No. 02-1371

In The Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF *AMICI CURIAE* OF FORMER PROSECUTORS, JUDGES AND LAW ENFORCEMENT OFFICIALS, SUPPORTING RESPONDENT

CHARLES D. WEISSELBERG
University of California
School of Law (Boalt Hall)
Berkeley, CA 94720
Telephone: (510) 643-8159
Facsimile: (510) 642-3856

STEPHEN J. SCHULHOFER
KIRSTEN D. LEVINGSTON
FREDERICK A.O. SCHWARZ, JR.
TOM GERETY
Brennan Center for Justice
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 998-6260
Facsimile: (212) 995-4692

GEORGE A. CUMMING, JR.
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-1198
Facsimile: (415) 442-1001

Attorneys for *Amici Curiae*

[Names Of Individual *Amici* Are Listed In The Appendix To This Brief]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE COURT SHOULD NOT OVERTURN *MIRANDA*'S PRE-INTERROGATION WARNING REQUIREMENT 5

A. *Miranda*'s Warning Requirement Applies to Law Enforcement and Promotes Effective Practices 5

B. Neither This Court's Exclusionary Rule Decisions Nor *Chavez v. Martinez* Displaces *Miranda*'s Affirmative Commands 12

C. The Court Should Disapprove the "Two-Stage" Interrogation Technique and Reaffirm that Warnings Must Be Given Prior to Interrogation 15

II. THE COURT SHOULD EXCLUDE EVIDENCE DERIVED FROM AN UNREASONABLE FAILURE TO ADMINISTER *MIRANDA* WARNINGS 20

A. Exclusion Is Appropriate and Necessary to Ensure that Officers Provide *Miranda* Warnings 20

B. A Rule Premised on Objective Good Faith Is Workable 24

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Berkemer v. McCarty, 468 U.S. 420 (1984)..... 8
Brown v. Illinois, 422 U.S. 590 (1975)..... 3, 27
Chavez v. Martinez, 123 S.Ct. 1994 (2003)... 3, 12, 14, 15, 24
Colorado v. Spring, 479 U.S. 564 (1987)..... 25
Darwin v. Connecticut, 391 U.S. 346 (1968) 16, 28
Davis v. North Carolina, 384 U.S. 737 (1966) 8
Davis v. United States, 512 U.S. 452 (1994) 25
Dickerson v. United States, 530 U.S. 428 (2000).....*passim*
Duckworth v. Eagan, 492 U.S. 195 (1989) 6
Edwards v. Arizona, 451 U.S. 477 (1981) 21
Fare v. Michael C., 442 U.S. 707 (1979)..... 8
Harris v. New York, 401 U.S. 222 (1971)..... 3, 12, 14, 21
Hope v. Pelzer, 536 U.S. 730 (2002) 26
Illinois v. Perkins, 496 U.S. 292 (1990)..... 25
Kaupp v. Texas, 123 S.Ct. 1843 (2003) (per curiam)..... 27
Mapp v. Ohio, 367 U.S. 643 (1961)..... 22
Michigan v. Harvey, 494 U.S. 344 (1990)..... 13
Michigan v. Tucker, 417 U.S. 433 (1974)..... 8, 13, 14, 21
Miller v. Fenton, 474 U.S. 104 (1985)..... 8
Minnesota v. Murphy, 465 U.S. 420 (1984)..... 25
Minnick v. Mississippi, 498 U.S. 146 (1990)..... 21
Miranda v. Arizona, 384 U.S. 436 (1966).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Moran v. Burbine, 475 U.S. 412 (1986) 6

New York v. Quarles, 467 U.S. 649 (1984)..... 6, 16, 25, 26

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

Oregon v. Hass, 420 U.S. 714 (1975) 13, 14

People v. Bradford, 929 P.2d 544 (Cal.), *cert. denied*, 522 U.S. 953 (1997) 22

People v. Neal, 72 P.3d 280 (Cal. 2003) 19

Rhode Island v. Innis, 446 U.S. 291 (1980)..... 5, 25, 26

Saucier v. Katz, 533 U.S. 194 (2001) 26

Stansbury v. California, 511 U.S. 318 (1994) 25, 26

State v. Knapp, 666 N.W.2d 881 (Wis. 2003)..... 22

State v. Kunkel, 404 N.W.2d 69 (Wis.), *cert. denied*, 484 U.S. 929 (1987) 17

State v. Provost, 490 N.W.2d 93 (Minn. 1992), *cert. denied*, 507 U.S. 929 (1993) 17

State v. Seibert, 93 S.W.3d 700 (Mo. 2002).....*passim*

Texas v. Cobb, 532 U.S. 162 (2001)..... 6

United States v. Bayer, 331 U.S. 532 (1947)..... 27

United States v. Khalil, 214 F.3d 111 (2d. Cir.), *cert. denied*, 531 U.S. 937 (2000) 17

United States v. Orso, 275 F.3d 1190 (9th Cir. 2001), *opns. respecting full court en banc reh'g*, *cert. denied*, 537 U.S. 828 (2002) 10

United States v. Orso, 266 F.3d 1030 (9th Cir. 2001)..... 22

United States v. Padilla, 819 F.2d 952 (10th Cir. 1987)..... 17

TABLE OF AUTHORITIES – Continued

Page

Wolf v. Colorado, 338 U.S. 25 (1948) 23

Wong Sun v. United States, 371 U.S. 471 (1963)..... 27

CONSTITUTIONS:

U.S. Const. amend. IV..... 22, 23, 27

U.S. Const. amend. V .....*passim*

U.S. Const. amend. XIV 8

STATUTES:

18 U.S.C. §3501 ..... 6, 7

MISCELLANEOUS:

Bureau of Justice Assistance, U.S. Dep't of Justice, Understanding Community Policing: A Framework for Action (1994) 18

Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?*, 73 S. Cal. L. Rev. 1275 (2000) 12

J. Edgar Hoover, *Civil Liberties and Law Enforcement*; *the Role of the FBI,* 37 Iowa L. Rev. 175 (1952) 11

Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 387 (1999) 22

Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. and Criminology 621 (1996)..... 9

TABLE OF AUTHORITIES – Continued

Page

Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure,* 49 UMKC L. Rev. 24 (1980) 22, 23

Office of the Missouri Attorney General, Front Line Report (March 2003), available at: http://www.ago.state.mo.us/032003fl.pdf 16

Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. 1121 (2001) 22, 23

Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998)..... 22

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the former law enforcement officers, judges and prosecutors whose individual names appear in the Appendix to this Brief. Each dealt with *Miranda v. Arizona,* 384 U.S. 436 (1966), as an everyday reality during years of public service, and each remains actively interested in the fair and effective functioning of the criminal justice system.

This case is vitally important to society and to law enforcement professionals, for this Court has never before confronted the issues attending a lengthy custodial interrogation by an officer who knowingly and deliberately refused to warn a suspect "prior to *any* questioning," as required by *Miranda*.[2] Much less has this Court ever before dealt with a situation in which the officer "candidly admitted that he used a two-stage interrogation technique," taught at a "national institute," to "obtain respondent's [second] confession" intended for use in the State's case-in-chief. Petition for Writ of Certiorari ("Pet."), at 5. As the officer himself testified below:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda*, and she repeated the items she had told us. (*State v. Seibert*, 93 S.W.3d 700, 704 (Mo. 2002)).

---

[1] This Brief is filed with the consent of Petitioner and Respondent. No counsel for any party authored this Brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this Brief.

[2] *Miranda*, 384 U.S. at 444. All emphasis in materials quoted in this Brief has been added, unless otherwise stated.

According to the officer, his current department and those with which he had served previously, all subscribed to this training. *See id.* at 702.

We write to condemn this training and practice. We have worked within *Miranda*'s warning requirement on a daily basis and have found it not to be a barrier to effective law enforcement and prosecution. We urge the Court not to overrule a critical component of *Miranda* – that a suspect *must* be warned of his or her rights prior to custodial questioning. We believe that a statement should be excluded from evidence when it is derived from an objectively unreasonable failure to provide *Miranda* warnings.[3]

SUMMARY OF ARGUMENT

Just a few Terms ago, this Court firmly rejected a challenge to the constitutional status of *Miranda*. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court overturned a federal statute that would have permitted custodial interrogations without pre-interrogation warnings, and that would have measured the admissibility of suspects' statements in federal cases by the traditional totality-of-the-circumstances test for voluntariness. The Court ruled that the statute did not provide equally effective alternatives to *Miranda*'s protections. *See id.* at 441-42. If Congress could not pass a statute that dispenses with *Miranda*'s warning requirement, officers should not

[3] We note that another case before the Court, *United States v. Patane*, No. 02-1183, raises the question whether *Miranda*'s exclusionary rule includes derivative evidence in the absence of bad faith. Whatever the outcome in *Patane*, normal derivative evidence principles should apply when there is a bad faith or unreasonable failure to provide *Miranda* warnings. Although *amici* did not appear in *Patane*, where the filing deadline preceded that of this case, that fact should not be taken to signal any position on the issues presented in *Patane*, other than the views expressed here.

be permitted to disobey *Miranda*'s commands and achieve the same result.

Miranda establishes affirmative obligations for law enforcement, and the officer in this case was required to advise Respondent of her Fifth Amendment rights at the outset of the custodial interrogation. Nothing in this Court's exclusionary rule cases, such as *Harris v. New York*, 401 U.S. 222 (1971), or in the recent decision in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), indicates otherwise. *Harris* and its progeny (including *Oregon v. Elstad*, 470 U.S. 298 (1985)), assume that officers will continue to obey *Miranda*. Neither does *Chavez* in any way undermine the core holdings of *Miranda* and *Dickerson*.

We do not believe that there is any reason to revisit *Miranda* and *Dickerson* now. *Miranda* provides a number of significant benefits for law enforcement, which would be lost if *Miranda* warnings were made optional. Moreover, a decision tolerating the "two-stage" interrogation technique would erode the public's trust in law enforcement, and lead to disrespect for the law and its institutions.

The Court should deter officers from disobeying *Miranda* by excluding evidence derived from an objectively unreasonable violation of *Miranda*'s warning requirement. We believe that this exclusionary rule is manageable and is similar to the objective analysis required in other circumstances. If an unreasonable violation is found, normal attenuation principles, such as those set forth in *Brown v. Illinois*, 422 U.S. 590 (1975), would apply.

The facts here show the ease of applying such a rule, and the reasons why this case differs from others, including *Elstad*. An officer awoke the Respondent at 3:00 in the morning, as she slept beside her badly-burned son in his hospital room. She was placed under arrest. The arresting officer was instructed *not* to provide *Miranda* warnings. After Respondent was placed in a small interview room,

the lead investigating officer questioned her, without administering warnings. He squeezed her arm and repeated a statement aimed at showing her criminal intent throughout the interview. Respondent made incriminating statements. After a coffee break, the interrogation resumed. This time, the officer advised Respondent of her rights, and she signed a waiver form. During this "second stage" of the interrogation, the officer began by reminding her of her previous unwarned statement.[4] She again incriminated herself. *See State v. Seibert*, 93 S.W.3d at 702.

No reasonable officer could have doubted that Respondent was in custody and subject to interrogation; hence, warnings were required prior to any interrogation. The second statement was close in time to the first, and the officer repeatedly reminded Respondent of what she had said before.[5] Thus, there was not sufficient attenuation to purge the taint of the violation. Finally, the officer's misconduct, measured objectively, is sufficient to distinguish this case from *Elstad* and others, where officers made what could be considered a good faith *Miranda* mistake.

---

[4] He said, "*OK, 'Trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" Seibert*, 93 S.W. 3d at 702.

[5] *E.g., id*. at 702: "*Now, In discussion you told us, you told us that there was an understanding about Donald. * * * 'Trice, didn't you tell me that he was supposed to die in his sleep."*

ARGUMENT

I. THE COURT SHOULD NOT OVERTURN *MIRANDA*'S PRE-INTERROGATION WARNING REQUIREMENT

A. *Miranda*'s Warning Requirement Applies to Law Enforcement and Promotes Effective Practices

In the almost four decades since *Miranda* was announced, federal, state and local law enforcement officials have successfully investigated and prosecuted crimes within *Miranda*'s constitutional framework. Officers have become accustomed to providing the requisite warnings at the outset of a custodial interrogation. Guided by a large and settled body of decisional law, courts have routinely determined the admissibility of evidence based upon officers' adherence to *Miranda*'s requirements. While there were early questions about certain aspects of the *Miranda* rule, by 1980 Chief Justice Burger was able to declare with confidence that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring); *Dickerson*, 530 U.S. at 443 (quoting *Innis*). One of the "reasonably clear" aspects of *Miranda* is that its rules apply directly to law enforcement. In our considered opinion, *Miranda*'s effectiveness depends upon the intent and ability of law enforcement agencies to adhere to that decision's "concrete constitutional guidelines." *Miranda*, 384 U.S. at 442; *Dickerson*, 530 U.S. at 435 (quoting *Miranda*). This case presents the knowing and deliberate failure to give pre-interrogation warnings, and so we focus on this particular requirement of *Miranda*. We note, however, that Petitioner's theory would make other requirements of *Miranda* optional as well. There would, for example, be no legal barrier to continuing to question custodial suspects

who have unequivocally asked for counsel for the purpose of obtaining a confession.

From the outset, law enforcement officials have understood that *Miranda*'s warning requirement applies directly to them. The Court declared in *Miranda*:

> [T]he following measures are *required.* Prior to *any* [custodial] questioning, the person *must* be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Id., 384 U.S. at 444. No reasonable interpretation of this language leaves any room to contend that the warnings are optional, not mandatory, or that they are anything other than binding upon police. While the Court has excused the need for warnings when there is a reasonable concern for the public safety (*see New York v. Quarles*, 467 U.S. 649 (1984)), the Court has otherwise only reaffirmed the mandatory, binding nature of the warning requirement. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 420 (1986) ("*Miranda imposed* on the police *an obligation* to follow certain procedures in their dealings with the accused. In particular, *prior* to the initiation of questioning, they *must* fully apprise the suspect" of his Fifth Amendment rights.)[6]

Any uncertainty along this score must be considered settled after *Dickerson*. There this Court overturned a federal statute, 18 U.S.C. §3501, that would have

[6] *See also, e.g., Texas v. Cobb*, 532 U.S. 162, 171 (2001) ("[T]here can be no doubt" that a suspect "*must*" be given warnings "*before* authorities may conduct custodial interrogation."); *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989) (*Miranda* "established certain procedural safeguards that *require* police to advise criminal suspects of their rights . . . *before* commencing custodial interrogation.").

supplanted *Miranda*'s procedures in federal cases. As the Court held,

> *Miranda requires procedures that will warn a suspect in custody of his right to remain silent* and which will assure the suspect that the exercise of that right will be honored. . . . §3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession.

Dickerson, 530 U.S. at 442 (citing *Miranda*). The statute and other contemporary practices did not provide "an adequate substitute for the warnings required by *Miranda*." *Id*. Thus, §3501 was held unconstitutional. *Id*. at 444.

In the case at bench, Petitioner attempts to accomplish through disobedience what Congress could not achieve through legislation. If a statute passed by Congress was unconstitutional for lack of a pre-interrogation warning requirement, surely the Court ought not to place its imprimatur upon the purposeful decision of individual police officers to withhold these self-same warnings.

Dickerson firmly resolved prior suggestions that *Miranda* lacked constitutional footing. Further, the benefits of *Miranda* for law enforcement, the courts, and the accused – which were thoroughly briefed in *Dickerson*[7] and discussed in the Court's opinion – remain as important today as they were several Terms ago. We highlight just three benefits of *Miranda* that were identified in *Dickerson*, all of which are at risk here.

---

[7] *See, e.g.,* Brief of Griffin B. Bell, et al. As Amici Curiae In Support of Petitioner, *Dickerson v. United States*, No. 99-5525 (filed Jan. 27, 2000).

First, *Miranda* gives officers clear guidance as to the limits of appropriate behavior during a custodial interrogation. Prior to *Miranda*, officers' conduct was measured solely by the "totality-of-the-circumstances test" for voluntariness, which "is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444 (citing *Haynes v. Washington*, 373 U.S. 503 (1963)). Voluntariness turns on "the techniques for extracting the statements" as well as "whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. 104, 116 (1985). Failure to administer *Miranda* warnings "is a significant factor" in the voluntariness analysis. *Davis v. North Carolina*, 384 U.S. 737, 740 (1966). That is why then-Justice Rehnquist wrote for the Court in *Michigan v. Tucker*, 417 U.S. 433, 443 (1974), that *Miranda* "help[s] police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." *See also Fare v. Michael C.,* 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation. . . . ") Rather than be forced to predict how an uncertain, ever-shifting menu of circumstances may apply to a suspect and an interrogation, police may easily master a short litany that is effective in protecting the Fifth Amendment.

Second, when officers adhere to *Miranda*'s rules, the prosecution may altogether avoid litigation over whether an initial unwarned statement was coerced or compelled within the meaning of the Fifth or Fourteenth Amendments, and whether any subsequent statement should be excluded as a tainted product of the first. "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *Dickerson*, 530 U.S. at 444

(quoting *Berkemer*). *Miranda* did not dispense with the voluntariness analysis, but pushed it from center stage. *See Dickerson*, 530 U.S. at 434. Under *Miranda*, courts apply simple, settled criteria in assessing whether law enforcement officers have respected a defendant's constitutional rights. Moreover, the certainty of the law in this area facilitates informed decision making by prosecutors and defense counsel as to whether a case should be tried or whether a ruling admitting a statement should be appealed. *Miranda* thus conserves resources by facilitating negotiated dispositions.

Third, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. The *Dickerson* Court made this point to explain why principles of *stare decisis* weighed against overruling *Miranda*, but we think it is important to note for another reason as well. By becoming "embedded in routine police practice," *Miranda* has helped professionalize law enforcement. *Miranda* establishes uniform, nationwide standards that further training and the development of common practices across jurisdictions. Moreover, the warnings are important because of who gives them: when they administer *Miranda* warnings, law enforcement officers remind themselves as well as suspects of the appropriate limits of custodial interrogation. Further, *Miranda* promotes effective interrogation practices. Because *Miranda* is a uniform rule that permeates our culture, it is familiar to many suspects[8] and they may be put at ease.

None of these benefits of *Miranda* would long survive a ruling approving Missouri's "two-stage" interrogation

[8] *See, e.g.,* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. and Criminology 621, 662-63 (1996).

technique or making *Miranda* warnings merely optional. As Judge Stephen Trott – a former state and federal prosecutor – has explained, the clear message to police trainers would be: "Don't advise, interrogate the suspect, violate the Constitution, use subtle and deceptive pressure, take advantage of the inherently coercive setting, and then, after the damage has been done, after the beachhead has been gained, gently advise the suspect of her rights." *United States v. Orso*, 275 F.3d 1190, 1197 (9th Cir. 2001) (Opn. of Trott, J., respecting denial of *sua sponte* call for full court *en banc* rehearing).

The United States argues that officers will still have an incentive to give warnings because of "the risk that their failure to give *Miranda* warnings, together with other evidence, might lead to a judicial finding that the first confession was coerced." Brief for the United States as Amicus Curiae ("U.S.Br."), at 20 (citing *Davis*, *supra*.) As the facts of this case, and the training of officers to avoid *Miranda*, demonstrate, the uncertain prospect that an unwarned statement or its fruits will be suppressed because it was involuntary is not sufficient to encourage law enforcement officers to provide pre-interrogation warnings. The United States itself made this point in *Dickerson*:

> Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would, in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), fail to issue warnings at all before conducting custodial interrogation.

Brief for the United States, *Dickerson v. United States*, No. 99-5525 (filed Jan. 28, 2000), at 37. Thus, while some

professional law enforcement agencies might require their officers to give some form of pre-interrogation warnings (as the Federal Bureau of Investigations did prior to *Miranda*),[9] many others would not.

An immediate result would be the return to prominence of the Due Process Clause and the more difficult-to-apply voluntariness standard. When officers employ the "two-stage" interrogation technique, there will almost always be questions as to whether an initial unwarned statement was voluntary, and whether any subsequent statement was a tainted product of the first. Defendants will challenge the voluntariness of any later statement as well as the validity of any *Miranda* waiver that follows a belated set of warnings. Sanctioning the "two-stage" interrogation tactic will inevitably undermine the assumption made by most judges that post-warning statements are voluntary and that post-warning waivers have been properly obtained. As the United States previously explained to this Court, "[i]f *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard." Brief for the United States, *Dickerson*, *supra*, at 37.

Miranda offers the principal set of bright-line rules for interrogators. Without its recognizable benchmarks, law enforcement officers may easily cross a constitutional line. Many statements would be ruled inadmissible and prosecutions lost. All of this would come at great cost to law enforcement, criminal defendants, the judicial system, and the public.

---

[9] *See* J. Edgar Hoover, *Civil Liberties and Law Enforcement; the Role of the FBI,* 37 Iowa L. Rev. 175, 177-182 (1952) (quoted approvingly in *Miranda,* 384 U.S. at 483-486).

B. Neither This Court's Exclusionary Rule Decisions Nor *Chavez v. Martinez* Displaces *Miranda*'s Affirmative Commands

Relying largely upon the plurality opinion in *Chavez v. Martinez*, and several exclusionary rule decisions that have allowed the limited use of evidence obtained through good-faith error, Petitioner argues that *Miranda* does not prevent law enforcement officers from questioning suspects without warnings. According to Petitioner, officers are free to conduct a "two-stage" interrogation, so long as the unwarned statement is not admitted in the case-in-chief and the subsequent statement is voluntary. *See* Brief for Petitioner ("Pet.Br."), at 11-17. Under this theory, *Miranda*'s exclusionary rule represents a value-neutral "price" for certain permissible modes of interrogation, rather than a "sanction" for prohibited conduct.[10] We urge the Court to reject these contentions and to denounce Missouri's "two-stage" interrogation tactic. Neither the exclusionary rule cases nor *Chavez* was meant to displace the holdings in *Dickerson* and *Miranda*, which require pre-interrogation warnings.

The first of the exclusionary rule decisions was *Harris v. New York*, holding that a statement elicited without *Miranda* warnings may be used for impeachment. That the officer acted in good faith in *Harris* is beyond question; the interrogation took place before *Miranda* was announced. *See id.*, 401 U.S. at 223. By permitting the statement to be used for impeachment, the Court plainly did not intend to promote unwarned interrogation. The majority brushed aside the "*speculative possibility* that

[10] *See* Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?*, 73 S. Cal. L. Rev. 1275, 1282-1319 (2000) (describing these different views of *Miranda*'s exclusionary rule, and explaining why it is properly viewed as a "sanction," not a "price.").

impermissible police conduct [would] be encouraged" if the government is permitted even limited use of a statement taken in violation of *Miranda*. *Id.* at 225. *Harris* was followed by other decisions allowing the limited use of evidence gathered through unintended error. *See Michigan v. Tucker*, 417 U.S. 433, 435-37, 447 (1974) (interrogation pre-dated *Miranda*); *Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("speculative possibility," citing *Harris*); *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (same).

Much the same is *Oregon v. Elstad*, in which an officer talked briefly with a suspect in his living room before taking him to the police station. *See id.*, 470 U.S. at 315. The Court permitted a second, warned statement into evidence but did not approve the officer's conduct. In her majority opinion, Justice O'Connor took pains to explain that the error was in good faith.[11] Citing *Tucker*, the Court noted that "the absence of any coercion or improper tactics undercuts the twin rationales – trustworthiness and deterrence – for a broader rule" of exclusion. *Elstad*, 470 U.S. at 308. *Tucker* holds that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct . . . Where the official action was pursued in complete good faith, however, the deterrence rationale

[11] As the Court remarked:

> This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation," or it may simply have reflected [Officer] Burke's reluctance to initiate an alarming police procedure before [Officer] McAllister had spoken with respondent's mother. Whatever the reasons for Burke's oversight, the incident had nothing of the earmarks of coercion. *See Rawlings v. Kentucky*, 448 U.S. 98, 109-110 (1980). Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

Id. at 315-16.

loses much of its force." *Id*., 417 U.S. at 447. *Elstad* is thus premised on the officer's good faith; the decision in no way authorizes police to question without warnings. Indeed, *Elstad* itself emphasized that "[t]he Court today in no way retreats from the bright-line rule of *Miranda*." *Elstad*, 470 U.S. at 317.

This Court's decisions not to penalize the prosecution for an officer's reasonable *Miranda* mistake cannot be taken as approval of deliberate misconduct. *Harris*, *Hass*, *Tucker*, and *Elstad* represent examples of this Court's balancing of the relative harms to the government and the accused when an officer acts in objective good faith. These decisions reflect the Court's efforts to create measured exceptions to an otherwise remorseless *per se* rule of exclusion. The tempered language of *Tucker*, for example, certainly conveys no impression of vast "loopholes," and *Harris* positively dismisses this notion as "speculative." These cases cannot provide a green light for Missouri's "two-stage" technique. Any such claim runs directly counter to the express language of *Miranda* and *Dickerson*, which make clear that *Miranda* does indeed impose affirmative duties upon law enforcement officials.

Neither does last Term's decision in *Chavez* displace these principal holdings of *Dickerson* and *Miranda*. In *Chavez*, four members of this Court held that a plaintiff could not maintain a civil rights action premised on a Fifth Amendment violation because his statements had not been introduced against him in a criminal prosecution. *Id*., 123 S.Ct. at 2000 (Thomas, J., joined by Rehnquist, O'Connor and Scalia, JJ.). No member of the Court sought to transform *Miranda*'s affirmative, protective commands into a rule prohibiting an officer's conduct only to the extent that such conduct violates the core of the Fifth Amendment. The plurality opinion acknowledges the validity of Court-created rules "designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Id*. at 2003. Thus, "the 'procedural safeguards' *required* by

Miranda" protect and "provide practical reinforcement" for the Fifth Amendment privilege. *Id*. (quoting *Tucker*, 417 U.S. at 444). *See also id*. at 2006-07 (Souter, J., joined by Breyer, J.) (concurring in the Fifth Amendment result and noting that a series of decisions, including *Miranda*, have established protections for the privilege that may go further than the core of the Fifth Amendment).

Chavez exposes a Court sharply divided on the question of when a Fifth Amendment violation is complete, and whether one may seek a civil remedy for a violation if there has been no use of a statement in a criminal case. But *Chavez* does not reveal any hesitation or uncertainty about the core holdings of *Miranda* and *Dickerson*.

C. The Court Should Disapprove the "Two-Stage" Interrogation Technique and Reaffirm that Warnings Must Be Given Prior to Interrogation

The officer who interrogated Respondent was no blundering rookie, and neither was his "exchange" with Respondent "brief," "confused," or unexploited. *Compare Elstad,* 470 U.S. at 315-16. He was a veteran interrogator, seasoned by training at a "national institute," and he knew exactly what he was about and why. Employing the "two-stage" interrogation technique of his training, the officer deliberately questioned Respondent in violation of *Miranda*'s clear commands, and successfully obtained what some investigators would call a "beachhead" confession. Then, after belatedly admonishing Respondent of her "rights," the officer commenced the second "stage," coaching Respondent to repeat her words in successful pursuit of the second ("breakthrough") confession that the court below refused to sanctify. *See Seibert*, 93 S.W.3d at 702-03. The officer employed this tactic because it is effective. Everyone in law enforcement knows that the purpose of the "two-stage" technique is to soften up the suspect and

increase the likelihood that she will not invoke her rights once warnings are belatedly given. Justice Harlan stated this simple truth thirty-five years ago. The Office of the Missouri Attorney General acknowledged it as well in a recent publication, describing the training of the officer in this case. We may compare their two observations:

Justice Harlan:	Missouri Attorney General:
"A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition."[12]	"The investigator . . . had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves."[13]

There was no legitimate justification for this tactic. The State concedes that its officer did not withhold warnings because of any reasonable concern for the public safety, which under *Quarles* provides a recognized exception to *Miranda*. The Missouri Supreme Court found that the officer conducted a "two-stage" interrogation "in order to secure an admissible confession." *Seibert*, 93 S.W.3d at 703. The State here argues that it also sought a statement to "sort out the roles of the various conspirators and focus the investigation." Pet.Br., at 42. In our view, focusing the investigation and assessing the roles of co-defendants are appropriate though ordinary reasons to question a custodial suspect; they cannot establish the sort of emergency that would justify the purposeful failure to follow

[12] *Darwin v. Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part and dissenting in part).

[13] Office of the Missouri Attorney General, Front Line Report (March 2003), available at: http://www.ago.state.mo.us/032003fl.pdf (last visited Oct. 3, 2003).

Miranda.[14] Moreover, had the officer only sought information to focus the investigation or for use against others, he could have stopped after receiving the initial unwarned statement. Instead, he advised Respondent of her rights and prompted her to repeat her earlier statement, with the purpose of obtaining evidence that would be admissible against Respondent in the prosecution's case-in-chief at trial, precisely as he had been trained to do.

The United States suggests that there may be other desirable reasons to withhold *Miranda* warnings, such as "when an officer seeks information in connection with a terrorism plot," or when an officer needs information to end an "ongoing criminal activity such as kidnapping." U.S.Br., at 23. Existing law already provides officers with the ability to question suspects without warnings in these situations, and the suspects' answers will be fully admissible. The public safety exception has been held to permit interrogation about whether a person intended to kill himself in a bombing. *See*, *e.g.*, *United States v. Khalil*, 214 F.3d 111, 121 (2d. Cir.), *cert. denied*, 531 U.S. 937 (2000). It has also been broadly interpreted to include questioning that might locate a victim or save a human life. *See*, *e.g.*, *State v. Provost*, 490 N.W.2d 93, 96-97 (Minn. 1992) (questioning about location of burn victim), *cert. denied*, 507 U.S. 929 (1993); *State v. Kunkel*, 404 N.W.2d 69, 75-76 (Wis.) (questioning about missing child), *cert. denied*, 484 U.S. 929 (1987); *United States v. Padilla*, 819 F.2d 952, 961 (10th Cir. 1987) (questioning about whether someone inside a house was injured or armed). It is wholly unnecessary to permit officers to withhold warnings in ordinary

[14] Multiple-defendant prosecutions are, of course, commonplace. Prosecutors have available a variety of legitimate tools to help them assess the defendants' relative culpability, including policies of leniency for early and full cooperation.

circumstances, such as those at bench, simply so that law enforcement officers may withhold warnings in other and different circumstances already encompassed within the established public safety exception.

The conduct of the officers in this case is alarming. In our view, retreating from *Miranda* – or permitting officers to flout *Miranda*'s requirements in this fashion – would erode public confidence in law enforcement and be destructive of the rule of law. This Court should again affirm that *Miranda* imposes clear obligations upon police.

The public has strong, settled expectations about *Miranda*. As "part of our national culture" (*Dickerson*, 530 U.S. at 443), the warnings have come to embody the notions of constitutional restraint upon police. To hold that the warnings are optional would lead many Americans to believe that they had lost some of their most fundamental rights. This would undermine trust in the security of our basic legal protections. It would send a message that controlling crime is no longer compatible with informing suspects of their essential constitutional rights.

Perhaps even more destructive to our institutions would be a holding that police are required to administer *Miranda* warnings, but that courts will tolerate deliberate violations of that requirement. Law enforcement officers depend upon the cooperation of citizens in reporting crime and assisting in criminal investigations. Thus, for example, the current trend towards community-based policing seeks to foster mutual trust and cooperation between law enforcement and the public, responding to limitations of other models of policing.[15] Condoning police violation of

[15] *See, e.g.,* Bureau of Justice Assistance, U.S. Dep't of Justice, Understanding Community Policing: A Framework for Action 15-16 (1994) ("Establishing and maintaining mutual trust is the central goal of the first component of community policing . . . This trust will enable

(Continued on following page)

long-standing and well-understood constitutional requirements will be destructive of that trust and cooperation.

In *People v. Neal*, 72 P.3d 280 (Cal. 2003), the California Supreme Court unanimously found a defendant's statement to be involuntary and inadmissible for any purpose, where the interrogating officer deliberately questioned a defendant over his repeated invocations of the right to counsel. We agree with Justice Marvin Baxter, who wrote separately to emphasize why compliance with *Miranda* is critical:

> In a free society, we place the police in a position of unique power, but only on condition that they will do their best to uphold the law, and to enforce it nobly and fairly. Their ability to function effectively depends upon their credibility in that role. The community must trust that they do not operate by deliberately violating the very standards they are sworn to observe. When the police dishonor proper procedures, community respect for the police, and for the law itself, is undermined. . . .
>
> Police officers are human beings . . . Individual mistakes and overreaching will occur . . . But our community should never be subjected to cynical efforts by police agencies, or the supervisors they employ, to exploit perceived legal loopholes by encouraging deliberately improper interrogation tactics. Such practices tarnish the badge most officers respect and honor.

Neal, 72 P.3d at 298 (Baxter, J., joined by Chin and Moreno, JJ., concurring; citation omitted).

---

the police to gain greater access to valuable information from the community that could lead to the solution and prevention of crimes. . . . ").

The officer's purposeful violation of *Miranda* in this case likewise deserves this Court's condemnation. *Miranda* and its progeny impose clear and affirmative obligations upon law enforcement officers. The "two-stage" interrogation technique defies the holdings in *Miranda* and *Dickerson*, and this Court should not tolerate it.

II. THE COURT SHOULD EXCLUDE EVIDENCE DERIVED FROM AN UNREASONABLE FAILURE TO ADMINISTER *MIRANDA* WARNINGS

A. Exclusion Is Appropriate and Necessary to Ensure that Officers Provide *Miranda* Warnings

The process of custodial interrogation contains "inherently compelling pressures" that undermine a suspect's ability to assert the Fifth Amendment privilege. *Miranda*, 384 U.S. at 467; *see also Dickerson*, 530 U.S. at 435. *Miranda* set forth "concrete constitutional guidelines" for law enforcement officials and the courts (*Miranda*, 384 U.S. at 442), with the aim of protecting the privilege. The Constitution requires *Miranda*'s prescribed procedures or alternatives that are "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467; *Dickerson*, 530 U.S. at 440 (quoting *Miranda*). In asking the Court to exclude a statement derived from an unreasonable failure to administer *Miranda* warnings, we do not seek to compel adherence to *Miranda*'s procedures for their own sake. Rather, *Miranda*'s safeguards are constitutionally necessary to protect the Fifth Amendment privilege, and the Court must take appropriate and necessary steps to ensure that these safeguards remain in place. Deterring police misconduct is a reason not to admit evidence derived from an unwarned statement, but the underlying provision that requires such exclusion is the Fifth Amendment itself.

Excluding a statement derived from deliberate misconduct is well within the mainstream of *Miranda* jurisprudence. In *Miranda*, the Court held that unless the prosecution established that police gave the pre-interrogation warnings and obtained a valid waiver, "no evidence obtained as a result of interrogation can be used." *Miranda*, 384 U.S. at 479. *Harris*, *Tucker* and *Elstad* provide exceptions, but all are premised upon the assumption that such use will not encourage impermissible behavior. Regrettably, that assumption no longer holds; officers have been trained not to comply with *Miranda*'s rules. The objectively unreasonable conduct of the officer here is sufficient to distinguish this interrogation from those other cases and supports a broader scope of exclusion. Where an officer acts in this fashion, the "deterrence rationale" applies with full force. "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447.

Moreover, this Court has elaborated *Miranda*'s requirements when "appropriate and necessary" to assure the vitality of *Miranda*'s safeguards and thereby protect the Fifth Amendment privilege. *See Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (as "an appropriate and necessary application of the *Edwards v. Arizona* rule," police may not reinterrogate a suspect who has asked for counsel even if the suspect has actually met with a lawyer); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (to "lend . . . substance" to an accused's right under *Miranda* to consult with counsel, officers may not reinterrogate a suspect in custody who has asked for an attorney).

Amici believe that the exclusion of a statement obtained through a "two-stage" interrogation is appropriate and necessary to encourage law enforcement officials to follow *Miranda*. The conduct of the officer in this case is quite troubling, and all the more so because the State

affirms that "there are already nationwide efforts to encourage officers" to question in this fashion. Pet., at 17. The State of Missouri further acknowledges the practice of questioning "outside *Miranda,*" which means refusing to allow suspects to invoke their Fifth Amendment rights and terminate questioning (Pet., at 3), the very strategy employed in *Neal*.[16] We are aware of a number of recent judicial decisions in which law enforcement officers have questioned suspects in deliberate violation of *Miranda.*[17] The Court should adopt an exclusionary rule sufficient to lead law enforcement officers to comply with *Miranda*. In our judgment, *Miranda*'s warning requirement is unenforceable without the sanction of exclusion. Many officers will fail to perceive the warning requirement as an affirmative obligation unless it is backed with the sanction of exclusion.[18]

---

[16] *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 387, 447-50 (1999). Law enforcement officers have acknowledged this training in at least one other matter before this Court. *See* Petition for Writ of Certiorari, *Butts v. McNally*, No. 99-1594 (filed April 3, 2000), at 7, 10 (detectives had received state-certified training that it was permissible to continue questioning a suspect who had invoked the right to counsel). A number of "outside *Miranda*" training materials are collected in Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 133-37, 189-92 (1998) and *In the Stationhouse after* Dickerson*,* 99 Mich. L. Rev. 1121, 1135-54 (2001).

[17] *See, e.g., State v. Knapp*, 666 N.W.2d 881, 899 (Wis. 2003) (warnings not given); *United States v. Orso*, 266 F.3d 1030, 1032-33 (9th Cir.) (en banc) (warnings not given), *opns. respecting full court en banc reh'g*, 275 F.3d 1190 (9th Cir. 2001), *cert. denied*, 537 U.S. 828 (2002); *Neal*, *supra* (questioning over invocations); *People v. Bradford,* 929 P.2d 544, 556-61 (Cal.) (same), *cert. denied*, 522 U.S. 953 (1997).

[18] *See, e.g.,* Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24 (1980). Loewenthal interviewed ninety New York City police commanders about the obligations of the Fourth Amendment prior to the application of the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

(Continued on following page)

We also believe that the difficulties of disciplining officers and instilling norms within individual law enforcement agencies weigh in favor of a uniform rule, backed by the sanction of exclusion. These days, officers are not trained solely within their own agencies; it is commonplace for police to receive training from statewide or national organizations, prosecutors, or officials from other jurisdictions. If *Miranda*'s requirements become optional, to be applied at the discretion of the interrogating officer, many trainers will say so. It is tough sledding for any chief or supervisor to sustain internal disciplinary measures when respected law enforcement officials tell officers that what their chief or supervisor may disapprove is perfectly lawful under decisions of this Court.[19] This is particularly so because most police forces are unionized, either formally or through informal officer associations that provide legal counsel and seek arbitration or other administrative review of any effort to sanction individual officers.

Moreover, officer discipline may not be the most effective or appropriate "remedy," because the problem is a "top down" one, involving not out-of-control officers, but agencies that sponsor training that encourages interrogation in a manner inconsistent with the plain language of *Miranda*. An exclusionary rule appropriately places

---

Although this Court had declared in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1948), that the Fourth Amendment's guarantee of privacy was "implicit in 'the concept of ordered liberty' " and applied to the states, officers did not understand that this holding imposed any legal obligations upon them because there was no sanction of exclusion. *See* Loewenthal, *supra*, at 29-30.

[19] In California, for example, "outside *Miranda*" training has come from highly respected sources, including the Commission on Peace Officer Standards and Training and other leading law enforcement agencies. *See* Weisselberg, 99 Mich. L. Rev. at 1136-40.

responsibility where it rests, which is upon senior law enforcement officials politically accountable for the behavior of individual officers in their charge.

Finally, this Court's decision in *Chavez v. Martinez* makes the sanction of exclusion all the more critical. No remedy other than exclusion is effective in enforcing the warning requirement. After *Chavez*, a civil rights lawsuit will be largely unavailable. And internal discipline seems highly unlikely where, as here, violating *Miranda* is departmental policy. *Chavez* puts the onus squarely on the remedy of exclusion. But to be effective in protecting the Fifth Amendment privilege and in preventing coercion, that remedy must provide a sufficient incentive for officers to give *Miranda* warnings.

B. A Rule Premised on Objective Good Faith Is Workable

The Court should exclude non-attenuated statements obtained by law enforcement officers who unreasonably fail to provide *Miranda* warnings. Such a rule would be based upon objective standards, not officers' or suspects' state of mind, and would be relatively easy to administer. An objective test of whether an officer's behavior was reasonable under *Miranda* would be no more difficult to administer than an objective test of whether a defendant was in custody: both look to external circumstances as a proxy for what was actually in the person's mind ("Am I intentionally violating Miranda?" "Am I free to leave?"). This exclusionary rule will reduce the incidence of involuntariness allegations and, at the same time, be easier for courts to apply than the totality-of-circumstances test for voluntariness.

An exclusionary rule that relies upon objective standards would be particularly manageable because this Court has placed a premium on clarity as it has articulated law enforcement's duties during a custodial interrogation. By

defining "custody" and "interrogation" objectively, instead of by reference to a suspect's own subjective beliefs (*see Stansbury v. California*, 511 U.S. 318, 323 (1994); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)), the Court has afforded every officer the reasonable ability to determine when warnings are required. Further, the Court has maintained *Miranda*'s "bright lines" by rejecting whole categories of claims that might make an officer's responsibilities more difficult to determine. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990) (warnings not required during contact with undercover officer); *Colorado v. Spring*, 479 U.S. 564, 575-77 (1987) (officers need not inform a suspect about the subject of the interrogation); *Moran v. Burbine*, 475 U.S. 412, 424-26 (1986) (officers need not advise a suspect that an attorney is trying to reach him); *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984) (interview with probation officer is not custodial interrogation). Moreover, because the burden is on a suspect to assert the right to counsel unequivocally (*see Davis v. United States*, 512 U.S. 452, 459 (1994)), no well-meaning officer need fear misperceiving an accused's invocation of that right. Thus, as the United States previously pointed out, "*Miranda*'s core procedures are not difficult to administer. Federal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions." Brief for the United States, *Dickerson*, *supra*, at 33.

The inquiry demanded by the exclusionary rule at bench would not fundamentally differ from that under *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the Court established the "public safety exception" to *Miranda*'s warning requirement, and held that "the availability of the exception does not depend on the motivation of the individual officers involved." *Id.* at 655-56. Pre-interrogation warnings are not required when "police officers ask questions *reasonably prompted* by a concern for the public safety." *Id.* at 656. Where, as here, a law

enforcement officer does not administer pre-interrogation warnings, the trial court would examine all of the surrounding circumstances and determine – as with the public safety exception – whether the officer acted reasonably. This assessment would be no more intrusive, exotic or difficult than in *Quarles*.[20] A court's inquiry into the underlying circumstances would likely not extend beyond the routine, everyday facts necessary to determine custody and interrogation.

This case illustrates the ease of applying such an exclusionary rule. No objectively reasonable police officer could believe that this interrogation was permissible under *Miranda*. Respondent was in a police station under actual arrest; there could be no doubt that this was "custody." *See Stansbury*, 511 U.S. at 322. She was questioned about an arson fire, inquiries that the police should know "are reasonably likely to elicit an incriminating response," and thus amounting to interrogation. *Innis*, 446 U.S. at 301. Warnings were therefore required. No minimally trained officer could think otherwise. The objective facts of the arrest, interrogation and application of the "two-stage" interrogation technique, all combine to rob the State of its argument that an exclusionary rule will propel courts into the unhappy task of having to divine the subjective intent of individual interrogating officers. *See* Pet., at 9; Pet.Br., at 33-38.

Once a court finds that an officer's failure to provide warnings was, as here, objectively unreasonable, it must then assess whether a subsequent statement or other

[20] Similar inquiries into officers' objective good faith are also made under the qualified immunity doctrine. Judges ask whether a constitutional right is "clearly established." *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The relevant question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

evidence was derived from the violation and whether there is sufficient attenuation to purge the taint of the unlawful conduct. *See Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Justice Jackson wrote for the Court in *United States v. Bayer*, 331 U.S. 532, 540-41 (1947) that a suspect who "can never get the cat back in the bag" is not necessarily "perpetually disabled" from making a voluntary confession, but reality must be accorded reasonable deference. In determining whether a subsequent statement is tainted by a previous illegality, this Court examines certain factors, including: the administration of *Miranda* warnings; the temporal proximity of the illegality and the subsequent statement; the presence of intervening circumstances; and the flagrancy of the misconduct. *See Brown v. Illinois*, 422 U.S. at 603-04.

These attenuating factors are no more difficult to apply to an unreasonable *Miranda* violation than in the ordinary Fourth Amendment context, though the first factor, the effect of *Miranda* warnings, merits further explication.

In the unlawful arrest context, *Miranda* warnings, standing alone, are usually insufficient to purge the taint of the Fourth Amendment violation. *See Kaupp v. Texas*, 123 S.Ct. 1843, 1846 (2003) (per curiam) (citing *Brown*). Similarly, we believe that when officers have engaged in a "two-stage" interrogation, a belated *Miranda* admonition should not ordinarily be treated as *per se* effective in rendering the subsequent statement "sufficiently a product of free will to break . . . the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603. The "reason why a person might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition." *Darwin*, 391 U.S. at 350 (Harlan, J., concurring in part and dissenting in part). The standard warning given under *Miranda,* "you have the right *to remain* silent," is couched in entirely forward-looking terms that presume

silence by the suspect *to* that point. This makes good sense when the warning is delivered "*prior* to *any* questioning," but it is confusing when delivered mid-stream: after all, a suspect who has already given an unwarned confession cannot very well "remain" silent. Equally ambiguous is the phrase that often follows: "If you *give up* the right to *remain* silent. . . . " The problem is the suspect who does *not* realize that confessing anew "would *increase* his peril," when everyone else knows that just the opposite is true. *Darwin,* 391 U.S. at 351 (Harlan, J., concurring in part and dissenting in part).

Elstad held that a subsequent administration of *Miranda* warnings to a suspect who has made a first unwarned statement "*ordinarily* should suffice" to enable "a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314. At the same time, however, the *Elstad* Court took pains to point out the absence of "deliberately coercive *or improper tactics* in obtaining the initial statement," and the Court indicated that under such circumstances a different rule of exclusion might be required. *Id*. *See also id*. at 309 (declining to hold that failure to give warnings "unaccompanied by any actual coercion *or other circumstances calculated to undermine the suspect's ability to exercise his free will*" taints a later warned statement). Here, by contrast, the record establishes circumstances that, viewed objectively, were calculated to undermine Respondent's free will. The officer engaged in a calculated, improper use of the first statement to elicit the second, by repeatedly referring to the first statement during his post-warnings interrogation. Under these circumstances, the administration of the forward-looking *Miranda* warnings should not be taken as *per se* effective in informing a suspect of the full extent of her rights, and in allowing her a voluntary choice between future speech or silence.

In accordance with the court below, we do not believe that a statement derived from an unreasonable failure to

provide *Miranda* warnings must always be excluded from evidence. Its admissibility should be assessed by traditional attenuation standards. We can envision some factors that, in combination, might particularly weigh in favor of a finding of attenuation, such as (a) a reasonable "cooling-off" period between first and second "stages"; (b) a separation between the two interrogations, meaning that post-warning interrogation should not include reference, quotation or coaching based upon the suspect's prior admission; and (c) advice to the suspect that what she said before cannot be used against her and that she is under no obligation to repeat or discuss it.[21]

We believe that the attenuation analysis is relatively straightforward to apply. The belated *Miranda* admonition did not inform Respondent that a decision to remain silent would have meaning. Only a cigarette break separated the two "stages" of the custodial interrogation, so the second statement was close in time to the first. There were no intervening factors. The officer's conduct was flagrant, as the continued interrogation of Respondent was essentially one of beseeching her to repeat the words of her prior, unwarned statement. This was altogether different from *Elstad;* the first "stage" of the interrogation successfully *created* the psychological and practical "disadvantages," and in the second "stage," the officer successfully *exploited*

[21] *Elstad* declined to establish a rule *requiring* officers to explain that a prior unwarned statement cannot be used against a suspect. *See id*., 470 U.S. at 316. The Court found such an explanation to be neither practicable nor necessary, noting that a breach of *Miranda* might not be identified until long after the interrogation had ended. *See id.* However, where an officer purposefully disobeys *Miranda*'s clear commands, there is no question but that the violation is known to the officer during the interrogation. Moreover, we suggest advice to the suspect about the prior statement not as a new mandatory requirement but, instead, as one factor among others that may be considered in favor of a finding of attenuation, if an officer has chosen to give such advice.

those disadvantages. For all of these reasons, we agree with the Missouri Supreme Court, which found that no intervening factors were sufficient to purge the taint of the *Miranda* violation. *See Seibert*, 93 S.W.3d at 705-07. Respondent's second statement should not have been admitted into evidence.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

CHARLES D. WEISSELBERG
University of California
School of Law (Boalt Hall)

STEPHEN J. SCHULHOFER
KIRSTEN D. LEVINGSTON
FREDERICK A.O. SCHWARZ, JR.
TOM GERETY
Brennan Center for Justice

GEORGE A. CUMMING, JR.
Counsel of Record
MORGAN, LEWIS &
BOCKIUS LLP

Attorneys for *Amici Curiae*

San Francisco, California
October 2003

APPENDIX

Amici Curiae

Michael R. Bromwich
Inspector General, Department of Justice, 1994-1999; Associate Counsel, Office of Independent Counsel for Iran-Contra, 1987-1989; Assistant United States Attorney, Southern District of New York, 1983-1987.

Calvin 'Buck' Buchanan
United States Attorney, Northern District of Mississippi, 1997-2001; Assistant United States Attorney, Northern District of Mississippi, 1990-1997; United States Army, Army Judge Advocate, 1983-1990.

Veronica Coleman-Davis
United States Attorney, Western District of Tennessee, 1993-2001; Referee, Juvenile Court, 1989-1998; Assistant District Attorney, 30th Judicial District of Tennessee, 1982-1985.

Sharon L. Davies
Assistant United States Attorney, Southern District of New York, 1990-1995.

John Gibbons
Judge, United States Court of Appeals for the Third Circuit, 1970-1990 (Chief Judge, 1987-1989).

Eric H. Holder, Jr.
Deputy Attorney General of the United States, 1997-2000; United States Attorney, District of Columbia, 1993-1997; Associate Judge, Superior Court of the District of Columbia, 1988-1993; United States Department of Justice, Public Integrity Section, 1976-1988.

James E. Johnson
Under Secretary of the Treasury for Enforcement, 1998-2000; Assistant Secretary of the Treasury for Enforcement, 1996-1998; Assistant United States Attorney, Southern District of New York, 1990-1996.

Laurie L. Levenson
Assistant United States Attorney, Central District of California, 1981-1989 (Assistant Division Chief, Chief of Training, 1988-1989; Chief, Criminal Appeals, 1986-1988).

Robert Litt
Principal Associate Deputy Attorney General, 1997-1999; Deputy Assistant Attorney General, 1994-1997; Assistant United States Attorney, Southern District of New York, 1978-1984.

Rory K. Little
Special Assistant United States Attorney, Northern District of California, 1994-1998; Associate Deputy Attorney General, 1996-1997; Chief, Appellate Section, United States Attorney's Office, Northern District of California, 1989-1994; Trial Attorney, Organized Crime and Racketeering Strike Force, 1987-1989.

Nancy Northup
Assistant United States Attorney, Southern District of New York, 1989-1996 (Deputy Chief of Appeals, 1994-1996).

Andrea Sheridan Ordin
Chief Assistant Attorney General, State of California, 1983-1990; United States Attorney, Central District of California, 1977-1981; Assistant District Attorney, County of Los Angeles, 1975-1977.

James Orenstein
Associate Deputy Attorney General, 1999-2001; Attorney-Adviser, Office of Legal Counsel, 1998-1999; Special Attorney to the United States Attorney General, 1996-1998; Assistant United States Attorney, Eastern District of New York, 1990-2001 (Deputy Chief, Organized Crime and Racketeering Section, 1995-1999).

Samuel Pillsbury
Assistant United States Attorney, Central District of California, 1984-1986.

Stephen A. Saltzburg
Deputy Assistant Attorney General for the Criminal Division, United States Department of Justice, 1988-1989.

Michael G. Scheininger
Assistant United States Attorney, District of Columbia, 1972-1979.

William Sessions
Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court, Western District of Texas, 1974-1987 (Chief Judge, 1980-1987); United States Attorney, Western District of Texas, 1971-1974.