NO. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL FRANCIS PATANE, *Respondent*

On Writ of Certiorari to the
United States Court
of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondent
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

MICHAEL G. KATZ
Federal Public Defender
VIRGINIA L. GRADY
Assistant Federal Public Defender

QUESTION PRESENTED

Does the derivative evidence rule, or "fruit of the poisonous tree" doctrine, apply to physical evidence located as the direct result of statements obtained from the defendant in violation of the constitutional rule announced in Miranda v. Arizona, 384 U.S. 436 (1966)?

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STATEMENT OF FACTS

A. Evidence adduced at the suppression hearing

On June 3, 2001, respondent Samuel Patane was released on bond from the El Paso County jail in Colorado Springs, Colorado.[1] J.A. 25. Fifty-year old Mr. Patane had been jailed on domestic violence charges pressed by his 43-year old ex-girlfriend, Linda O'Donnell. J.A. 11, 88-89. As required by Colorado law, a mandatory three-day restraining order was entered against Mr. Patane when he was released from jail. J.A. 11. The restraining order prohibited him from making any contact, direct or indirect, with Ms. O'Donnell. J.A. 12.

At the time of his release, Mr. Patane had a prior felony conviction for possession of a controlled substance, as well as a prior misdemeanor domestic violence conviction. J.A. 5, 91-93. Both convictions prohibited him from possessing a firearm. See 18 U.S.C. §922(g) (2003).

On the day the restraining order was to expire, Ms. O'Donnell called the police to report a violation of the restraining order that had allegedly occurred two days earlier. J.A. 11, 19. She reported that she had received a telephone call two days before, but when she picked up the phone, the caller hung up. J.A. 12. She reported that she then activated the "*69" feature on her telephone, a feature that identifies the telephone number from which the last call was placed. J.A. 26. According to Ms. O'Donnell, the "*69" feature indicated

[1]Respondent pronounces his name "Pat-nee."

that the call had been placed from Mr. Patane's telephone number. J.A. 12. Ms. O'Donnell also told the police that Mr. Patane had a gun, a "Glock" that he had purchased at a gun show. J.A. 13, 37-38.

Earlier, someone--perhaps Ms. O'Donnell-- had told Mr. Patane's probation officer that Mr. Patane had a gun. J.A. 36-37, 44-45, 91. The probation officer had reported this to the Bureau of Alcohol, Tobacco and Firearms (ATF), and ATF had enlisted a local police detective to investigate. J.A. 35-36. The detective, Josh Benner, was a member of a joint ATF/Colorado Springs Police Department gun-interdiction task force. J.A. 35.

After Ms. O'Donnell reported the hang-up phone call, a local police officer, Tracy Fox, prepared a complaint that authorized Mr. Patane's arrest for a restraining-order violation. J.A. 11-12, 92. She and another officer, Officer Mulso, then went to Mr. Patane's home to arrest him. J.A. 14. They were met there by Detective Benner, who planned to question Mr. Patane about the gun. J.A. 39. Officers Fox and Mulso were in uniform. J.A. 14-15. Detective Benner was in plain clothes but was wearing a badge and carrying a sidearm. J.A. 39-40, 42. The two uniformed officers went to the front door, while Detective Benner went around back, in case Mr. Patane tried to run. J.A. 14. The two uniformed officers knocked and asked for Mr. Patane. J.A. 14.

Mr. Patane came to the door, barefoot, and the officers asked him to step outside. J.A. 15, 21. They told him that they wanted to talk to him about a report that he had violated a restraining order involving Linda O'Donnell. J.A. 15, 30. Mr. Patane complied

with their request to step outside but said that he had not violated the restraining order. J.A. 15, 30. When Officer Fox asked Mr. Patane to explain Ms. O'Donnell's allegation that he had called her and hung up, Mr. Patane said that he had not made any such call and that Ms. O'Donnell was falsely accusing him. J.A. 15, 30, 90.

Officer Fox then placed Mr. Patane under arrest for a restraining-order violation, but she did not read him his Miranda rights. J.A. 15, 30. Instead, she asked him if he had any identification and if he wanted to get his shoes. J.A. 15. Mr. Patane went back into the house, and the officers followed him. J.A. 16. When Mr. Patane reached his bedroom, he became very upset. J.A. 16. According to Officer Fox, he started "crying and yelling and saying things weren't fair and that [the officers] were ruining his life." J.A. 16. Because, as Officer Fox characterized it, Mr. Patane "started basically to freak out," the officers placed him in handcuffs. J.A. 16. Officer Fox then retrieved Mr. Patane's identification for him, but not his shoes, and the officers led the handcuffed Mr. Patane back outside. J.A. 16.

Detective Benner had by then come back around to the front of the house, and he approached Mr. Patane. J.A. 16. He told him that he was with the ATF gun-interdiction unit and that he was there to talk to him. J.A. 40. Detective Benner started to read Mr. Patane his Miranda rights but got no further than, "You have the right to remain silent," when the handcuffed, barefoot, and still upset Mr. Patane said, "I know my rights." J.A. 31, 40, 47. Detective Benner responded, "You know your rights?" J.A. 31, 40. Mr. Patane

answered either, "Yes," or "Yeah, I know my rights." J.A. 40, 46. Detective Benner did not then, or at any point, obtain from Mr. Patane a waiver of his rights. Instead, being aware that Mr. Patane was still upset about the restraining-order allegation, the detective began to question him about the gun. J.A. 40-41, 47.

Detective Benner said that he was interested in the guns that Mr. Patane owned. J.A. 41. Mr. Patane responded by referring to a gun other than the one in which Detective Benner was interested. J.A. 41. Detective Benner replied that he was more interested in the "Glock." J.A. 41. Mr. Patane said, "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." J.A. 41. Detective Benner persisted despite Mr. Patane's stated reluctance to say anything further. Detective Benner said, "In order to be truthful about this whole matter--you have been truthful up to this point--I need to know about the Glock." J.A. 41. Detective Benner also said that Mr. Patane had been cooperative up to that point and that "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." J.A. 48. At that point, Mr. Patane disclosed the location of the gun, telling Detective Benner: "The Glock .40 caliber pistol is in my bedroom on the wooden shelf against the wall in a gray case." J.A. 93.

Detective Benner asked Mr. Patane if he could have permission to get the gun. J.A. 41. Mr. Patane either said, "Yes," or "Yes. Again, it's on the wooden shelf in my bedroom." J.A. 41, 93. Detective Benner then went into the house and found the gun,

exactly where Mr. Patane said it would be, in a gray gun case on a wooden bookshelf, behind some magazines. J.A. 41-42, 93.

B. Proceedings below

Mr. Patane was indicted in the United States District Court for the District of Colorado for possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. § 922(g). See United States v. Patane, 304 F.3d 1013 (2002). He moved to suppress the firearm on Fourth Amendment grounds, arguing that the seizure of the gun was the fruit of an arrest effected without probable cause. Id. He also moved to suppress the gun on Fifth Amendment grounds, arguing that the seizure of the gun was the fruit of an unlawful interrogation that was conducted both in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and by coercive tactics. C.A. doc. 12; J.A. 62-65, 74. Mr. Patane argued that, in addition to having been obtained in violation of Miranda, the statements that resulted from this interrogation were actually compelled. C.A. doc. 12; J.A. 64. The government conceded a Miranda violation, acknowledging that there "was not a knowing waiver," but argued that the statements were nonetheless voluntary. J.A. 74, 86.

After an evidentiary hearing, the court granted Mr. Patane's motion to suppress the gun. J.A. 78-86. The court rested its holding on Fourth Amendment grounds, ruling that Linda O'Donnell's uncorroborated report of a single, hang-up call from Mr. Patane's phone did not constitute probable cause to believe that Mr. Patane had violated the restraining

order. J.A. 78-85. The court also concluded, as the government conceded, that a Miranda violation had occurred. J.A. 85-86.

After the district court announced its ruling from the bench, government counsel asked the court if it would make a finding that Mr. Patane's statements were voluntary. J.A. 86. The court, which, in earlier responding to the government's argument that Mr. Patane's statements were voluntary, had pointed out that Mr. Patane was handcuffed, in custody, and upset when he made the statements, denied the request. J.A. 74, 86.

The government filed an interlocutory appeal, challenging the district court's probable cause ruling. Patane, 304 F.3d at 1013. Mr. Patane argued in response that the probable cause ruling should be affirmed and that the suppression order could also be affirmed on the ground that the gun was the inadmissible fruit of a Miranda violation. Id.

The court of appeals rejected the district court's probable cause ruling but affirmed the suppression order on the ground that the gun was the inadmissible fruit of a Miranda violation. Id. The court reasoned that, because this Court's decision in Dickerson v. United States, 530 U.S. 428 (2000), established that a violation of Miranda's warning requirement is a violation of the Constitution, suppression of the physical fruit of such a violation is required. The court reasoned further that suppression is required regardless of whether the violation of Miranda is negligent or intentional because 1) a suspect's rights are violated "just as surely by a negligent failure to administer Miranda warnings as a deliberate failure," and 2) "[d]eterrence is necessary not merely to deter intentional

wrongdoing, but also to ensure that officers diligently (non-negligently) protect--and properly are trained to protect--the constitutional rights of citizens." Patane, 304 F.3d at 1028-29.

After filing a petition for rehearing en banc, which was denied, the government filed a petition for certiorari, asserting that the question presented was "whether a failure to give a suspect the warnings prescribed by Miranda v. Arizona, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but *voluntary* statement." Petition for a Writ of Certiorari at (I) (emphasis added). The government asserted this as the question presented notwithstanding the district court's specific denial of the government's request for a finding on the issue of voluntariness.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966), announced a constitutional rule with two components. First, before a police officer may interrogate a person who is in custody, he must inform the person of his rights--including his right to have counsel present during the interrogation--and must obtain a waiver of those rights before proceeding further. If the suspect asserts his right to remain silent or to have counsel present during the interrogation, the officer must honor that assertion. Second, if the police officer violates the rule--by failing to inform the person of his rights, by failing to obtain from the person a waiver of his rights, or by failing to honor an assertion of the person's rights--any

statements resulting from the interrogation are not admissible to prove the person's guilt at trial.

A violation of the constitutional rule of Miranda is a violation of the Constitution. Consequently, the derivative evidence rule, or "fruit of the poisonous tree" doctrine, which applies to constitutional violations, applies to Miranda violations.

Even if a violation of the constitutional rule of Miranda were not a violation of the Constitution, the derivative evidence rule would apply under the balancing test used to determine the applicability of the derivative evidence rule to non-constitutional violations. In this case, which involves: 1) a clear violation of Miranda; 2) directly followed by interrogation as to the location of physical evidence and seizure of the evidence upon the suspect's disclosure of its location; 3) followed by prosecution of the defendant for possession of the physical evidence, the interests served by excluding the physical evidence outweigh the interests served by admitting it.

ARGUMENT

I. Introduction

The exclusionary rule requires the exclusion of unlawfully obtained evidence. The derivative evidence rule is a corollary to the general exclusionary rule and requires the exclusion of evidence derived from the initial unlawfully obtained evidence. The rule is sometimes referred to as "the fruit of the poisonous tree" doctrine, the "tree" being the primary evidence and the "fruit" being the secondary, derivative evidence. See, e.g.,

Nardone v. United States, 308 U.S. 338, 341 (1939) (referring to unlawfully intercepted telephone conversations as the "poisonous tree" and evidence derived from the conversations as "fruit").

This Court has applied the derivative evidence rule to various types of police misconduct. This Court has applied the derivative evidence rule, for example, to constitutional violations, e.g., Wong Sun v. United States, 371 U.S. 471 (1963), to violations of federal statutes, e.g., Nardone, 308 U.S. at 338; to violations of federal rules, e.g., Harrison v. United States, 392 U.S. 219 (1968), and to violations of court-made prophylactic rules, id.

This Court has never decided the question presented here: whether the derivative evidence rule applies to a violation of the warning requirement of Miranda v. Arizona, 384 U.S. 436 (1966), that results in the recovery of physical evidence.[2] Nonetheless, the approach that this Court has taken in cases applying the derivative evidence rule compels its application here. Under this approach, when a violation of the Constitution is involved, this Court applies the derivative evidence rule automatically. When a violation of the

[2]Three federal courts of appeals have held, contrary to the decision of the court of appeals in this case, that the derivative evidence rule does not generally apply in the case of physical evidence fruit of a Miranda violation, even after this Court's decision in Dickerson v. United States, 530 U.S. 428 (2000). See United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002); United States v. Sterling, 283 F.3d 216 (4th Cir.), cert. denied, 535 U.S. 931 (2002); United States v. DeSumma, 272 F.3d 176 (3d. Cir. 2001), cert. denied, 535 U.S. 1028 (2002). Several state courts have held, both before and after Dickerson, that the derivative evidence rule *does* apply in the case of physical evidence fruit of a Miranda violation. See, e.g., Ex Parte Yarber, 375 So.2d 1231 (Ala. 1979); State v. Linck, 708 N.E.2d 60 (Ind. Ct. App. 1999); State v. Preston, 411 A.2d 402 (Me. 1980); Commonwealth v. White, 371 N.E.2d 777 (Mass. 1977), aff'd by an equally divided Court, Massachusetts v. White, 439 U.S. 280 (1978) (per curiam).

Constitution is *not* involved, a balancing test is used, with this Court weighing the interests served by exclusion of the derivative evidence against the interests served by admission of the evidence.

The first question in this case, therefore, is whether a violation of Miranda's warning requirement is a violation of the Constitution. Because, contrary to the government's argument, precedent establishes that a violation of Miranda's warning requirement is a violation of the Constitution, the derivative evidence rule automatically applies here. The derivative evidence rule also applies under a balancing test, because the interests served by excluding physical evidence derived from a Miranda violation outweigh the interests served by admitting it.

II. Because a Violation of Miranda's Warning Requirement is a Violation of the Constitution, the Derivative Evidence Rule Applies.

A. Miranda: The Warning Requirement

In Miranda, this Court laid down "concrete *constitutional* guidelines for law enforcement agencies and courts to follow." Miranda, 384 U.S. at 442 (emphasis added). Specifically, the Miranda Court announced a rule that, before subjecting an individual to custodial interrogation, the police must follow "procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." Id. at 439. The procedures must not only "inform

accused persons of their right of silence," but also must "assure a continuous opportunity to exercise" this right. Id. at 444.[3]

The police may satisfy these requirements by informing a suspect that he 1) "has a right to remain silent," 2) "that any statement he does make may be used as evidence against him," and 3) "that he has a right to the presence of an attorney, either retained or appointed." Id. at 444. If the police do not inform an in-custody suspect of his rights, any statements that result from the interrogation are inadmissible at trial.[4] Id.

A Miranda advisement is required prior to custodial interrogation even if a suspect claims to know his rights, because a suspect's perceived awareness of his rights may be neither accurate nor complete. In addition, the delivery of the warning assures even one who knows his rights that "his interrogators are prepared to recognize his privilege should he choose to exercise it." Id. at 468. Moreover, the easily and quickly performed act of giving an advisement even to a suspect who claims to know his rights avoids subsequent disputes over what that knowledge, in fact, was. For this reason, courts "will not pause to

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[3]There is one exception to Miranda's warning requirement, namely the public-safety exception announced in New York v. Quarles, 467 U.S. 649 (1984). Under that exception, custodial interrogation may be conducted without Miranda warnings, if "overriding considerations of public safety" justify immediate questioning. Thus, if unwarned custodial interrogation were necessary to thwart a kidnapping in progress, for example, a Miranda advisement would not be required, and the police would not engage in misconduct by failing to give the warnings.

[4]There is one exception to Miranda's exclusionary rule, that being the impeachment exception announced in Harris v. New York, 401 U.S. 222 (1971). Under that exception, statements obtained in violation of Miranda's warning requirement may be used to impeach the defendant if he testifies at trial. This exception is identical to the exception to the Fourth Amendment exclusionary rule, which allows illegally seized evidence to be used for impeachment. See Walder v. United States, 347 U.S. 62, 65 (1954).

inquire in individual cases whether the defendant was aware of his rights without a warning being given." Id. at 468. Indeed, in the Miranda case itself, this Court held that Ernesto Miranda's unwarned statements were inadmissible despite his having signed a written statement indicating that he had "'full knowledge'" of his "'legal rights.'" Id. at 492.

B. A Violation of Miranda's Warning Requirement is a Violation of the Constitution.

More than thirty years after Miranda was decided, this Court cleared up confusion that had arisen in the lower courts over whether Miranda announced a constitutional rule or merely a "judicially created rule[] of evidence [or] procedure." Dickerson v. United States, 530 U.S. 428, 437 (2000). In Dickerson, this Court held that "Miranda announced a constitutional rule." Id. at 444. In doing so, the Court stated its disagreement with the Fourth Circuit Court of Appeals' conclusion that the Miranda protections are not constitutionally required. The Court conceded that its references to the Miranda warnings as "prophylactic," in cases like Michigan v. Tucker, 417 U.S. 433 (1974), and its statement in Tucker that the Miranda warnings are "not themselves rights protected by the Constitution," were at least partly to blame for the court of appeals having reached the erroneous conclusion that the Miranda rule is not constitutionally mandated. Id. at 437-38. By so conceding, the Court disavowed its previous statements that Miranda's warning requirement is not itself a right protected by the Constitution.

Notwithstanding the government's argument to the contrary, Dickerson makes clear that a violation of Miranda is a violation of the Constitution. As a matter of simple logic, if an act violates a constitutional rule--a rule required by the Constitution--the act violates the Constitution. In addition, the Court in Dickerson noted that it has allowed state prisoners to raise Miranda violations in federal habeas corpus proceedings, which are available only for persons in custody "'in violation of the Constitution or laws or treaties of the United States.'" Id. at 439 n.3 (quoting 28 U.S.C. §2254(a)). The Court's further observation that the Miranda rule is not a law or treaty of the United States means that a violation of Miranda must be a violation of the Constitution.[5]

C. Because a Violation of Miranda's Warning Requirement is a Violation of the Constitution, the Derivative Evidence Rule Applies.

The application of the derivative evidence rule to constitutional violations is well established. The rule, while most familiar from the Fourth Amendment context, actually has its roots in a Fifth Amendment case, Counselman v. Hitchcock, 142 U.S. 547 (1892). In Counselman, this Court held that the Fifth Amendment protects against the government's use of evidence *derived from* compelled testimony, not just against the government's use of the compelled testimony itself: "[The Fifth Amendment protects against] that use of compelled testimony which consists in gaining *therefrom* a knowledge of the details of a

[5]This Court's recent decision in Chavez v. Martinez, 123 S.Ct. 1994 (2003), is not to the contrary. "As a section 1983 action for damages, Chavez has no bearing on . . . a criminal proceeding in which the defendant challenges the admissibility [of evidence]." People v. Neal, 72 P.3d 280, 290 n.1 (Cal. 2003).

crime, and of sources of information which may supply other means of convicting the witness or party." Id. at 586 (emphasis added).

This Court has continued to read the derivative evidence rule broadly in the Fifth Amendment context. For example, in Hoffman v. United States, 341 U.S. 479 (1951), this Court explained, "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish *a link in the chain of evidence* needed to prosecute the claimant for a federal crime." Id. at 486. (emphasis added). In Kastigar v. United States, 406 U.S. 441 (1972), this Court held that "the Fifth Amendment privilege against compulsory self-incrimination . . . protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could *lead to* other evidence that might be so used." Id. at 444-45. (emphasis added). In United States v. Hubbell, 530 U.S. 27 (2000), this court reaffirmed that the Fifth Amendment privilege against self-incrimination protects against both use and *derivative* use, id. at 37-38, and the concurring opinion stated that "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of *any* incriminating evidence." Id. at 49 (Thomas, J. concurring) (emphasis added). Most recently, a plurality of this Court noted that "those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or *evidence derived from their*

statements) in any subsequent criminal trial." Chavez v. Martinez, 123 S. Ct. 1994, 2002 (2003) (plurality opinion) (second emphasis added).

Because a violation of Miranda's warning requirement constitutes a violation of the Fifth Amendment, the derivative evidence rule applies, and the opinion of the court of appeals in this case should be affirmed.

III. Even if a Violation of Miranda's Warning Requirement Were Not a Violation of the Constitution, the Derivative Evidence Rule Would Apply Under the Balancing Test Used to Determine the Applicability of the Rule in Non-Constitutional Contexts.

A. The Balancing Test Used in Non-Constitutional Contexts.

When police misconduct does not involve a constitutional violation, this Court applies a balancing test to determine whether the derivative evidence rule applies. This Court first applied such a test in Nardone v. United States, 308 U.S. 338 (1939), which involved a violation of a federal statute, and later applied it in Harrison v. United States, 392 U.S. 219 (1968), which involved violations of a procedural rule and a court-made prophylactic rule.

1. Nardone v. United States, 308 U.S. 338 (1939)

Nardone involved a violation of the Communications Act of 1934, a statute that, among other things, prohibited the interception of interstate wire or radio communications. The case was before the Court twice. The first time it considered Nardone, the Court held that evidence obtained in violation of the statute should be excluded in order to deter

violations of the statute. Nardone v. United States, 302 U.S. 379 (1937). The second time around, the Court held that the government, being prohibited from introducing the unlawfully intercepted evidence, was also prohibited from using the "fruit" of the unlawfully obtained evidence. The Court in Nardone dubbed such derivative evidence the "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939).

In so holding, the Court articulated a balancing test for use in determining whether to apply the fruit of the poisonous tree doctrine. The doctrine should be applied when the interest in the admission of "evidence logically relevant in criminal prosecutions" is outweighed by any countervailing "public policy expressed in the Constitution *or the law of the land*." Id. at 340 (emphasis added). In conducting this balancing, courts should be mindful that any claim for exclusion of logically relevant evidence is "heavily handicapped" and that exclusion must be justified by an overriding interest. Id.

Applying this test, the Court in Nardone first observed that what was at issue was a "prohibition of particular methods in obtaining evidence." Id. If the derivative evidence rule were not applied to a violation of such a prohibition, the Court reasoned, the effect would be "to reduce the scope of [the statute at issue] to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every *derivative* use they may serve." Id. (emphasis added). This result would "largely stultify the policy which compelled [this Court's] decision" to exclude the unlawful interceptions in the first place. Id. The intercepted conversations themselves had been suppressed, the Court reminded,

to "translat[e] into practicality . . . [the] broad considerations of morality and public well-being" that had prompted Congress to ban interception of communications. Id. "To forbid the direct use of methods thus characterized, but to put no curb on their full *indirect* use would only *invite the very methods* deemed 'inconsistent with ethical standards and destructive of personal liberty'" that had led Congress to ban such methods. Id. (emphases added). To deter violations of the statute, the Court concluded, it was necessary to apply the rule that "'knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively." Id. at 341 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

2. Harrison v. United States, 392 U.S. 219 (1968)

This Court next applied the derivative evidence rule in a non-constitutional context in Harrison, 392 U.S. at 219. In Harrison, the Court excluded evidence derived from statements obtained "in violation of Mallory v. United States," a non-constitutional, procedural rule,[6] and "in violation of a prior en banc decision of the Court of Appeals, Harling v. United States."[7] Harrison, 392 U.S. at 220 n.2. The rule announced in Harling was a court-made, "prophylactic rule" designed to protect the non-criminal, parens patriae function of the juvenile court. See Harrison v. United States, 359 F.2d 214, 226 (D.C. Cir. 1965) (on rehearing en banc) (describing Harling as having established a "prophylactic

[6]See Mallory v. United States, 354 U.S. 449 (1959).

[7]See Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961) (en banc).

rule"). Under the Harling rule, statements made by a defendant who is under the jurisdiction of the juvenile court are not admissible if the case is subsequently transferred to adult court.

In Harrison, the evidence that was derived from the statements obtained in violation of Mallory and Harling was the testimony of the defendant from a previous trial. The prosecution introduced the defendant's testimony against him at the subsequent trial, and it was that testimony that this Court held to be inadmissible "fruit." Specifically, this Court held that the defendant's testimony from the previous trial was "the inadmissible fruit of the illegally procured confessions." Id. at 221. The confessions were "illegally procured," according to the Court, because they were "obtained in violation of Mallory v. United States" and "in violation of a prior en banc decision of the Court of Appeals, Harling v. United States." Id. at 220 n.2, 221. The Court reasoned that "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby--the fruit of the poisonous tree, to invoke a time-worn metaphor." Id. at 222. Although the defendant "'made a conscious tactical decision to seek acquittal by taking the stand after (his) in-custody statements had been let in,'" id. at 223 (quoting Harrison v. United States, 387 F.2 203, 210 (D.C. Cir. (1967) (alteration in original)), he did so "to overcome the impact of confessions illegally obtained [by violation of Mallory and Harling] and hence improperly introduced." Harrison, 392 U.S. at 223. Accordingly, "his

testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." Id.

In deciding to apply the derivative evidence rule, the Court in Harrison used a balancing test similar to that employed in Nardone. Specifically, the Court balanced the "deterrence such suppression might achieve" against the obstacles such suppression places in the path of law enforcement. Id. at 224 n.10. The Court struck the balance in favor of suppressing the derivative evidence at issue, reasoning that "[t]he exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime." Id.

In a later decision, Oregon v. Elstad, 470 U.S. 298 (1985), this Court suggested that Harrison was based on a violation of the Fifth Amendment, rather than on violations of the non-constitutional rules announced in Mallory and Harling.[8] Elstad, 470 U.S. at 316. A close reading of Harrison demonstrates otherwise. First, the opinion in Harrison nowhere mentions the words "Fifth Amendment" or even the word "Constitution." Indeed, the only place the words "Fifth Amendment" appear at all in Harrison is in a dissenting opinion noting that the majority did *not* "hold that Harrison was compelled to take the

[8]Specifically, the Court stated in Elstad that, "[i]f the prosecution has actually violated the defendant's *Fifth Amendment* rights by introducing an inadmissible confession at trial, *compelling* the defendant to testify in rebuttal, the rule announced in Harrison v. United States, 392 U.S. 219 (1968), precludes use of that testimony on retrial." Oregon v. Elstad, 470 U.S. 298, 316-17 (emphasis added).

stand and incriminate himself contrary to his privilege under the Fifth Amendment." Harrison, 392 U.S. at 229 (White, J., dissenting). Second, Harrison could not have been based on a violation of the Fifth Amendment's *primary* ban on the use of compelled testimony because, if it had been, there would have been no need for the Court to discuss, much less to rest its holding on, the *derivative* evidence rule.

In short, both Harrison and Nardone stand for the proposition that the derivative evidence rule may be applied even in the absence of a constitutional violation, and that, in such a case, application of the rule is determined by balancing the interests served by excluding the evidence against the interests served by admitting it.

B. The Balancing Test Applied: The Interests Served By Excluding Physical Evidence Derived From a Violation of Miranda's Warning Requirement Outweigh the Interests Served By Admitting Such Evidence.

1. Miranda's Warning Requirement Serves the Important Constitutional Interest of Preventing Violations of the Fifth Amendment.

The Fifth Amendment provides in pertinent part that "no person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. A "criminal case" arises for Fifth Amendment purposes before the actual trial of the defendant. See Hubbell, 530 U.S. at 37. Indeed, a "criminal case" must arise even before judicial proceedings have been initiated against a suspect, given the difference in language between the text of the Fifth Amendment and the text of the Sixth Amendment. While the Fifth Amendment uses the phrase "criminal case," the Sixth Amendment uses the phrase

"criminal prosecution[]." U.S.CONST. amend. VI. A "criminal prosecution" begins at the latest with the initiation of judicial proceedings. Brewer v. Williams, 430 U.S. 387, 398 (1977). The phrase "criminal case" is broader than the phrase "criminal prosecution." See Counselman, 142 U.S. at 563. A "criminal case," therefore, must begin before a "criminal prosecution," and thus must include the stage of a case prior to the initiation of judicial proceedings.[9] The Fifth Amendment's prohibition of compelled self-incrimination in a "criminal case," therefore, must apply to police interrogation.

In Miranda, the Court imposed a warning requirement designed to prevent violations of the Fifth Amendment's prohibition of compelled self-incrimination. Specifically, the Court imposed a rule designed to prevent compelled self-incrimination in the inherently coercive setting of custodial interrogation. By requiring police to advise a suspect of his constitutional rights before custodial interrogation and to honor any invocation of those rights, Miranda's warning requirement serves the exceedingly important interest in preventing violations of a "celebrated provision in the Bill of Rights," the Fifth Amendment. Chavez v. Martinez, 123 S. Ct. 1994, 2015 (2003) (Kennedy, J., concurring in part and dissenting in part).

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[9]A plurality of this Court took exactly the opposite view in Chavez v. Martinez, 123 S. Ct. 1994 (2003), stating that a "criminal case" requires the initiation of legal proceedings. Chavez, 123 S. Ct. at 2000 (plurality opinion). This view, which interprets the Fifth Amendment term "criminal case" as being identical to the Sixth Amendment term "criminal prosecution," failed to command a majority of the Court, however. It is also inconsistent with the principle of construction that the use of different words within related provisions generally implies that different meanings were intended. See United States v. Bean, 537 U.S. 71, 76 n.4 (2002).

2. Exclusion of Physical Evidence Derived From a Violation of Miranda's Warning Requirement is Necessary to Deter Violations of the Requirement.

a. Exclusion of Derivative Evidence is Necessary to Deter Intentional Violations of Miranda's Warning Requirement.

Absent a clearly applicable derivative evidence rule, the police have an incentive to violate Miranda intentionally, in the hopes of securing derivative evidence. See generally David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L. J. 805, 843-47 (1992) (describing the incentives). Indeed, in some jurisdictions, police are *trained* to violate Miranda to maximize their chances of obtaining derivative evidence that may prove even more valuable than the defendant's statements, which, if unwarned, are inadmissible.

In State v. Seibert, 93 S.W.3d 700 (Mo. 2002) (en banc), cert. granted, 123 S. Ct. 2091 (2003), for example, a case this Court will review this term, a Missouri police officer admitted to having interrogated an in-custody murder suspect without first advising her of her Miranda rights, based on "a conscious decision to withhold Miranda hoping to get an admission of guilt." Id. at 702. He had been trained to do this, admitting at the suppression hearing that "an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." Id. The tactic produced the desired results: the unwarned suspect first made an incriminating statement,

then waived her Miranda rights, then repeated her initial statement. Id. at 702. The second statement was admitted at trial, and the defendant was convicted. Id. at 701-02.

The Supreme Court of Missouri reversed, holding that suppression was necessary to deter intentional violations of Miranda. The court found it especially significant that the general exclusionary rule barring unwarned statements from the government's case in chief had not deterred the officer from making a conscious decision to violate Miranda. Id. at 704. The court noted that, being fully aware that any unwarned statement would be inadmissible, and that the suspect might not give a subsequent statement once she was advised of her rights, the officer nonetheless had decided to "roll the dice" and violate Miranda. Id. The court reasoned that, without suppression of derivative evidence in such circumstances, there was nothing to deter police from deciding that "the desirability of getting information, such as the names of witnesses or location of physical evidence," outweighs the fact that the prosecution will not be able to use an unwarned statement in its case in chief. Id.

Police officers in California have likewise been trained to violate Miranda in order to secure derivative evidence. One commentator notes a videotape in which a California *prosecutor* instructs police officers on how and why to violate Miranda deliberately in certain circumstances. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 135, 189 (1998). The prosecutor instructs the officers to consider violating Miranda, for example, where the need to recover *physical* evidence outweighs the need for the

defendant's statements--where, in the prosecutor's words, "[y]ou've got him, but you'd kinda like to have the gun that he used or the knife that he used or whatever else it was." Id. at 190.

It is perfectly proper to violate Miranda to obtain the "fruits" of such violations, the prosecutor explains further, because, according to the prosecutor, Miranda does not include any derivative evidence rule. The prosecutor states:

> Let me back up for a second because you may have raised an eyebrow when I ran across a couple of these . . . . The Miranda exclusionary rule is limited to the defendant's own statement out of his mouth. That is all that is excluded under Miranda. It doesn't have a fruits of the poisonous tree theory attached to it the way constitutional violations do. When you violate Miranda, you're not violating the Constitution . . . . [A]ll you're violating is a court decision controlling admissibility of evidence. So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper . . . . Oregon v. Elstad, from the U.S. Supreme Court, and a bunch of federal cases and some state cases . . . a lot of cases have said 'the fruit of the poisonous tree' derivative products doctrine does not apply to Miranda violations. All we lose is the statement taken in violation of Miranda. We do not lose physical evidence that resulted from that.

Id. at 191-92.

The Supreme Court of California recently took note of the official encouragement of Miranda violations. In reversing a defendant's conviction due, in part, to the taking of a statement in deliberate violation of Miranda, the court stated that "at least until recently

the employment of interrogation techniques in deliberate violation of Miranda as a 'useful' but improper 'tool' has not been isolated or limited . . . , and worse yet has not been without widespread official encouragement." People v. Neal, 72 P.3d 280, 290 n.5 (Cal. 2003).

As the Missouri and California examples show, "[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use . . . only invite[s] the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" Nardone, 308 U.S. at 340. As those examples further show, the perceived lack of any curb on the indirect use of statements obtained in violation of Miranda has had exactly the effect this Court warned of in Nardone. It has invited the very methods this Court in Miranda deemed "destructive of personal liberty." The perceived lack of any limit on the indirect use of Miranda-violative statements has been treated by prosecutors and police officers like the ones in the above examples as a veritable license to violate Miranda. For this reason, application of the derivative evidence rule to physical evidence resulting from a Miranda violation is necessary to deter intentional violations of Miranda.

b. To Deter Violations of Miranda's Warning Requirement, Exclusion of Derivative *Physical* Evidence is Especially Important.

Applying the derivative evidence rule to physical evidence fruit of a Miranda violation is more important than applying the rule to other types of "fruit," because police have more of an incentive to ignore the requirements of Miranda in the case of physical

evidence. In the case of physical evidence, the link between the unwarned questioning and the recovery of the derivative evidence is direct, whereas, in the case of testimonial evidence, recovery of the derivative evidence depends on the exercise of volition by a human being. If the police learn of the location of a piece of physical evidence, for example, they can simply retrieve it. If the police learn of the identity of a witness, however, the evidentiary value of that information depends on an exercise of volition by the witness--the witness's decision to cooperate. As this Court explained, in a decision holding that the derivative evidence rule is inapplicable to a Fourth Amendment violation that leads to the discovery of a live witness:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence.

United States v. Ceccolini, 435 U.S. 268, 277 (1978) (quoting Smith v. United States, 117 U.S. App. D.C. 1, 3-4, 324 F.2d 879, 881-82 (1963) (Burger, J.)).

Similarly, as this Court recognized in Elstad, a human exercise of volition separates unwarned questioning from a subsequent, arguably derivative statement of the suspect. The exercise of volition in a subsequent-statement case is the suspect's decision to waive his rights, once he is finally advised of them, and his decision to repeat his earlier,

unwarned statement. In sharp contrast, an unwarned statement regarding the location of inanimate, physical evidence leads the police directly to that evidence; no intervening act of volition is required.

Because police have more of an incentive to ignore the requirements of Miranda in the case of physical evidence fruit, there is a greater need for deterrence than in the case of other types of "fruit." In addition, even within the category of physical evidence fruit, there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense. Physical evidence constitutes the very essence of the offense when that offense is possession of a prohibited object. When the offense is possession of a prohibited object, the physical evidence in question is the heart of the prosecution's case.

In this case, for example, evidence that the gun was found on a shelf in Mr. Patane's bedroom is virtually all the prosecution needs to prove the offense. Evidence of Mr. Patane's statements would not be necessary, because the presence of the gun on a shelf in his bedroom would be an equal, if not better, *substitute* for the statements. As the court of appeals explained:

> As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction.
>
> . . . From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under Miranda and Wong Sun,

> and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make *greater* use of the confession than merely introducing the words themselves.

Patane, 304 F.3d at 1026-27.

In a possession case, then, the defendant's disclosure of the location of a prohibited object becomes the equivalent of a confession by the defendant to possession of the object, at least where, as is the case here, the location of the object establishes the defendant's possession of it. Police have an incentive to ignore Miranda in such circumstances, because securing and being able to use the physical evidence at trial is more important than securing and being able to use statements of the defendant at trial.

Given the incentive that police have to ignore Miranda in possession cases, the exclusion of physical evidence fruit in such cases is particularly necessary to deter Miranda violations. Particularly in possession cases, "suppression of the statement alone [does not] provide[] deterrence sufficient to protect citizens' constitutional privilege against self-incrimination." Id. at 1028. As the court of appeals recognized in this case, "Miranda's deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement." Id. at 1029. Suppression of the gun is therefore required. Id.

c. Exclusion of Derivative Physical Evidence is Necessary to Deter Even Negligent Violations of Miranda's Warning Requirement.

Application of the derivative evidence rule is also necessary to deter negligent violations of Miranda. As this Court stated in Michigan v. Tucker, 417 U.S. 433 (1974), suppressing evidence gained as the result of negligent conduct by the police serves "to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." Id. at 447. If physical evidence fruit of a negligent Miranda violation is admissible, police departments have less incentive to train officers to comply with Miranda. As the court of appeals recognized in this case, suppression of physical fruit of even a negligent Miranda violation is necessary "to ensure that officers . . . properly are trained to protect . . . the constitutional rights of citizens." Patane, 304 F.3d at 1028; cf. United States v. Leon, 468 U.S. 897, 919 n.20 (1984) (quoting with approval Professor Israel's observation in the Fourth Amendment context that, "The key to the [exclusionary] rule's effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits.") (alteration in original).

In addition, applying the derivative evidence rule to physical evidence fruit of negligent Miranda violations will avoid the difficulty that would necessarily arise in attempting to distinguish between negligent and intentional violations of Miranda. It is

important to avoid such distinctions, even the government agrees, because a rule that requires such line-drawing would cause the parties and the court to become "embroiled in collateral litigation over the mental state of particular federal or state agents who did not administer Miranda warnings in their initial questioning of the defendant." Brief for the U.S. as Amicus Curiae, Missouri v. Seibert, 93 S.W. 3d 700 (Mo. 2002), cert. granted, No. 02-1371 (May 19, 2003), 2003 WL 21840207 at *2. Moreover, "in cases where the failure to administer Miranda warnings was calculated, obtaining evidence of such deliberate violations of Miranda often would be difficult or impossible." Patane, 304 F.3d at 1029.

Distinguishing between negligent and intentional Miranda violations would also run counter to a long line of Miranda cases rejecting distinctions based on the subjective intent of the police officer conducting the interrogation. See, e.g., Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) ("underlying intent of the police" is irrelevant to determination of whether "interrogation" occurred); New York v. Quarles, 467 U.S. 649, 655-56 (1984) (public- safety exception "does not depend upon the motivation of the individual officers involved"); Moran v. Burbine, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); Stansbury v. California, 511 U.S. 318, 323-25 (1994) (per curiam) (in determining whether a suspect is "in custody," subjective and undisclosed views of the officers are not relevant); see also Elstad, 470 U.S.

at 317 ("We do not imply that good faith excuses a failure to administer Miranda warnings . . . .").

Finally, such line-drawing is ill-advised, as the government again agrees, because "[u]nwarned questioning has the same effect on a suspect whether the officer's failure to warn was deliberate or the result of an oversight." Brief for U.S. as Amicus Curiae, Missouri v. Siebert, 93 S.W. 3d 700 (Mo. 2002), cert. granted, No. 02-1371 (May 19, 2003), 2003 WL 21840207 at *9. "A suspect is affected by the methods that an officer uses to interrogate him, not by the officer's subjective mental state." Id. at *17.

3. The Costs of Excluding Physical Evidence Derived From a Violation of Miranda's Warning Requirement Do Not Outweigh the Benefits of Exclusion.

Application of the derivative evidence rule to the physical fruit of a Miranda violation exacts the same cost as application of any exclusionary rule--relevant, reliable evidence is kept from the factfinder. See, e.g., Rogers v. Richmond, 365 U.S. 534, 545 (1961) (holding that an unconstitutionally obtained confession must be excluded regardless of its reliability). As is the case with any exclusionary rule, this cost is justified when, as is the case here, exclusion of evidence is necessary to assure compliance with a rule required by the Constitution. As this Court has explained, the "[exclusionary] rule has primarily rested on the judgment that the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community outweighs the importance of securing the conviction of the specific defendant on trial." United States v. Caceres, 440

U.S. 741, 754 (1979). In this case, the importance of deterring police noncompliance with Miranda, which noncompliance "may invade the constitutional rights of individuals throughout the community," id., outweighs the importance of securing the conviction of Mr. Patane, assuming the government is, in fact, unable to secure his conviction without the gun.

In addition, the cost of excluding derivative *physical* evidence is not as high as the cost of excluding other types of derivative evidence, such as the testimony of a live witness. The cost of excluding the testimony of a witness is higher than the cost of excluding physical evidence because "[unlike] guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet[,] [w]itnesses can, and often do, come forward and offer evidence entirely of their own volition." Ceccolini, 435 U.S. at 276. Consequently, while suppression of the testimony of a witness "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the [violation] or the evidence discovered thereby," suppression of physical evidence is directly related to the violation that produced it. Id. at 277. As a result, "[t]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an *inanimate object*." Id. at 280 (emphasis added).

Finally, the government overstates the cost of excluding the physical evidence in this case because, contrary to the government's claim, prosecution of Mr. Patane would still be possible even if the gun is suppressed. Under Tenth Circuit case law, the government need not introduce the firearm itself to obtain a felon-in-possession-of-a-firearm conviction. See United States v. Gregg, 803 F.2d 568, 571 (10th Cir. 1986). Testimony of a witness who saw the defendant in possession of the firearm is, instead, sufficient for conviction. Id. In this case, Mr. Patane's ex-girlfriend, Linda O'Donnell, could be a witness for the government because, according to her statements to the police, she was with Mr. Patane when he purchased the gun at a gun show. In addition, if Mr. Patane took the stand and denied possessing the gun, his statements regarding the location of the gun could be used to impeach him. See Harris v. New York, 401 U.S. 222, 226 (1971). Thus, although suppression of the gun derived from the Miranda violation would weaken the government's case, it would not, as the government claims, preclude prosecution.[10]

In sum, the important constitutional interest served by excluding physical evidence derived from a violation of Miranda's warning requirement far outweighs the cost of

[10]In addition to satisfying the possession element of the offense, the testimony of Linda O'Donnell could also satisfy the interstate commerce element. According to Ms. O'Donnell's statements to the police, Mr. Patane's gun was a Glock, a gun that is manufactured in Austria and shipped to Georgia for distribution in the United States. See Spence v. Glock, 227 F.3d 308, 310 (5th Cir. 2000). Together with testimony that Glocks are manufactured and distributed outside Colorado, Ms. O'Donnell's testimony that Mr. Patane possessed a Glock in Colorado would be sufficient under United States v. Gregg, 803 F.2d 568, 571 (10th Cir. 1986), to show that the gun had traveled in interstate commerce.

exclusion. Given this circumstance, the opinion of the court of appeals applying the derivative evidence rule in this case should be affirmed.

IV. The Government's Reliance on Tucker and Elstad is Misplaced Because Neither Case Involved Derivative *Physical* Evidence.

In its brief, the government contends that Tucker, 417 U.S. at 433, and Elstad, 470 U.S. at 298, support its argument that the derivative evidence rule does not apply to physical evidence fruit of a Miranda violation. The government's reliance on the two cases is misplaced. Because neither case involved derivative *physical* evidence, the balance of interests in the two cases was different from the balance of interests in this case.

A. Michigan v. Tucker, 417 U.S. 433 (1974)

In Tucker, this Court held that the derivative evidence rule does not apply to live-witness fruit of a violation of Miranda's warning requirement, at least when the "Miranda violation" occurred before Miranda was even decided. In Tucker, the defendant was arrested prior to this Court's decision in Miranda. The police, therefore, did not fully advise the defendant of his "Miranda rights" before interrogating him. The defendant's responses to the questioning led the police to a person who ultimately became the government's star witness at trial.

The Court began its analysis in Tucker by considering whether the failure to provide full Miranda warnings "directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only prophylactic rules

developed to protect that right." Tucker, 417 U.S. at 439. The Court concluded that a Miranda violation does not in itself deprive an accused of "his privilege against compulsory self-incrimination as such, but rather fail[s] to make available to him the full measure of procedural safeguards associated with that right." Id. at 444. Precedents applying the derivative evidence rule to constitutional violations, therefore, did not control.[11] Id. at 446.

The Court then used a balancing test to determine whether the derivative evidence rule should be applied. In assessing the benefits of applying the derivative evidence rule to the "Miranda" violation at hand, the Court focused on the primary purpose of the Fifth Amendment exclusionary rule, which is to deter violations of the Fifth Amendment. The Court emphasized that "'[t]he rule is calculated to prevent, not to repair.'" Id. (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)). The Court emphasized further that the purpose of the exclusionary rule "is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'" Id. But, the Court cautioned, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." 417 U.S. at 447. Under the circumstances of Tucker, however, the interest in deterring violations of Miranda's

[11] As noted above, this Court later clarified in Dickerson that Tucker does not mean that the procedural safeguards of Miranda are not required by the Constitution. Dickerson, 530 U.S. at 437-38.

warning requirement was minimal, the Court reasoned, given that Miranda had not even been decided at the time the officers questioned the defendant. Id. Unless police officers are expected to comply with cases that do not yet exist, the Court reasoned further, the police in Tucker were not even negligent in failing to comply with Miranda at the time they questioned the defendant. Id. The Court concluded that the "strong interest . . . of making available to the trier of fact all concededly relevant and trustworthy evidence" and "'the interest in the effective prosecution of criminals'" therefore outweighed "the need to provide an effective sanction to a constitutional right" under the circumstances in Tucker. Id. at 450-51 (quoting Jenkins v. Delaware, 395 U.S. 213, 221 (1969)).

Tucker is distinguishable from this case. First, unlike in Tucker, the purpose of the Fifth Amendment exclusionary rule--to deter police from violating the Fifth Amendment--*is* served by applying the derivative evidence rule in this case. Unlike in Tucker, Miranda had been on the books for thirty-five years at the time Detective Benner questioned Mr. Patane. Indeed, by then, Miranda had become "embedded in routine police practice to the point where the warnings [had] become part of our national culture." Dickerson, 530 U.S. at 443. Detective Benner was charged with knowing that, before he subjected Mr. Patane to custodial interrogation, he was required to advise him, not only of his right to remain silent, but also of his right to counsel, retained or appointed. See Duckworth v. Eagan, 492 U.S. 195, 202-04 (1989) (while rights advisement need not be verbatim recital of the precise language contained in the Miranda opinion, it must include advisement of the right to

counsel); Miranda 384 U.S. at 471 (stating that advising a custodial suspect of his right to counsel is an "absolute prerequisite" to interrogation.)

Second, unlike in Tucker, the fruit of the interrogation in this case was physical evidence rather than a live witness. As discussed above, the link between improper questioning and the securing of derivative evidence is more direct in the case of physical evidence than it is in the case of a live witness because the evidentiary value of physical evidence does not depend on a human exercise of volition. Consequently, there is more incentive to engage in improper questioning when the goal is to locate concrete, physical evidence rather than a witness, and there is a correspondingly greater need for deterrence in the case of physical evidence.

That Tucker did not shed significant light on the question of the admissibility of *physical* evidence derived from a Miranda violation was confirmed when, just four years after Tucker, this Court split four to four on that very question. See Massachusetts v. White, 439 U.S. 280 (1978) (per curiam). The still-undecided nature of the question was confirmed again, ten years later, in Patterson v. United States, 485 U.S. 922 (1988) (White, J., dissenting from denial of certiorari). In Patterson, Justice White noted that, "In Michigan v. Tucker, this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in Miranda v. Arizona." Id. at 922 (citation omitted).

In sum, Tucker involved different interests than are involved here, and Tucker's weighing of those interests does not control the resolution of this case.

B. Oregon v. Elstad, 470 U.S. 298 (1985)

The Elstad case, on which the government also relies, is equally inapposite. In Elstad, this Court held that the derivative evidence rule does not apply to a Miranda violation yielding a *subsequent statement by the accused* as its fruit. In Elstad, the police went to the defendant's home to execute a warrant for his arrest but did not read him his Miranda rights. Instead, an officer questioned the defendant about the burglary for which they had come to arrest him, and the defendant admitted his involvement. The police then took the defendant to the sheriff's office, where they questioned him again. This time, the officers advised the defendant of his Miranda rights before questioning him. After the defendant signed a written waiver of his rights, he gave a complete oral statement and later reviewed, corrected, and signed a written confession.

This Court granted certiorari "to decide whether an initial failure of law enforcement officers to administer the warnings required by Miranda v. Arizona, without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights." Elstad, 470 U.S. at 300 (citation omitted). This Court held that it does not. Id.

The Elstad Court began its analysis by noting that the fruit of the poisonous tree metaphor is familiar "from the Fourth Amendment context." Id. at 303. Although the

Elstad Court did not so state, the fruit of the poisonous tree doctrine was also familiar at that time from the statutory context from which it originated, see Nardone, 308 U.S. at 341 (first using the "fruit of the poisonous tree" metaphor); from the regulatory context, see Harrison, 392 U.S. at 219 (applying the fruit of the poisonous tree doctrine to violations of court-made and legislative rules); and from the Sixth Amendment context, see United States v. Wade, 388 U.S. 218 (1967)(applying the fruit of the poisonous tree doctrine to a Sixth Amendment violation). The Elstad Court also did not mention that the "derivative evidence rule," which preceded, and operates in the same way as, the "fruit of the poisonous tree doctrine," originated in the context of the *Fifth* Amendment, not the Fourth Amendment. See Counselman, 142 U.S. at 586 (Fifth Amendment case first discussing the derivative evidence doctrine); see also Hubbell, 530 U.S. at 37-38 (applying the derivative evidence doctrine in a Fifth Amendment context); Kastigar, 406 U.S. at 444-45 (same); Murphy v. Waterfront Comm'n of New York, 378 U.S. 52, 79 (1964) (same).

After commenting on the familiarity of the fruit of the poisonous tree doctrine from the Fourth Amendment context, the Court noted that only constitutional violations *necessarily* call for application of the fruit of the poisonous tree doctrine. Elstad, 470 U.S. at 305-06. The Court did not state that only if there is a constitutional violation can the fruit of the poisonous tree doctrine apply. Instead, after stating that a violation of Miranda's warning requirement is not a violation of the Constitution itself, the Court proceeded to apply a balancing test to determine whether the derivative evidence rule should be

applied. Id. at 312. The circumstances under which the Court applied the balancing test were: 1) a violation of Miranda's warning requirement, 2) that was subsequently cured by full compliance with Miranda, and 3) that was followed by a knowing, intelligent, and voluntary statement of the accused. The Court found that the interest in the admission of the subsequent statement in these circumstances outweighed the interest in exclusion because, to hold otherwise, would be to "effectively immunize[ ] a suspect who responds to pre-Miranda warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent." Id. This immunity, the Court reasoned, would "come[ ] at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." Id. The specific holding of the Court in Elstad was that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id. at 318.

Elstad is distinguishable from this case. First, unlike in Elstad, the Miranda violation in this case was never "cured" by subsequent compliance with Miranda. Second, unlike in Elstad, the connection between the improper questioning and the obtaining of the derivative evidence was not broken by an intervening exercise of volition. Mr. Patane's alleged consent to the entry of his home and to the seizure of his gun was not an exercise of volition because any consent that he gave was not voluntary. Any consent that he gave was also "come at by exploitation of [the primary] illegality," see Wong Sun v. United

States, 371 U.S. 471, 488 (1963), the primary illegality being the unwarned questioning that immediately preceded the alleged consent. Consequently, Mr. Patane's alleged consent to the warrantless entry of his home and to the seizure of his gun was not a voluntary act capable of removing the taint of the preceding questioning that took place in violation of Miranda.

Although Elstad did not involve physical evidence, the Court made opaque reference to the question of physical-evidence fruit of a Miranda violation. The Court commented, for example, that Tucker's reasoning that exclusion of the testimony of a third-party witness would not serve the purpose of the derivative evidence rule "applies with equal force when the alleged 'fruit' of a noncoercive Miranda violation is neither a witness, nor an article of evidence, but the accused's own voluntary testimony." Elstad, 470 U.S. at 308. But, as the dissent in Elstad cautioned, the case "surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to *physical* evidence obtained as a proximate result of a Miranda violation," because the Court in Elstad "relie[d] heavily on individual 'volition' as an insulating factor in successive-confession cases[,] . . .[a] factor [that] is altogether missing in the context of *inanimate* evidence." Id. at 347 n.29 (Brennan, J., dissenting) (emphasis added).

The Court in Elstad also made a passing reference to fruits of a Miranda violation in general, stating that a Miranda violation "does not require that the statements *and their fruits* be discarded as inherently tainted." Id. at 307 (emphasis added). For example, the

Court observed, while unwarned statements must be "discarded" for use in the government's case in chief, they may still be used to impeach the defendant if he testifies.[12] Id. Read in context, it is clear that the Court's observation that unwarned statements and their fruits need not be discarded for *all* purposes was not intended to mean either that unwarned statements are always admissible, which they clearly are not, or that the fruits of such statements are always admissible.

That Elstad did not shed significant light on the question of the admissibility of *physical* evidence derived from a Miranda violation is supported by Justice White's subsequent observation, in Patterson, that, "[w]hile Elstad has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a Miranda violation, that decision did not squarely address the question presented here, and in fact, left the matter open." Patterson, 485 U.S. at 923 (internal citations omitted).

Elstad, like Tucker, involved a different balance of interests than is present in this case and, therefore, does not control .[13]

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[12]As noted above, this is true even in the Fourth Amendment context, where, as is the case with evidence obtained in violation of Miranda, the evidence may still be used for impeachment. See Walder v. United States, 347 U.S. at 65.

[13]The government also relies on Schmerber v. California, 384 U.S. 757 (1966), and its progeny in arguing that physical evidence derived from a Miranda violation should not be suppressed. This reliance is even more misplaced than the government's reliance on Elstad and Tucker. In Schmerber, this Court held that the withdrawal of blood from the defendant and the admission of its analysis at trial did not violate the Self-Incrimination Clause because neither act compelled the defendant to provide "evidence of a testimonial or communicative nature." Id. at 761. No rule of any kind was violated in Schmerber, much less a constitutional

V. The Government's Argument that a Police Officer May Conduct a Custodial Interrogation Without First Advising the Suspect of His Rights is Incorrect.

The government contends, for the first time in the history of this case, that a police officer's failure to advise a suspect of his rights before subjecting him to custodial interrogation does not violate the rule announced in Miranda. According to the government, so-called Miranda violations consisting of a police officer's failure to warn are not actually violations at all, because Miranda does not, in fact, include any requirement that warnings be given. All Miranda requires, according to the government, is the exclusion at trial of statements that are not preceded by warnings. Police officers are free, under the government's theory, to interrogate an in-custody suspect without first providing warnings, and they do not engage in misconduct when they do so. Given that unwarned custodial interrogation is perfectly proper, the government's theory continues, there is no need to deter it.

The government's argument lacks merit. First, it is inconsistent with the Miranda decision itself. Second, it is inconsistent with more than three decades of case law interpreting Miranda.

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rule. There was no "tree" in Schmerber, much less any "fruit." In this case, by contrast, the words of Mr. Patane that directed Detective Benner to the gun were clearly testimonial or communicative in nature, and the Fifth Amendment, thus, is clearly implicated. Moreover, there *was* a violation in this case, a violation of the constitutional rule of Miranda.

A. Miranda Announced a Warning Requirement and Not Merely an Evidentiary Rule.

The Miranda decision itself makes clear that the Court was announcing a two-part rule. The first part *requires* police officers to advise suspects of their rights before subjecting them to custodial interrogation. The second part dictates the consequences of failing to comply with the first part: statements taken in violation of the warning requirement must be excluded at trial. The government's argument, which focuses exclusively on the second part of the Miranda rule and ignores the first, is belied by the language of the Miranda decision itself.

In the very first paragraph of Miranda, the Court states that its decision "deal[s] with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation *and* the *necessity for procedures* which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." Miranda, 384 U.S. at 439 (emphases added). The Court also states in the introductory section of the opinion that the Court granted certiorari, in part, "to give concrete constitutional guidelines for *law enforcement agencies* and courts *to follow*." Id. at 441-42 (emphases added).

The Court continues in the same vein throughout the opinion, emphasizing that the rule it is announcing applies to the conduct of police officers as well as to trial judges determining the admissibility or inadmissibility of evidence. The Court states:

> --The principles announced today deal with *the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation* while in custody at the station or otherwise deprived of his freedom of action in any significant way. . . . [T]he safeguards to be erected about the privilege must come into play *at this point*.
>
> --The *limits we have placed on the interrogation process* should not constitute an undue interference with a proper system of law enforcement.
>
> --To summarize, we *hold* that *when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized. [P]rocedural safeguards must be employed* to protect the privilege. . . .

Id. at 477, 478-79, (emphases added).

The Court also makes clear throughout the opinion that the warning requirement it announces is exactly that--a *requirement*. Thus, the Court states:

> --In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused *must be* adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.
>
> --The *requirement of* warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege. . . .
>
> --[T]his warning [of the right to counsel] is an *absolute prerequisite* to interrogation.
>
> --[W]e *hold* that an individual held for interrogation *must be* clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . .

Id. at 467, 471, 476 (emphases added).

In sum, notwithstanding the government's argument to the contrary, Miranda itself makes clear that it was announcing a warning requirement, and not just an evidentiary rule.[14]

B. This Court has Consistently Interpreted Miranda as Having Announced a Warning Requirement and Not Merely an Evidentiary Rule.

In more than three decades of case law following the Miranda decision, this Court has consistently interpreted that decision as having announced a rule requiring that suspects be advised of their rights before they are subjected to custodial interrogation. From a case decided just one week after Miranda to this Court's most recent pronouncements, this Court has made clear that Miranda sets out a warning requirement and not merely a rule for determining the admissibility of evidence at trial. See, e.g., Johnson v. New Jersey, 384 U.S. 719, 726 (1966) ("In view of the standards announced one week ago concerning *the warnings which must be given* prior to in-custody interrogation, this case also obliges us to determine whether Miranda should be accorded retroactive application.") (emphasis added); Quarles, 467 U.S. at 656 ("The Miranda decision was based in large part on this Court's view that the warnings which it *required* police to give

[14]Although in the body of its brief the government insists that Miranda did not announce a warning requirement, the government's statement of the question presented in this case implicitly acknowledges that Miranda includes a warning requirement, and that it is not just an evidentiary rule. The government states the question presented as "[w]hether a failure to give a suspect the warnings *prescribed by* Miranda v. Arizona requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement." Petitioner's Brief at (I) (emphasis added; citation omitted). If the warnings are "prescribed" by Miranda, they are required by Miranda.

to suspects in custody would reduce the likelihood that the suspects would fall victim to *constitutionally impermissible practices of police interrogation* . . . .") (emphases added); Moran, 475 U.S. at 420 ("Miranda imposed on the police an *obligation* to follow certain procedures in their dealings with the accused") (emphasis added); Colorado v. Spring, 479 U.S. 564, 567 n.1 (1987) ("Under this Court's decision in Miranda . . ., prior to a custodial interrogation a criminal suspect *must* [be advised of his rights]") (emphasis added); Teague v. Lane, 489 U.S. 288, 303 (1989) ("[I]n Miranda . . ., the Court held that, absent other effective measures to protect the Fifth Amendment privilege against self-incrimination, a person in custody *must* be warned prior to interrogation that he has certain rights, including the right to remain silent.") (emphasis added); Davis v. United States, 512 U.S. 452, 457 (1994) ("[W]e held in Miranda . . . that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police *must* explain this right to him before questioning begins.") (emphasis added); Thompson v. Keohane, 516 U.S. 99, 107 (1995) ("To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the Miranda Court held, suspects interrogated while in police custody *must* be told [of their rights].") (emphasis added); Dickerson, 530 U.S. at 440 ("[T]he Miranda Court concluded that, '[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused *must* be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.'") (emphasis added); see also

Chavez, 123 S. Ct. at 2013 (2003) (Kennedy, J., concurring in part and dissenting in part) ("The Miranda warning, as is now well settled, is a constitutional *requirement* adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause.") (emphasis added).

Contrary to the government's argument, Miranda and its progeny simply do not allow police officers to perform a cost/benefit analysis before deciding whether to give warnings before conducting custodial interrogation in a particular case. Instead, the warnings are a constitutional prerequisite to custodial interrogation. Police officers violate a constitutional rule by failing to give Miranda warnings before custodial interrogation. When unwarned custodial interrogation produces physical evidence--particularly physical evidence that is the essence of the offense--the physical evidence must be suppressed. Given this, the gun Detective Benner recovered from Mr. Patane's bedroom must be suppressed, because it was the direct result of Detective Benner's questioning of Mr. Patane in violation of the constitutional rule of Miranda.

CONCLUSION

The judgment of the court of appeals should be affirmed.

JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondent
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

MICHAEL G. KATZ
Federal Public Defender

VIRGINIA L. GRADY
Assistant Federal Public Defender

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