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P R O C E E D I N G S

(11:04 a.m.)

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

Ms. Mitchell.

ORAL ARGUMENT OF KAREN K. MITCHELL

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

7 QUESTION: Going forward, but not going
8 backward.

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

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

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

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

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

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

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

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

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

20 QUESTION: No, please finish.

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

25 QUESTION: The difficulty I have with the

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

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

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

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

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

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

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

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

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

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

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

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

1 MS. MITCHELL: Yes.

2 QUESTION: -- after the warnings were given?

3 MS. MITCHELL: Yes.

4 QUESTION: You agree with that.

5 MS. MITCHELL: Absolutely.

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

10 MS. MITCHELL: I would not --

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

13 MS. MITCHELL: I think it --

14 QUESTION: What -- what is your position
15 exactly?

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

18 QUESTION: But it is relevant in the inquiry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 QUESTION: Why not?

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

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

19 MS. MITCHELL: What --

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

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

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

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

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

15 MS. MITCHELL: In and of --

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

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

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

3 MS. MITCHELL: Yes.

4 QUESTION: -- earlier statement.

5 MS. MITCHELL: As occurred in this case.

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

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

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

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

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

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

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

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

7 MS. MITCHELL: I don't --

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

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

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

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

25 MS. MITCHELL: Correct.

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

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

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

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

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

25 MS. MITCHELL: Correct.

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

5 MS. MITCHELL: I think --

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

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

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

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

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

10 If there are no other questions at this time.

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

13 MS. MITCHELL: Yes.

14 QUESTION: Very well.

15 Mr. Gornstein, we'll hear from you.

16 ORAL ARGUMENT OF IRVING L. GORNSTEIN

17 ON BEHALF OF THE UNITED STATES

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

18 MR. GORNSTEIN: No, Justice Breyer.

19 QUESTION: Because?

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

1 the initial and the second interrogation.

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

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

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

25 QUESTION: Mr. Gornstein, I --

1 MR. GORNSTEIN: -- totally on the --

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

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

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

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

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

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

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

15 QUESTION: Oh, I misunderstood you.

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

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

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

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

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

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

4 QUESTION: Mr. Gornstein --

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

6 QUESTION: No. Please finish your answer.

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

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

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

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

6 MR. GORNSTEIN: Yes.

7 QUESTION: Okay.

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

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

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

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

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

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

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

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

25 QUESTION: -- the likelihood of a voluntary

1 waiver.

2 MR. GORNSTEIN: No. I --

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

5 QUESTION: Thank you, Mr. Gornstein.

6 Ms. Bartholow. Is that correct?

7 MS. BARTHLOW: Yes, it is, Your Honor.

8 QUESTION: We'll hear from you.

9 ORAL ARGUMENT OF AMY M. BARTHLOW

10 ON BEHALF OF THE RESPONDENT

11 MS. BARTHLOW: Thank you, Mr. Chief Justice,
12 and may it please the Court:

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

16 QUESTION: What do you mean by a systematic
17 interrogation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. BARTHOLOW: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MS. BARTHOLOW: Both.

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

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

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

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

1 interrogation before.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MS. BARTHOLOW: The --

4 QUESTION: No actual coercion.

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

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

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

16 QUESTION: What about -- suppose our reason --

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

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

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

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

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

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

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

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

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

3 MS. BARTHLOW: Yes, Your Honor, we did. We
4 cited Westover.

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

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

9 QUESTION: Finish the Chief Justice's --

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

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

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

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

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

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

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

22 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 QUESTION: Thank you.

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

1 waiver.

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

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

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

18 If there's no --

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

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

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

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

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

14 MS. BARTHLOW: Exactly. I mean, they have more
15 incentive not to warn, especially because they talked to
16 her before on two occasions. They -- and I think they
17 tape recorded her interview with them on the -- February
18 14th, hoping that she would make some sort of
19 incriminating statement, and when she didn't, then they
20 engaged in this practice to subject her to the intense
21 custodial interrogation to try and get the -- the warning
22 from her. But they weren't -- I mean -- excuse me -- the
23 confession from her. But they weren't going to warn her
24 because they were afraid she might invoke. And I think
25 this Court in Escobedo said, you know, we shouldn't fear

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

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

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

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

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

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

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

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

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

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

8 And if there --

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

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

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

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

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

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

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

4 Thank you.

5 QUESTION: Thank you, Ms. Bartholow.

6 Ms. Mitchell, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF KAREN K. MITCHELL

8 ON BEHALF OF THE PETITIONER

9 MS. MITCHELL: Thank you, Your Honor.

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

25 So just the idea that you have a traditional

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

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

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

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

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

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

14 If there are no further questions.

15 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
16 Mitchell.

17 The case is submitted.

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