Criminal Law & Procedure

Supreme Court Preview: Fine-Tuning Miranda

*by Kent Scheidegger**

***Miranda* and Its Limitations**

For its October 2003 term, the United States Supreme Court accepted four cases relating to the rule of *Miranda* v. *Arizona*.[1] This unusual cluster reminds us once again that the case which supposedly drew bright lines 37 years ago remains a fertile source of litigation to this day.

From the day it was decided, *Miranda* was among the most controversial of the Supreme Court's criminal procedure decisions. Justice Harlan called it "heavy-handed and one-sided."[2] Justice White said the rule had "no significant support in the history of the privilege or in the language of the Fifth Amendment."[3] Two years after the *Miranda* decision, Congress repudiated it by enacting 18 U.S.C. § 3501, a statute which would lie dormant for three decades.

The *Miranda* rule "overprotects" the privilege against compelled self-incrimination by excluding from evidence any statement given by a suspect in custody without the prescribed warnings and an express waiver.[4] As a result, it does not merely exclude statements which actually are compelled,[5] but also "patently *voluntary* statements taken in violation" of its requirements.[6] The consequent injury to the truth-seeking function of the criminal trial caused the Supreme Court to issue a long series of damage-control decisions limiting the scope of *Miranda*'s rule of exclusion. The rule was not applied retroactively to other cases tried before its issuance.[7] In *Harris* v. *New York*,[8] the Court limited *Miranda*'s rule of exclusion to the prosecution's case in chief. If the defendant takes the stand, his voluntary but unwarned statement can be used for impeachment. *Michigan* v. *Tucker*[9] rejected a "fruit of the poisonous tree" argument and allowed the prosecution to use a witness located through the defendant's statement despite noncompliance with the *Miranda* rule. In *New York* v. *Quarles*,[10] the Court crafted a public safety exception to *Miranda*, allowing the police to question an arrested suspect about the location of a gun without the *Miranda* warnings and admit his answer in evidence. "The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution,' "[11] justifying a distinction between a *Miranda*-noncompliant statement and an actually compelled statement.

Oregon v. *Elstad*,[12] an opinion written by Justice O'Connor in 1985, is the central precedent for the cases to be decided this term. In *Elstad*, the police went to the suspect's home with an arrest warrant for a burglary. They asked Elstad if he knew why they were there. When he said he did not, the officer described the crime and said he believed Elstad was involved. He said, "Yes, I was there." Then they took him to the police station and read him his *Miranda* rights. Elstad understood and waived his rights and made a full statement.[13] The Supreme Court assumed that the first statement was a *Miranda* violation, because the state had conceded that point earlier in the litigation, but it allowed admission of the defendant's second, properly warned statement. "We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver."[14]

Dickerson* and *Chavez

In 2000, the Court's arguably conflicting statements on the status of *Miranda* came to a head in *Dickerson* v. *United States*.[15] The Fourth Circuit had awakened Congress's long-dormant repudiation of *Miranda*. Seizing upon the *Quarles/Tucker* statement above, it held that *Miranda* was a nonconstitutional rule within the power of Congress to modify, and admissibility of confessions in federal trials was governed by the voluntariness standard of 18 U.S.C. § 3501.[16] The Supreme Court reversed. The fact that it had always applied the rule to state as well as federal courts was conclusive that the rule was constitutional and that Congress could not simply legislate a return to the status quo ante.[17] The Court also declined to overrule *Miranda* on its own, based squarely on *stare decisis* rather than on the correctness of *Miranda* as an original matter.[18] The *Dickerson* Court did not repudiate the earlier decisions making "exceptions" to *Miranda*, including *Harris*, *Elstad*, and *Quarles*. Indeed, it seems to reaffirm them.[19] It also did not repudiate earlier statements that the *Miranda* warnings are not themselves constitutional rights or that the legislative branch could substitute other effective procedures. The Court quoted a statement from Chief Justice Burger that he would neither overrule nor extend *Miranda*.[20]

The last case on the *Miranda* rule before the present term was *Chavez* v. *Martinez*,[21] decided at the end of the last term. This case was a civil suit brought by a person who was arrested and questioned, but never prosecuted. Although the Court was fractured, it is apparent from the several opinions that the status of *Miranda* as a "prophylactic" rule survives *Dickerson*, and taking a statement without complying with *Miranda* is not, by itself, a violation of the Constitution.[22]

Even before the Supreme Court issued its decision

in *Chavez*, it had apparently decided that further clarification of *Miranda* was needed. It had granted *certiorari* in three cases related to the *Miranda* rule for argument and decision in the October 2003 Term: *Fellers* v. *United States*, *United States* v. *Patane*, and *Missouri* v. *Seibert*. All three were argued in December, and one was decided January 26. Just before commencement of the term, the Court took a fourth case, *Yarborough* v. *Alvarado*, which will be argued March 1.[23]

United States* v. *Patane

The strongest case for the prosecution is *United States* v. *Patane*. The police arrested Patane and began to read him the *Miranda* warnings when he interrupted them and said he knew his rights. Then they asked him about the location of his gun, which, as a convicted felon, it was illegal for him to possess. He told them it was in his bedroom and gave consent for them to enter to retrieve it. The government made a dubious concession that this was a *Miranda* violation, so Patane's statement was not admissible, but argued that the gun itself remained admissible under *Tucker* and *Elstad*. The Tenth Circuit held that *Dickerson* had undermined the premise of *Tucker* and *Elstad*, that *Miranda* is a "prophylactic" rule, and further that physical evidence as "fruit" is distinguishable from both the witness in *Tucker* and the defendant's subsequent statement in *Elstad*.[24] The latter holding was contrary to the Tenth Circuit's own precedent. "However," the court said, "once again *Dickerson* has undercut the premise upon which that application of *Elstad* and *Tucker* was based because *Dickerson* now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation."[25] This opinion was rendered before *Chavez*.

The defendant's brief makes three main arguments. First, failure to comply with *Miranda*'s warning requirement is itself a violation of the Constitution, and therefore the derivative evidence rule applies full force. This is a difficult argument, at best, given the holding in *Chavez* (which the defendant only mentions briefly), and the Court's apparent reaffirmation of *Tucker* and *Elstad*. Second, the balancing of interests weighs in favor of exclusion of derivative evidence, the very argument the Court rejected in *Tucker* and *Elstad*. Third, Patane argues that physical evidence is distinguishable, because there is no intervening act of free will, as there is in the cases of a witness testifying or an arrested suspect making a second, properly warned statement. This argument is somewhat stronger, but weighing on the other side is the greater reliability of physical evidence, not depending on a witness's veracity or unknowable psychological pressures that may have produced an out-of-court statement. In the present case, the presence of a gun in the defendant's bedroom is virtually conclusive evidence of guilt. In *Withrow* v. *Williams*,[26] the Court said that keeping out unreliable evidence was a major purpose of the *Miranda* rule, and that factor is completely absent here.

Fellers* v. *United States

A different twist on the "fruit" question was presented but not decided in *Fellers* v. *United States*. After Fellers had been indicted on drug charges, the police came to his house and said they wanted to discuss the indictment. Fellers made incriminating statements. The police then arrested him, took him to jail, gave him the *Miranda* warnings, and obtained a waiver. Fellers made more incriminating statements. The District Court suppressed the statements made at the house but admitted those made at the jail. The Tenth Circuit affirmed based on *Oregon* v. *Elstad*.[27]

The twist here is that the underlying violation is not of the Fifth Amendment *Miranda* rule. Rather, it was the Sixth Amendment rule of *Massiah* v. *United States*[28] that was violated. Because judicial criminal proceedings had already begun against Fellers, he had a right not to be interrogated without his lawyer present, regardless of whether he was in custody. However, *Patterson* v. *Illinois*[29] established that a waiver taken according to *Miranda* also waives the *Massiah* right. To succeed in suppressing the second statement, assuming *Elstad* is still good law, Fellers must distinguish his case from *Elstad*.

To distinguish *Elstad*, Fellers asserted that the *Massiah* violation in his case is a violation of the Sixth Amendment itself, and therefore it is distinguishable from the antecedent *Miranda* violation in *Elstad*, where the Court said that a violation of the *Miranda* warning requirement is not itself a violation of the Constitution. This argument put the defendant in *Fellers*, supported by the American Bar Association, at odds with the defendant in *Patane*, supported by the Brennan Center for Justice, who asserts that a *Miranda* violation is a violation of the Constitution.

The Supreme Court decided not to resolve the intricate questions presented by the *Fellers* case. On January 26, the Court issued a short, unanimous opinion by Justice O'Connor, which simply reversed the Eighth Circuit on the issue of the initial *Massiah* violation.[30] The Court confirmed the "deliberate elicitation" standard for *Massiah* cases and left the "fruits" question to be reconsidered by the Eighth Circuit on remand.

Missouri* v. *Seibert

The strongest case for the defense side is *Missouri* v. *Seibert*. This case arose from a bizarre scheme by Patrice Seibert and two of her sons to conceal the circumstances of the death of a third son by burning down their own home. Donald Rector, another teenager living in the home, died in the fire, and the critical question was whether his death was part of the plan.[31] The police intentionally questioned Seibert and obtained inculpatory statements without reading her the *Miranda* warnings, then read her the warnings and obtained a waiver, and then got more

statements from her by referring back to the earlier statements. The Missouri Supreme Court divided 4-3, with the majority holding this was distinguishable from *Elstad* and the dissent believing that *Elstad* was controlling precedent.

Unfortunately for Seibert, her attorney has filed a shrill, over-the-top brief that does not get around to distinguishing *Elstad* until page 33. Once there, though, the brief does note that the short conversation in Elstad's living room was far less coercive than Seibert's station-house interrogation. Further, the brief notes that *Elstad* limited its rule to circumstances "absent deliberately coercive or improper tactics in obtaining the initial statement,"[32] and otherwise hedged its holding. The United States Solicitor General, as *amicus* in support of the state, reads *Elstad* as allowing an exception to its rule of admissibility only for cases where the first statement is coerced in the pre-*Miranda* due process sense.

The bright-line alternatives in this case are to either (1) accept the Solicitor General's position and admit the second statement whenever the first is not actually coerced; or (2) overrule *Elstad* and exclude the second statement whenever the first is not taken in compliance with *Miranda*. Neither of these courses seems likely, and the Court has just recently reminded us how much it dislikes bright-line rules.[33] A more probable outcome is a rule somewhere between these two extremes, raising as many questions as it answers.

Yarborough* v. *Alvarado

The Fourth *Miranda* case, *Yarborough* v. *Alvarado*, differs from the others in that it arises from federal *habeas* review of a state judgment, rather than direct appeal. The standard of review here is quite different due to the Antiterrorism and Effective Death Penalty Act of 1996.[34] The case is also different in that it does not involve a "fruit of the poisonous tree" question, but rather the question of when a suspect is "in custody" so as to require the *Miranda* warnings. The Court has long recognized that "the task of defining 'custody' is a slippery one,"[35] and that errors by the police in determining whether a suspect is in custody are inevitable.

Alvarado was a 17-year-old suspected of involvement in a robbery-murder. He was brought to the station by his parents, questioned there, and then taken home by his parents. The state appellate court concluded he was not in custody for the purpose of requiring *Miranda* warnings, applying a test taken from a Supreme Court opinion.[36]

The Ninth Circuit found that the state court had failed to give sufficient weight to the fact that Alvarado was a juvenile, and that, in the terms of the *habeas* statute, this was an "unreasonable application" of Supreme Court precedent, in that the state court had unreasonably failed to extend Supreme Court precedent on *Miranda* by recognizing special protections for juveniles.[37]

Alvarado will probably be decided primarily as a *habeas* case and shed little additional light on the *Miranda* body of jurisprudence. The standard the Ninth Circuit used to evaluate the state judgment was already disapproved last term.[38] Once the federal court finds that the state court applied the correct legal standard from Supreme Court precedents, as it clearly did in this case, a collateral attack can only succeed if the state court's application of that standard to the facts was objectively unreasonable.[39] The *Alvarado* case would be close if the Court were reviewing it *de novo* on direct appeal. Under the AEDPA standard, a case that is close on the merits is clearly not a proper ground for collateral attack.

Conclusion

Patane and *Seibert* should provide some clarification of the "fruit of the poisonous tree" issue for the *Miranda* rule. The question of whether the same analysis applies to the *Massiah* rule will have to wait for another term. Look for a decision in *Alvarado* at the end of the term, but do not expect the Court to shed much light on what "custody" means.

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Footnotes

[1] 384 U. S. 436 (1966).
[2] *Id.*, at 525 (dissenting opinion).
[3] *Id.*, at 526 (dissenting opinion).
[4] *See* Duckworth v. Eagan, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring).
[5] "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ." U. S. Const. Amdt. 5.
[6] Oregon v. Elstad, 470 U. S. 298, 307 (1985) (emphasis in original).
[7] *See* Johnson v. New Jersey, 384 U. S. 719, 721 (1966). The absence of any principled basis for distinguishing Johnson's case from Miranda's drew a dissent from Justices Black and Douglas. See *id*., at 736; Linkletter v. Walker, 381 U. S. 618, 641-642 (1965) (Black, J., dissenting). Years later, the Court would accept that all appellants at the same stage of review must be treated the same. *See* Griffith v. Kentucky, 479 U. S. 314, 323-324 (1987); Teague v. Lane, 489 U. S. 288, 304-305 (1989) (plurality opinion).
[8] 401 U. S. 222, 226 (1971).
[9] 417 U. S. 433, 445-446, 452 (1974).
[10] 467 U. S. 649 (1984).
[11] *Id*., at 654 (quoting *Tucker*, 417 U. S., at 444).
[12] 470 U. S. 298, 308 (1985).
[13] *Id*., at 301.
[14] *Id.*, at 318.
[15] 530 U. S. 428 (2000).
[16] United States v. Dickerson, 166 F. 3d 667, 672 (CA4 1999).
[17] 530 U. S., at 438.
[18] *Id.*, at 443.
[19] See *id.*, at 441.
[20] *Id*., at 443 (quoting *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (Burger, C. J., concurring in judgment)).
[21] 123 S. Ct. 1994 (2003).
[22] *Id.*, at 2003-2004 (opinion of Thomas, J.); *id*., at 2007 (opin-

ion of Souter, J.); *id*., at 2013 (Kennedy, J., concurring in part and dissenting in part).

[23] Briefs of the parties are available on the ABA Web site, http://www.abanet.org/publiced/preview/briefs/home.html. The Solicitor General's briefs as a party in *Patane* and *Fellers* and as *amicus* in *Seibert* are available at http://www.usdoj.gov/osg/briefs/2003/2003brieftypes.html. *Amicus* briefs of the Criminal Justice Legal Foundation in *Patane*, *Fellers*, and *Alvarado* are available at http://www.cjlf.org/briefs/briefmain.htm.

[24] United States v. Patane, 304 F. 3d 1013, 1019, 1023 (CA10 2002).

[25] *Id*., at 1023.

[26] 507 U. S. 680, 692 (1993).

[27] United States v. Fellers, 285 F. 3d 721 (CA10 2002).

[28] 377 U. S. 201 (1964).

[29] 487 U.S. 201 (1964).

[30] Fellers v. United States, 540 U.S.__(No. 02-6320, Jan. 26, 2004), http://www.supremecourtus.gov/opinions/03pdf/02-6320.pdf.

[31] State v. Seibert, 93 S.W.3d 700 (2002).

[32] 470 U.S., at 314.

[33] *See* United States v. Bank*s*, 540 U.S.__(No. 02-473, Dec. 2, 2003) (slip op., at 4), http://www.supremecourtus.gov/opinions/03pdf/02-473.pdf.

[34] 28 U.S.C. § 2254(d).

[35] *Elstad*, 470 U.S., at 309.

[36] The state court opinion in *Alvarado* is unpublished. It took the custody standard from People v. Ochoa, 966 P. 2d 442, 471 (Cal. 1998), which quoted Thompson v. Keohane, 516 U.S. 99, 112-113 (1995).

[37] *See* Alvarado v. Hickman, 316 F. 3d 841, 853-854 (CA9 2002).

[38] *See* Lockyer v. Andrade, 538 U.S. 63 (2003), disapproving Van Tran v. Lindsey, 212 F. 3d 1143 (CA9 2000).

[39] *See* Williams v. Taylor, 529 U.S. 362, 409 (2000).