, but that's certainly not a minimal condition which is also a ceiling on the admissibility.

And we simply point to the fact that there's nothing in this record that ever showed that defendant was unwilling to talk to the police officers. There's no indication of his unwillingness to volunteer information.

When one compares his limited admission of

presence at the crime scene with the full two-page confession that followed, including a gratuitous postscript that suggested he'd received as payment for his participation in the crime, a baggie of marijuana, it's clear that this is not the example of a defendant who reluctantly was brought to the bar of justice or was reluctant to admit his complicity and involvement and in these events.

Under these circumstances, the trial court made a finding, the trial court which heard the testimony of the police officers, and which said explicitly that there was no taint or connection and said explicitly that the statement was voluntary.

But even if, as you have suggested, Chief Justice Burger, there were some connection between the first and the second episodes, the Miranda warning itself is sufficient to constitute the presence of an intervening factor which renders his second confession fully voluntary.

If the Miranda warning failure were the violation, if it is in fact the poison, the antidote to the poison is the administration of the Miranda warnings themselves.

QUESTION: Why wouldn't that be true if they actually physically assaulted the defendant at the time

of his arrest? Why wouldn't that still be true?

Why shouldn't the Miranda warning always insulate the second confession under your submission?

MR. FROHNMAYER: Because that may not be enough, by itself, to indicate that the restoration or the proper balance between the police and the individual has always been recreated.

QUESTION: What do you mean by the proper balance between -- I don't understand what that means.

MR. FROHNMAYER: Well, by the proper balance, we take to understand the meaning why the Miranda warnings are given in the first place, and why this Court elaborated that doctrine in 1966. And it's this: the presumption of station house coercive -- an atmosphere of coercion in the station house, such that something must be done by police officers if they wish to secure a waiver of the right to counsel and the right not to speak, there must be some statement by official authority that gives the individual a clear knowledge of his own right to self-determination.

And it is the effect of the warnings to do that.

QUESTION: But why isn't the Miranda warning always sufficient to do that? I don't understand -- it seems to me there is some inconsistency in your position.

Isn't it true that if you assume that the first statement was a violation of Miranda, you must be assuming it was presumptively coercive? And why is a presumption of coercion any different than actual beating?

MR. FROHNMAYER: Well, I think that gets to the point. The presumption of coercion is dispelled by giving of the warnings which destroy the only thing that a presumption creates, and that's a presumption.

Where there's been an actual beating, this Court's precedent suggests that there must be a more serious lapse of time and change of circumstances to assure the voluntariness of the second confession. We believe that --

QUESTION: I simply don't understand the difference between the two cases under your submission. Maybe I'm just stupid, I guess.

MR. FROHNMAYER: No, I seriously fail to advance that contention.

I would wish to reserve the balance of my time for rebuttal, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Babcock.

ORAL ARGUMENT OF GARY D. BABCOCK, ESQ.

ON BEHALF OF THE RESPONDENT

MR. BABCOCK: Mr. Chief Justice, and may it

please the Court, what police misconduct are we talking about by way of deterrence? You are not about to apply the fruit of the poisonous tree doctrine unless you find something to deter by way of police misconduct.

Now, there were two of them in this case, and I'll tie these directly to the trial, given enough words. The first was manipulation of custody. And as you know, you don't have to advise under Miranda until there's custody. The second -- and this is going to be the second part of my argument -- is the manipulation of Elstad's waiver in the obtaining of his confession.

Now, I've got to go a little slower here as far as talking about the particular record. This case is very different to me because it has an arrest warrant. Most of the cases I deal with, we're talking about probable cause without a warrant, and the police have to do some investigation, justifiably so, to find probable cause before they arrest the person and take him downtown.

Here, Officers McAllister and Burke, when they left the station house, had an arrest warrant in their back pocket. That meant two things: They had probable cause, and they had identity. And they both testified in the transcript that they were going to the Elstad house for one purpose and one purpose only, and that was

to arrest Elstad and take him to the police station.

And they get to the house and knock on the door. Mrs. Elstad answers the door; the police properly identify themselves, and they say "Is your boy home?" This is a 19-yeare-old boy, no prior criminal record. He's in the bedroom.

So the police officers proceed with the mother to the bedroom to where the boy is lying naked, except for a pair of short, on the bed listening to a radio. Two police officers, now armed with a warrant, walk in and they tell him to get dressed.

Now, we don't know how long they were in the bedroom, in Elstad's bedroom, because we don't -- it's not in the record. We know that the warrant wasn't executed.

Now, a very important thing that comes up next, fact-finding-wise, as far as custody goes, and also as far as police misconduct, is after Elstad gets his clothes on, Burke takes Elstad not to the police car, but he takes and isolates him in the living room. And McAllister takes Elstad's mother and takes her to the kitchen.

Now, the only advice that's given during this stage of the game is the fact that McAllister tells the mother, look it; we've got this arrest warrant, and this

is the only time I know of that it's ever executed is on the mother. And they say, we don't want you to be upset with these circumstances.

In the meantime, that's what happens with the mother, and I don't know where she goes, except she's probably around when they take him to the police car. A chief feature here again of misconduct, and we're getting to Justice Stevens's question very soon on what happens at the police station with the waiver -- but then the interrogation starts. No execution of the warrant by Burke, but he says, do you know the victims? And the defendant admitted, yes, he did.

And he said, I had heard there was a burglary there. And Burke says, yeah, and you were involved, weren't you? And now this key language of "I was there."

I've got to stop for one moment and mention the two things that the Solicitor General and the Attorney General -- positions they take. They take two positions.

One, they fire back on -- first of all, they take the position I was there is like being downtown in the First Interstate Bank on Wednesday afternoon in front of the tellers, and there's hundreds of people in there. No. "I was there" was equal to, in this man's

mind, in being in the First Interstate Bank on Sunday afternoon in the vault. "I was there" is equal to "I am a burglar."

The people that owned this property were away. If you said you were in that house, you were a burglar. So there's no problem about it being exonerating. It was equal to a confession, and I'm going to refer to it as a confession to make my job easier.

The second problem is inducement. The inducement, this causation factor that we're talking about. And it has been mentioned here today about this fact that the State has the burden of proof here, not us; because theirs is the constitutional violation.

Now, the inducement. Everything's going fine here with Elstad and Officer Burke in their discussions in the living room until he said "I was there," and all of a sudden he's in the police car and downtown behind bars.

QUESTION: Is it your position that that much, that incident you described, was a violation in and of itself of the Fifth Amendment?

MR. BABCOCK: Yes, Your Honor.

QUESTION: So you think that the Miranda warning requirement is constitutionally mandated?

MR. BABCOCK: Under these facts, yes, ma'am.

QUESTION: Despite the language in the court's opinion in Quarrels in other cases to the effect that it's not?

MR. BABCOCK: Well, I'll be candid with you. I don't know about that. I'm saying that when -- let me say this in answer to your question. There is no duty by the police officer to execute the warrant until he takes it off the shelf and he starts manipulating your custody requirement.

The minute he starts manipulating your custody requirement, Miranda sets in. And that --

QUESTION: Don't you think they really used the warrant? The police are not supposed to even go in the house without a warrant to arrest somebody.

MR. BABCOCK: The only time in the record --

QUESTION: Didn't they think they had a right to go into the house with an arrest warrant?

MR. BABCOCK: The only time -- the only time -- on the record, this is in the record -- that the warrant comes into play is that Officer McAllister -- this is in the transcript --

QUESTION: Well, they wouldn't have even gone to the house without the warrant.

MR. BABCOCK: Yes, they had the warrant.

QUESTION: Well, I know. Well, they were using it then.

MR. BABCOCK: Well, they were using it as a backup in their back pocket. They had a good defense in case anybody challenged them. You're talking about this 19-year-old boy and a mother. No one challenged their authority to go in.

I'm just telling you that the --

QUESTION: The State doesn't challenge the fact that he was in custody and that there was a Miranda violation in the house.

MR. BABCOCK: The district attorney conceded all of this.

QUESTION: I don't know why --

MR. BABCOCK: Pardon?

QUESTION: What's the point, then, in going through all of this?

MR. BABCOCK: Because it's very important, as I understand the times that you've applied the poisonous tree doctrine, it's very important to be concerned about the prophylactic or the deterrence value of that rule.

But number two is, I haven't got there yet, it's very important for you to understand the posture of the advice of rights that Justice Stevens is asking about. And I want to tell you --

QUESTION: You've got to show that the tree is more poisonous than most trees?

MR. BABCOCK: Very poisonous.

QUESTION: What has it got to do with this case?

MR. BABCOCK: My argument here is that the manipulation of the warrant and the getting the statement out of him is tied right together with the advice of rights that was given at the police station.

QUESTION: Is there any doubt that he was under arrest when they took him by the arm and said get dressed, we're going down to the station?

MR. BABCOCK: I think factually, that once they took him to the living room, he was under arrest.

QUESTION: You don't think he had any doubt about it, or anybody in the house had any doubt about it?

QUESTION: They were certainly using their right under the warrant then, I take it.

MR. BABCOCK: No. The first time the arrest warrant was used was in the kitchen with the mother.

QUESTION: Well, that may be --

MR. BABCOCK: I'm just saying that it's important what's going on --

QUESTION: But he was arrested when they took

him out of his bedroom.

MR. BABCOCK: No.

QUESTION: Well, what did you just say?

MR. BABCOCK: I said that the only time they mentioned the arrest warrant was with the mother --

QUESTION: Didn't you say he was, in effect, under arrest when they took him down to the living room?

MR. BABCOCK: Factually, as a matter of law.

QUESTION: Well, all right.

MR. BABCOCK: He was never told that.

QUESTION: Supposing that he had been arrested in the sense that he was not free to leave, and three hours later they told him that they had a warrant for his arrest, and only then.

Would you say he hadn't been arrested up until the time they told him they had a warrant?

MR. BABCOCK: Arrest isn't important, only as it relates to advice. I think I threw a wrench in the machinery. I'm only saying that you can't manipulate custody to delay the giving of advice, and this record will show you that Officers Burke and McAllister delayed execution of the warrant so they wouldn't have to give him Miranda advice.

QUESTION: But I thought you said that he was

arrested when he came from the bedroom. You're suggesting that the warrant wasn't executed at that time because they didn't state to him that "I have a warrant for your arrest"?

MR. BABCOCK: No. I'm only answering the amicus brief, and I should have said that. The amicus claims he wasn't under arrest.

I should never have mentioned the amicus claim. I'm sorry; I withdraw anything I said about that.

Now, the problem gets sticky right here. They go ahead and then the boy says, "I was there," and then they take him into the police car and take him on downtown. It's a lapse of about 45 to 60 minutes, and then they take the Miranda card and they tell Elstad -- nothing else exists in this record to dispel any notion in Elstad's head that he had let the cat out of the bag and said "I was at the burglary."

They read the white card to him, and it says "Anything you say can be used against you." Now, what does that tell Elstad? That tells Elstad that -- or Burke is telling Elstad, hey, I can use your statement at the house, "I was there." This card says anything you say can be used against you.

So the actual giving of the Miranda advice

compounds the problems with the initial constitutional violation.

QUESTION: Isn't it equally an interpretation that anything you say from now on can be used against you?

MR. BABCOCK: I don't dare use the phrase, but is it "double entendre"? Is it two meanings? And remember, the burden is on the State here. I think that it could be interpreted two ways. Anything you say in the future can be used against you, and anything you say can be used against you.

QUESTION: Did he testify?

MR. BABCOCK: No. This is all based upon two police officers' testimony.

QUESTION: Well, what are you telling us about what was in his mind just out of the clear blue?

MR. BABCOCK: Well, I'm only arguing that until the presumption is rebutted by the Attorney General's office, that you can --

QUESTION: You've been talking about what was in his mind --

MR. BABCOCK: Yes.

QUESTION: But that's your testimony.

MR. BABCOCK: Well, I'm just saying, though, that when he says "I was there," and he's locked into

the police car, that you can, as the judge --

QUESTION: Don't put me in now. I wasn't there.

MR. BABCOCK: I'm saying that he has no knowledge and he's induced, when he gets to the police station, after the cat has been let out of the bag, to go ahead and give the full confession.

So when Burke tell him that anything that can be used against him, without more, then Elstad has no choice but to say, well, look it, let me give you the details on the burglary. And that's exactly what Elstad does.

Now, here's the point I wanted to make in answer to Justice Stevens's point; that there is a case, if I can pronounce it -- and it's -- let me sure I get this right -- and it's Schneckloth v. Bustamonte -- and there's a long opinion involving what kind of waiver you have to have for the Fourth Amendment.

And five of you agreed that it's more than a voluntary waiver. It has to be an understanding intelligent waiver, and that's the key -- an intelligent waiver. And that's what the Solicitor General says in his brief.

QUESTION: Well, but didn't that case hold that the prosecution need not show that a person who

consents to a search knew that he could refuse?

MR. BABCOCK: Yes. And with that case, there were pages and pages coming to that conclusion, distinguishing the Fourth Amendment voluntary waiver standard with the more complex Johnson v. Zerbst and Miranda v. Arizona, voluntary plus, understanding plus intelligent relinquishment of a right.

And although that might be dicta in a sense, that rule of law was established in Johnson v. Zerbst and Miranda. Miranda is quoted at length in the Schneckloth case, and there were five of you that joined with that proposition.

It makes sense here, too. Elstad today has never been given an opportunity to intelligently object to the use of the statement "I was there" at the home. There has never yet been an understanding waiver of that point as we stand here arguing the case.

And it can't just be a voluntary Fourth Amendment rule that you apply here. There must be something in Burke's advice that --

QUESTION: Mr. Babcock, strictly speaking, the "I was there" statement was never offered, was it?

MR. BABCOCK: No.

QUESTION: So when you say he hasn't been given an opportunity to object to the use of that

statement, that statement was never used against him.

MR. BABCOCK: Yes. I'm sorry, Your Honor. That adopts the argument that the statement where he elaborates on "I was there" was a product, a fruit of "I was there," because he didn't intelligently -- he has never been given the right to intelligently object to -- I think the words were that he was never told that the first statement was inadmissible before he confessed.

There is a footnote to that effect by Justice Blackmun in Brown v. Illinois.

QUESTION: Well, but are you suggesting by kind of negative implication from Schneckloth v. Bustamonte that, although the Fourth Amendment does not require that a person be told he has a right to consent before something is admissible, to refuse consent -- somehow, the Fifth Amendment, you cannot show consent unless you have affirmatively told the person that his prior confession cannot be used against him?

MR. BABCOCK: Yes, Your Honor. I am arguing that you have to go beyond just voluntary. There are pages --

QUESTION: Yes, but our Court has never adopted such a rule as a per se rule.

MR. BABCOCK: This would not be per se. We'd just be saying that we've got to have something more

than the Fourth Amendment type of waiver.

QUESTION: But the Oregon Court of Appeals gave the impression it was laying down a rule broader than just this case, I thought.

MR. BABCOCK: I think the Court of Appeals -- I differ from what the Attorney General says about that case. I think the Attorney General was applying a two-pronged test, and I haven't got it here for presentation, but it goes with the idea of presumption of involuntariness that arise, and of time being factors.

It also talks about intelligence. And although they don't cite Bustamonte -- they don't even cite Johnson. V. Zerbst. I had always wondered myself, what was the difference between a Fourth Amendment waiver and a Fifth Amendment waiver like we have today.

And, believe me, Justice Stewart's opinion spells it out in fine detail. There was an issue about habeas corpus from which three of you joined that part of it. I think Justice White had joined Justice Stewart in trying -- I'm sure you could call it dicta. But it was very important to define what these valuable waiver rights were, to define the Fourth Amendment right.

And I am certainly not an expert on what's point of law and what's dicta. It's good here, though,

because, you see, it points up the fact that Elstad never had the slightest idea what was going on.

QUESTION: Well, how do you distinguish McMann, where the defendant didn't know that his confession was inadmissible, and yet he was allowed to enter a valid guilty plea without understanding the effect of his confession?

MR. BABCOCK: Did he have a lawyer?

QUESTION: Yes, he did.

MR. BABCOCK: Well, I don't know anything about that case, but I would say that there you've got good attenuation.

Understand now, we've got 40 or 50 minutes just lapsing by here, and bang, "I was there," bang, I'll give you the details. And you've got to have, to have the intelligent waiver concept have any meaning, it would seem to me there is true attenuation here.

QUESTION: I notice you filed your brief on June 18th -- at least that's March. About a week after that, the Court came down with the case involving the police approaching a man who was in a supermarket with an empty shoulder holster under his arm, and they said where is the gun?

Now, is this something like "Where is the gun"? "Were you there?" or "Where were you?"

MR. BABCOCK: I don't know enough about that case, Your Honor, except I would only say that at some point, when you're able to conclude from the record -- and this is a very rare case -- you won't be able to do it in most instances -- that there is custody and that advice should be given --

QUESTION: Well, there was pretty good custody in the supermarket because at least one, perhaps two policemen had guns pointed at him when they said, "Where is the gun?"

MR. BABCOCK: And was that for the officer's protection? I would say that most certainly, under those kinds of circumstances, if you're doing it to protect the police officers or whatever, you've sort of got every case with its own facts.

I find something, I've never run into this kind of case before where police have a warrant they never execute, and I'm only arguing --

QUESTION: They executed it. They arrested him in his bedroom.

MR. BABCOCK: They never executed the warrant.

QUESTION: Well, you mean they never told him, "I have a warrant for your arrest."

MR. BABCOCK: Well, but that kept them from

giving advice.

QUESTION: That may be, but they nevertheless arrested him.

MR. BABCOCK: I'm sorry. What?

QUESTION: They nevertheless arrested him.

MR. BABCOCK: Without advice.

QUESTION: You agree he was arrested, whether they referred to the warrant or not. When they left the bedroom, he was arrested -- from the facts.

MR. BABCOCK: I noted you agree that there was an arrest. I thought, in coming here, we maybe had to argue that point. But --

QUESTION: It's been conceded by the other side that --

MR. BABCOCK: No, it hasn't, Your Honor.

QUESTION: It has been conceded that we treat this case as though he were in custody when the first statement was made. It makes no difference. We concede that. That's the starting proposition.

There was a Miranda violation in failing to warn for the first statement. Don't we start there in deciding this case?

MR. BABCOCK: I'm sorry, Your Honor; the amicus brief didn't.

QUESTION: Well, I think we're dealing with

what the parties have -- how the parties have framed the issues, and it certainly would be my understanding that the starting point is to say, okay, a Miranda warning should have been given in the living room before the officer said, "Do you know these people, were you there?"

MR. BABCOCK: Total agreement.

QUESTION: When you refer to the amicus brief, there were two. Which one are you referring to?

MR. BABCOCK: The Solicitor General's, Your Honor.

QUESTION: Counsel, you've been arguing it for 15 or more minutes, and I warned you 10 minutes ago. Are you ever going to get to any other part of this argument than what has already been agreed on?

MR. BABCOCK: Well, I think there's only two arguments, Your Honor. And that is, to apply the fruit of the poisonous tree doctrine to prevent the police officers from manipulating custody so they don't have to give consent; and where you have successive confessions, and the first confession is bad, that you have advice that covers that first confession and allows an intelligent waiver under Johnson v. Zerbst and the Bustamonte case and the Miranda decision.

QUESTION: Well, you're arguing for a new,

more extensive Miranda rule. You just want it expanded to require an additional warning to be given; right?

MR. BABCOCK: Only where there has been a constitutional violation, Your Honor. And --

QUESTION: Well now, wait a minute. In the face of Michigan v. Tucker and Quarrels, how can you say it's a constitutional violation to ask a defendant something without a Miranda warning? It's a failure to give the prophylactic Miranda warning, isn't it?

MR. BABCOCK: At the house?

QUESTION: Yes.

MR. BABCOCK: Yes.

QUESTION: It's not a constitutional violation, is it, to ask someone something without the Miranda warning -- if it's determined to be essentially voluntary and not coercive?

MR. BABCOCK: But, see, there was no advice given at the house, Your Honor. And that violation --

QUESTION: Yes, right. It violates the Miranda rule.

MR. BABCOCK: And that's constitutional.

QUESTION: Well, how can you say that in the face of Michigan v. Tucker and Quarrels?

MR. BABCOCK: Well, Michigan v. Tucker, I would say I have a difficult time with that, in the

sense I don't see that as a Miranda case, because the man gave an alibi defense.

The case was handed down before, Miranda v. Arizona; the police were totally bona fide; in fact, they were almost clairvoyant. They almost knew what kind of advice to give. They left out the magic word "indigent." And that was the Attorney General classifies as a technical violation.

There was no deterrent value to the case. It's a case that's not, I don't think, against us or for us. It's a case where it should have been affirmed there was no police misconduct to deter.

This is a much different case, as I've been trying to explain in these last few minutes. So Tucker v. -- I don't think even Harrison v. U.S., whether it was reversed, there was any deterrent value. But the important part is the deterrent value, and I would not say to expand Miranda; limit it to an arrest warrant situation where the police have obtained an improper confession in the first instance and obtained the fruits of that violation, and not given proper advice to dispel that action. That's pure attenuation. And keep it very limited; I think in most cases, the police have to go on in the house and other places and investigate and ask questions.

In this case they didn't have to do so.

Thank you.

CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.

ON BEHALF OF THE PETITIONER

MR. FROHNMAYER: Thank you, Mr. Chief Justice. I have three points for rebuttal.

The first is that the issue of the manipulation of custody of defendant was not argued below, nor does the record support that assertion. Defendant below simply argued that the second confession had to be suppressed because the first admission had let the cat out of the bag. It was the "cat out of the bag" metaphor in psychology.

My second point relates, Justice Stevens, to what I hope is a more complete answer to your question. That is, that Miranda advice repairs a pure Miranda defect. Miranda advice does not necessarily repair a Fourth Amendment defect, as this Court has held in the trilogy of cases involving Brown v. Illinois and Dunaway; nor does it necessarily cure a case in which there is actual coercion under the Fifth Amendment which is a core constitutional violation as opposed to what Justice O'Connor was indicating in the colloquy with counsel, a violation of the rule of Miranda.

QUESTION: That's very helpful. It really is, because I think perhaps the case boils down to this colloquy with Justice O'Connor; is whether a Miranda violation is actually a constitutional violation, or is it merely some kind of court-made rule that does not amount to that?

And I must confess that if it's not a constitutional violation, I don't know where this Court ever had the power to set aside any state conviction on the ground that they didn't follow a rule we thought it would be a good rule.

It seems to me, analytically, it must be a constitutional violation or else we have no business in this area at all.

MR. FROHNMAYER: Except that under either reading, this Court of Appeals decision should be reversed because if it is a core constitutional violation, the core of the constitutional violation was cured by the giving of the warrant.

QUESTION: Well, see, my problem is, if you regard it as a constitutional violation, then you have some difficulty, at least it seems to me, saying that it's any different from point of view of shifting burdens and causation and all that, between this case and one in which the man was actually physically beaten,

because in either event it's the same constitutional violation.

But if you say, as Justice O'Connor suggests, that it's really not a constitutional violation, it's kind of a second-class wrong, then there's integrity in your argument.

MR. FROHNMAYER: Well, I think, respectfully, there's integrity in either case because even before the Miranda violation was -- the Miranda doctrine was violated, this Court examined a number of cases in which there had been an earlier coerced confession in which a cure had been effected by removal of the defendant from time or place which caused the recreation of the voluntary condition for the confession.

Here, where the violation is at least at the outer periphery of the Fifth Amendment, if it's there at all, as opposed to your rule, compliance with the rule restores that element of voluntariness and destroys the presumption of station house coercion which the rule was meant to prevent.

And that's the thrust of our argument, and I believe responsive to your question.

The final point is simply this: And that is, that my colleague from the Public Defender's Office has mentioned the issue of deterrence. And if one turns

that question on its head and looks to what is being deterred, if this second, valid, voluntary, trustworthy confession is excluded, it's far more damaging than any police conduct that might otherwise be deterred by throwing out everything.

And the reason for that is that it would send a message to the police that if you make a mistake, you can't fix it. It would send a message to the police that if an error has been made in the initial advisal of rights to the defendant, he is forever foreclosed --

QUESTION: That's not correct. That's too much, because they could always get him a lawyer. They could always fix it. I know they never do as a practica matter, but they could easily fix it by saying we'll get you a lawyer before you give us your second confession.

MR. FROHNMAYER: Well, in this case at least, the defendant did not have the means that required him to have --

QUESTION: But I don't think you can say it's totally unfixable.

MR. FROHNMAYER: Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We'll hear arguments next in Iuce v. the United States.

(Whereupon, at 1:52 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-773 - OREGON, Petitioner v. MICHAEL JAMES ELSTAD

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BY Paul A. Richardson

(REPORTER)