No. 02-6320

In the Supreme Court of the United States

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the interaction between police officers and petitioner after his indictment, in which petitioner made a voluntary statement without having received the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), rendered his subsequent statements inadmissible under the Sixth Amendment.

2. Whether statements that petitioner made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed as the fruits of his initial interaction with the police.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 119-128) is reported at 285 F.3d 721. The order of the district court (J.A. 110-116) adopting in part and rejecting in part the report and recommendation of the magistrate judge (J.A. 108-109) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2002. A petition for rehearing was denied on May 7, 2002. Pet. App. 1. The petition for a writ of certiorari was filed on July 29, 2002 and was granted on March 10, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months of imprisonment, to be followed by a four-year term of supervised release. J.A. 3. The court of appeals affirmed. J.A. 119-128.

1. On February 23, 2000, a federal grand jury returned a one-count indictment charging petitioner with conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. 846. J.A. 7-8. The next day, Deputy Sheriff Jeffrey Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael A. Garnett of the Lincoln Police Department, who were members of the Lincoln/Lancaster County Drug Task Force working in cooperation with federal authorities, went to petitioner's house to arrest him. J.A. 15-16, 70. Both Bliemeister and Garnett had met petitioner previously; Bliemeister had met petitioner in 1995 while doing volunteer

work at a hospital, and had interviewed petitioner in 1999 about a citizen tip that he was involved in drug dealing. J.A. 15. Garnett had interviewed him in 1991. J.A. 81-82. When they arrived at the house, the officers (who were in plain clothes) identified themselves, and petitioner invited them inside. J.A. 17, 70-71.

Once inside, Deputy Bliemeister told petitioner, "John, I'm here to discuss your involvement in the distribution of methamphetamine." J.A. 61. In one "continuous * * * statement," *ibid.*, Bliemeister then told petitioner that a grand jury had indicted him for conspiring to distribute methamphetamine; that Bliemeister had a federal warrant for petitioner's arrest; and that the indictment concerned petitioner's alleged involvement with persons such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. J.A. 18, 61, 86, 112. Petitioner stated that "at that point in his life * * * he had a lot of personal problems," J.A. 18, and explained that he had been having business problems with a former business partner and was going through a divorce. J.A. 18, 62, 69. Although petitioner mentioned among his "personal problems" the fact that he had used methamphetamine, he did not mention methamphetamine distribution. Petitioner acknowledged that he knew at least some of the people Bliemeister had mentioned but did not connect them with drug distribution. See J.A. 47, 87. During the visit, the officers asked petitioner no questions about narcotics or about the pending charges. J.A. 18-19, 22, 62, 75-76. After about five to ten minutes, J.A. 20, the officers interrupted petitioner's monologue to tell him they needed to transport him to the county jail. J.A. 21. After petitioner retrieved his shoes from the basement, the officers took petitioner to the Lancaster County Jail.[1]

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[1] While accompanying petitioner to get his shoes, Deputy Bliemeister asked petitioner, for officer safety reasons, whether there were any

During the approximately 20-minute ride, J.A. 49-50, 104, the officers asked petitioner no questions, but petitioner spoke unprompted about personal matters, including a land deal that had gone badly for him. J.A. 23.

After arriving at jail, Bliemeister and Garnett fingerprinted, photographed, and booked petitioner. The officers then advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his rights and signed a written waiver-of-rights form. See J.A. 9, 23-26. During a half-hour interview with Bliemeister and Garnett, J.A. 51, petitioner stated that he had purchased "user quantities" of methamphetamine from Kuenning and Sardeson and had used the drug, J.A. 29, 30, 33, 35, stated that he had provided money to Kuenning, J.A. 31-32, and stated that he had introduced Kuenning to Mark Farfalla. J.A. 32-33. Petitioner denied distributing or selling methamphetamine, J.A. 37-38, and denied buying methamphetamine from Sardeson or Kuenning in quantities sufficient for resale. J.A. 30. Petitioner also said that he had loaned money to Kuenning to permit her to pay her cell phone bill and to allow her to post bond after being arrested, but had not given her money to permit her to buy methamphetamine. J.A. 31, 34. Petitioner denied that he had introduced Kuenning to Farfalla in order to provide her with a drug source, J.A. 33, and denied selling methamphetamine to Sardeson. J.A. 37. Although petitioner said that he knew Geffs, he denied purchasing methamphetamine from him. J.A. 29. Petitioner denied purchasing methamphetamine from Val Green, J.A. 34-35, and

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firearms in the basement. J.A. 59. When petitioner responded that he had three shotguns and a rifle in the house and showed them to the officers, they seized the firearms. Although petitioner, as a convicted felon, was prohibited from owning firearms, the officers told petitioner that he would not be booked for unlawful possession of the firearms, and no such charges were brought against him. See J.A. 22, 34, 59.

was evasive about whether he had purchased supplies of the drug from Farfalla. J.A. 32-33, 35. Petitioner said that he knew individuals named Leon Thompson and Ernie Lawrence and admitted sharing methamphetamine with Thompson, but denied selling the drug to either of them. J.A. 37-39.

2. Before trial, petitioner moved to suppress the statements that he made to Bliemeister and Garnett. Petitioner argued that he "was in custody when he was contacted by" the officers at his house, and he did not make a "voluntary, knowing and intelligent waiver of his rights to remain silent and to the assistance of counsel" because he had not been informed "that he did not have to answer questions and was entitled to an attorney." Br. in Supp. of Defendant's Mot. to Suppress at 3. The district judge submitted the motion to a magistrate judge for consideration. J.A. 1.

The magistrate judge recommended that the statements that petitioner made at his house be suppressed, concluding that the officers had obtained them through custodial interrogation without advising petitioner of his *Miranda* rights. J.A. 103, 108. The magistrate judge reasoned that Deputy Bliemeister's initial statement that he had come to petitioner's house to "discuss" petitioner's involvement in methamphetamine distribution and his description of the charges against petitioner constituted interrogation under *Miranda* because those words were "designed to elicit a response." J.A. 103 (citing *Rhode Island* v. *Innis*, 446 U.S. 291 (1980)). The magistrate judge further recommended that the portions of petitioner's jailhouse statement that involved individuals the officers had mentioned at petitioner's house (*i.e.*, Kuenning, Sardeson, Geffs, and Farfalla) should be suppressed as the fruit of the prior unwarned interrogation, J.A. 104-105, because "the primary taint of the initial interrogation by the officers was [not] removed * * * between the time of the initial * * * interrogation and statement and the time of the subsequent interview in the

jail." J.A. 105. The magistrate judge concluded, however, that petitioner's statements during the jailhouse interview relating to the "distribution of methamphetamine" and "the subject of [petitioner] fronting money for the purchase of methamphetamine" "[o]bviously * * * need not be suppressed," J.A. 104-105, because those subjects were raised for the first time at the jailhouse after petitioner had received *Miranda* warnings. Both parties filed objections to the magistrate judge's recommendation. See Br. in Supp. of Defendant's Objection to Report and Recommendation 3.

3. The district court suppressed the statements that petitioner made at his house. J.A. 115. The court adopted the recommendation of the magistrate judge that petitioner was in custody at the time of those statements and that the statements were made in response to remarks from the officers that were "implicitly questions." See J.A. 110, 115. The court declined, however, to suppress petitioner's statements made at the jail. The court reasoned that, because petitioner voluntarily made the jailhouse statements following waiver of his *Miranda* rights, "the facts of this case fall squarely within the Supreme Court's holding in *Oregon* v. *Elstad*, 470 U.S. 298 (1985)," J.A. 112-113 (parallel citations omitted), which held that, though *Miranda* requires that an unwarned statement be suppressed, the admissibility of any subsequent statement made after administration of warnings turns solely on whether it is knowingly and voluntarily made. J.A. 114 (citing *Elstad*, 470 U.S. at 309). The district court concluded that "the unwarned statements of [petitioner] made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings." J.A. 115.

4. The court of appeals affirmed. For the first time on appeal, petitioner explicitly claimed that not only had his rights under *Miranda* been violated, but his Sixth Amendment right to counsel had been violated as well. See Pet.

C.A. Br. 36; see also *id.* at 39 ("Neither the magistrate [judge] nor the [district] judge considered whether [petitioner's] Sixth Amendment right to counsel was violated."). The court of appeals rejected that claim, holding that the statements were admissible under *Oregon* v. *Elstad*. J.A. 121-122. The court found that the record "amply support[ed]" the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. J.A. 123.

The court of appeals also rejected petitioner's argument that, under *Patterson* v. *Illinois*, 487 U.S. 285 (1988), "the officers' failure to administer the *Miranda* warnings at his home violated his [S]ixth [A]mendment right to counsel inasmuch as the encounter constituted a post-indictment interview." J.A. 122. The court of appeals found *Patterson* "not applicable" because "the officers did not interrogate [petitioner] at his home." J.A. 122-123.

In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers violated petitioner's Sixth Amendment right to counsel by "deliberately elicit[ing]" incriminating information from him without counsel present after the indictment had been returned. J.A. 127. Judge Riley stated, however, that the police conduct with respect to petitioner's initial statement did not require suppression of petitioner's subsequent statement. Judge Riley reasoned that, under the rationale of *Elstad*, the second statement was admissible in light of petitioner's knowing and voluntary waiver of his right to counsel before questioning. J.A. 128.

SUMMARY OF ARGUMENT

I. This Court has interpreted the Sixth Amendment to render inadmissible in the government's case in chief information that government agents deliberately elicit from the accused after his indictment unless he was first advised

of his right to the assistance of counsel and made a voluntary decision whether to exercise that right. In this case, the government did not deliberately elicit statements from petitioner at the time of his arrest so as to raise any Sixth Amendment issue. The officers did not ask petitioner questions, or encourage him to reveal incriminating information. Rather, the officers simply informed petitioner, in a single continuous statement, that they were there "to discuss" his involvement in methamphetamine distribution, that he had been indicted for conspiring to distribute methamphetamine, that the officers had an arrest warrant, and that the charges concerned petitioner's involvement with certain individuals. Courts have long held that informing a person of the charges that support his arrest is not an interrogation tactic or its equivalent, but is routine police practice that is consistent with the Federal Rules of Criminal Procedure. Deputy Bliemeister testified without contradiction that he did not "expect" petitioner to respond. The officers' conduct did not constitute the sort of deliberate attempt to obtain information that the officials "must have known" would elicit a response or would be "likely" to do so. *United States* v. *Henry*, 447 U.S. 264, 271, 274 (1980). Accordingly, there is no "poisonous tree" to support petitioner's argument that his second statement—made after he indisputably received *Miranda* warnings and validly waived his right to counsel—should be discarded as tainted fruit.

II. Even if the officers' conduct at petitioner's house were viewed as deliberate elicitation of information from an accused who had not been advised of his right to counsel, the Sixth Amendment does not require that petitioner's later statements at the jailhouse be suppressed, on the theory that they were the fruit of the poisonous tree. Petitioner's voluntary, knowing, and intelligent waiver of his right to counsel before speaking with the officers at the jailhouse is

sufficient to ensure that petitioner's decision to make the statements was an act of free will.

This Court confronted an analogous issue under the Fifth Amendment in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). In *Elstad*, the Court held that when officers obtain a voluntary statement from a suspect without having administered *Miranda* warnings, and later obtain a second statement after having administered *Miranda* warnings, the second statement is admissible if it was knowing and voluntary. *Elstad*'s analysis is equally applicable in the closely related Sixth Amendment context. In both contexts, the administration of *Miranda* warnings cures the condition that renders the initial, unwarned statement inadmissible. The defendant, with full awareness of his rights, is free to make a voluntary election to speak with officials on his own, and his statements can be received in evidence consistent with the Sixth Amendment.

Petitioner contends that the rationale of *Elstad* is inapplicable because the deliberate elicitation of statements from an unwarned accused, unlike the failure to provide *Miranda* warnings to an unindicted suspect, involves a constitutional violation at the time of the police conduct. That claim is unfounded. The Sixth Amendment rule on which petitioner relies is that a defendant's statement, deliberately elicited without a valid waiver of counsel, "c[an] not constitutionally be used by the prosecution as evidence against *him* at his trial." *Massiah* v. *United States*, 377 U.S. 201, 207 (1964). The Sixth Amendment "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). Accordingly, as Justice Stevens has observed, "[t]he Sixth Amendment right to counsel * * * is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. It is

thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting) (citations and internal quotation marks omitted).

Even if there were a Sixth Amendment violation at the time the initial statements were made, petitioner's receipt of *Miranda* warnings and his waiver of rights before making his second statement at the jailhouse justifies their admission. The warnings and petitioner's valid waiver were the antidote for any Sixth Amendment concern raised by the initial encounter. Petitioner argues that the second statement must be regarded as the fruit of the first, because the first statement let "the cat out of the bag" and exerted psychological pressure on petitioner to waive his rights and give a second statement. This Court in *Elstad* rejected the same argument. The Court explained that "the causal connection between any psychological disadvantage created by [an initial] admission and [an] ultimate decision to cooperate is speculative and attenuated at best." 470 U.S. at 313-314. That reasoning applies here as well: speculation about the accused's motives for speaking to officers provides no justification for importing a multi-factor attenuation-of-the-taint analysis into the Sixth Amendment law of confessions. Nor is there any justification for applying Fourth Amendment precedents, or Sixth Amendment precedents dealing with evidence other than confessions, to this setting, when *Elstad* provides the most applicable precedent.

Finally, the cost of suppressing a voluntary confession, given after a valid waiver of the right to counsel, outweighs any benefit to the protection of Sixth Amendment rights. The exclusion of reliable evidence of guilt in the form of the defendant's voluntary statements impairs the truthseeking function of a criminal trial. And Sixth Amendment interests

are adequately protected by excluding the statement that preceded the accused's waiver of his rights.

III. Even if a multi-factor attenuation-of-the-taint analysis were to be applied, on this record, petitioner's jailhouse statements should be admitted. The conduct of the officers at petitioner's house was, at most, a mild form of deliberate elicitation; no explicit interrogation ensued; and nothing was said or done to encourage petitioner to keep talking. In addition, petitioner's initial statement did not let "the cat out of the bag." He spoke of using methamphetamine, not distributing it, and at most acknowledged some association with some of the individuals allegedly involved in the conspiracy. Finally, the thorough and complete administration of *Miranda* warnings gave petitioner the information needed to make an independent decision whether to answer questions without counsel. Based on all of the relevant factors, his decision to proceed alone was "an act of free will [sufficient] to purge [any] primary taint." *Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (per curiam) (second bracketed word added) (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)).

ARGUMENT

THE ADMISSION OF PETITIONER'S SECOND STATEMENT, MADE AFTER A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL, DID NOT VIOLATE THE SIXTH AMENDMENT

In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court has held that, once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements "deliberately elicited" from an accused without a valid waiver of the right to counsel. See, *e.g.*, *Michigan* v. *Harvey*, 494 U.S. 344, 348 (1990); *Kuhlmann* v. *Wilson*, 477 U.S. 436,

457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977). The rule recognizes that, with the shifting of the government's role from investigation to accusation, "the assistance of one versed in the 'intricacies . . . of law' * * * is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)). The exclusion of statements obtained in the absence of a valid waiver of counsel thus serves to protect "the integrity or fairness of [the] criminal trial." *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

For deliberately elicited, uncounseled post-indictment statements to be admissible at trial, the prosecution must establish that the accused voluntarily, knowingly, and intelligently relinquished his Sixth Amendment right to counsel. See, *e.g.*, *Harvey*, 494 U.S. at 348-349. The Court has held that "when a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda* v. *Arizona*, [384 U.S. 436 (1966)], that will generally suffice to establish a knowing and intelligent waiver * * * for purposes of postindictment questioning." *Harvey*, 494 U.S. at 349; *Patterson* v. *Illinois*, 487 U.S. 285, 296-298 (1988).

In this case, the officers advised petitioner at the jailhouse of his *Miranda* rights, including his right to consult with an attorney, and he voluntarily waived those rights both orally and in writing. See J.A. 104. Petitioner nevertheless claims that his subsequent statements should have been suppressed, arguing that the officers "deliberately elicited" his initial statements at his house without obtaining a valid waiver of counsel (Br. 12-16), that fruit-of-the-poisonous-tree analysis applies (Br. 16-25), and that his later statements at

the jail were the tainted fruit of earlier misconduct (Br. 25-41). Each element of that claim is without merit.

I. The Police Officers Did Not Deliberately Elicit The Statements That Petitioner Made At His House

The Sixth Amendment is not violated simply because the government uses at trial "incriminating statements from the accused [given] after the right to counsel has attached." *Moulton*, 474 U.S. at 176 (citing *Henry*, 447 U.S. at 276 (Powell, J., concurring)). A defendant who volunteers statements after indictment cannot invoke the Sixth Amendment to exclude them. See *Henry*, 447 U.S. at 276 (Powell, J., concurring) ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action"). Rather, to exclude statements on the ground that the right to counsel had attached and was not waived, the accused must show that law enforcement officers "took some action * * * that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459.

Deliberate elicitation includes both affirmative questioning and statements or conduct that officials "must have known," *Henry*, 447 U.S. at 271, would induce the accused to incriminate himself or that would be "likely" to do so, *id.* at 274. But as the Court has been careful to note in the *Miranda* context, officers "cannot be held accountable for the unforeseeable results of their words or actions." *Rhode Island* v. *Innis*, 446 U.S. 291, 301-302 (1980). Rather, the Court's Sixth Amendment jurisprudence is "concerned with interrogation or investigative techniques that [are] *equivalent to* interrogation." *Kuhlmann*, 477 U.S. at 457 (emphasis added); cf. *Moulton*, 474 U.S. at 177 n.13 (informant's participation in a conversation with the accused was "the functional equivalent of interrogation") (quoting *Henry*, 447 U.S. at 277 (Powell, J., concurring)); see also *Nix* v. *Williams*, 467 U.S. at 437 (noting that incriminating statements

had been obtained "by what was viewed as interrogation in violation of [the defendant's] right to counsel").

In this case, police officers neither asked petitioner questions at his house, nor "deliberately elicit[ed]" statements from him before taking him to the jailhouse and giving him *Miranda* warnings. Accordingly, the court of appeals correctly concluded (J.A. 122-123) that the officers' statements and actions did not implicate this Court's Sixth Amendment right-to-counsel cases.[2]

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[2] Petitioner suggests (Br. 12) that the court of appeals "may have used the term 'interrogation' as a shorthand to mean that only *affirmative questioning* of petitioner by the officers outside the presence of counsel would have implicated the Sixth Amendment." But the government's brief in the court of appeals explained that both express questioning and "words or actions that the police should know are reasonably likely to elicit an incriminating response" constitute interrogation. Gov't C.A. Br. 18-19 (quoting *Innis*, 446 U.S. at 301) (internal quotation marks omitted). Although petitioner now asserts that the court of appeals "employed an incorrect legal standard" by referring to "interrogation," Br. 15, the court of appeals' use of the term is consistent with this Court's repeated recognition that the *Massiah* rule is concerned with "techniques that [are] equivalent to interrogation." *Kuhlmann*, 477 U.S. at 457. Moreover, petitioner himself bears some responsibility for how the courts below framed the issue. In the district court, petitioner claimed that he had been subject to "custodial interrogation" in his home, and invoked neither the "deliberate elicitation" standard nor even the Sixth Amendment. See Br. in Supp. of Defendant's Mot. to Suppress 3-4; Br. in Supp. of Defendant's Objection to Report and Recommendation 4; see also J.A. 101, 103 (magistrate judge framed issues as "whether or not the defendant was in custody" and "whether or not he was interrogated"). While petitioner cited the Sixth Amendment in his court of appeals brief, he "argue[d] that the officers * * * interrogated him at his house" and did not invoke the "deliberate elicitation" standard. Pet. C.A. Br. 41.

A. Officers Routinely Explain The Nature Of The Charges Supporting An Arrest For The Benefit Of The Accused, And That Advice Is Not Designed To Elicit A Response

Petitioner contends that Deputy Bliemeister's brief explanation of the conspiracy charges petitioner faced "could only have been 'designed to elicit a response'" from petitioner. Br. 15 (quoting J.A. 103); Br. 39. An officer making an arrest, however, has ample justification for explaining the nature of the charge against the arrested person. The Federal Rules of Criminal Procedure contemplate that law enforcement officers will notify the accused of the charges against him at the time of arrest.[3] Rule 4(c)(3)(A) requires that, in executing an arrest warrant, the officer must show the warrant (which must "describe the offense charged," Fed. R. Crim. P. 4(b)(1)(B)) to the defendant or, if the officer does not have the warrant, must "inform the defendant of the warrant's existence and of the offense charged." Fed. R. Crim. P. 4(c)(3)(A); Fed. R. Crim. P. 9(c)(1)(A); see also Fed. R. Crim. P. 4 advisory committee notes to 2002 amendments ("Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists."). Bliemeister's effort to identify the particular conspiracy by describing its alleged members was not different in principle from informing a murder defendant of the identity of his alleged victim or a bank robbery defendant of the name of the bank he is alleged to have robbed, information entirely in keeping with the language and purpose of the Federal Rules.

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[3] The Federal Rules apply to arrests by a state law enforcement officer on a federal warrant. Rule 4(c)(1) provides that an arrest warrant may be executed by a marshal or "other authorized officer," which has been construed to include state law-enforcement officers. See, *e.g.*, *United States* v. *Bowdach*, 561 F.2d 1160, 1167 (5th Cir. 1977).

Such routine behavior in an arrest setting is not tantamount to interrogation or to conduct deliberately designed to obtain information. Bliemeister testified that, consistent with his usual procedure, he told petitioner about the charges against him and the persons with whom he was accused of conspiring in order to dispel any confusion that petitioner might have had about being accused of current trafficking activity—a likely mistake because the indictment did not itself name his co-conspirators, see J.A. 7, and petitioner's involvement with Kuenning and the others had ended months earlier (indeed, several of them had long been incarcerated). J.A. 56. Bliemeister testified without contradiction that he did not intend to elicit an incriminating response, and indeed, "did [not] expect that [petitioner] would respond."[4] *Ibid.* There was no reason that Bliemeister would have expected that routine information about the nature of the charge would elicit an incriminating response from someone who, like petitioner, had significant experience with the criminal justice system.[5] See Presentence Investigation Report (PSR) ¶¶ 59-64.

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[4] Although the magistrate judge emphasized (J.A. 103) Deputy Bliemeister's negative response when asked whether he was "surprised that [petitioner] made comments in response to his [statement]," J.A. 56, Bliemeister's lack of surprise is not indicative of whether he knew his statement was "likely" to elicit an incriminating response (see *Henry*, 447 U.S. at 274), because it is not uncommon for suspects to make statements of some sort (whether inculpatory, exculpatory, or simply expletives) in response to a police announcement that they are under arrest or have been charged with a crime. Far more probative is Deputy Bliemeister's testimony that he "did [not] expect that [petitioner] would respond" to his statement, J.A. 56, suggesting that he did not intend that petitioner would make a statement, much less incriminate himself.

[5] At the time of his arrest in this case, petitioner had at least three convictions (including one for cocaine distribution, which was set aside after petitioner completed probation, and one for manslaughter related to cocaine distribution), and a separate arrest for assault. See PSR ¶¶ 59-64.

In the related context of *Miranda* warnings, courts have repeatedly held that informing the defendant of the charges against him (or even of the evidence supporting those charges) does not constitute the functional equivalent of interrogation because it is unlikely to elicit an incriminating response.[6] See, *e.g.*, *United States* v. *Benton*, 996 F.2d 642, 644 (3d Cir.) ("it would be unreasonable to conclude that the police intentionally created circumstances likely to elicit a statement from [the suspect]," because the officer "did nothing more than tell [the suspect] why he was being arrested"), cert. denied, 510 U.S. 1016 (1993); *United States* v. *Payne*, 954 F.2d 199, 202 (4th Cir.) ("interrogation is not so broad as to * * * reach all declaratory statements by police officers concerning the nature of the charges against the suspect"), cert. denied, 503 U.S. 988 (1992); *United States* v. *Crisco*, 725 F.2d 1228, 1232 (9th Cir.) ("It cannot be said that Agent Clem should have known that his remarks [explaining drug charges against defendant] were likely to elicit an incriminating response from [the defendant]."), cert. denied, 466 U.S. 977 (1984). Similarly, this Court has held that statements "normally attendant to arrest and custody"—which

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[6] As a matter of Fifth Amendment jurisprudence, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent," and the "functional equivalent" of interrogation in turn consists of "words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 300-301 (footnotes omitted). The Court did remark in *Innis* that "if indeed the term 'interrogation is even apt in the Sixth Amendment context," the Fifth and Sixth Amendment definitions of the term "are not necessarily interchangeable." *Id.* at 300 n.4. But the inquiry that the Court directed under *Innis* into whether declaratory statements constitute "interrogation" under *Miranda* is closely comparable to whether statements by police "deliberately elicit" an incriminating response within the meaning of the Sixth Amendment. Cf. *Kuhlmann*, 477 U.S. at 457.

surely encompass notice of the charges under the Federal Rules—do not constitute "interrogation." *Innis*, 446 U.S. at 301; accord *United States* v. *Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994) (holding that statements that "informed [the defendant] of the circumstances of his arrest" were "properly characterized as statements normally attendant to arrest and custody" and thus were not interrogation); see also *Arizona* v. *Roberson*, 486 U.S. 675, 687 (1988) (holding that even after a suspect invokes his *Miranda* rights in the investigation of one crime, the police "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation").

B. The Arresting Officer's Words Were Not A Deliberate Elicitation Of Information

In support of his claim that Bliemeister's initial statement "surely constitute[d]" (Br. 15) a deliberate attempt to elicit incriminating information, petitioner contends that the officer's use of the word "discuss" to introduce his brief description of the indictment constituted an "invitation * * * to discuss pending charges." Br. 14-15. Taken in context, the record indicates that Bliemeister merely used colloquial language to inform petitioner that he wished to tell petitioner about the charges that he faced. Although one meaning of the word "discuss" denotes speaking about a topic *with* another person, another common use of the word denotes speaking about a topic *to* another person, as a lecture or speech would "discuss" a topic. See, *e.g.*, *Webster's New International Dictionary of the English Language* 746 (2d ed. 1958) ("3. To make clear or open; explain; disclose in speech; declare."); *The American Heritage College Dictionary* 397 (3d ed. 1993) ("1. To speak with others about. 2. To consider (a subject) in speech or writing."); see also *The New Shorter Oxford English Dictionary* 689 (1993) ("4. Make known, declare.") (emphasis omitted).

The officers' conduct was entirely consistent with the understanding that they wished to inform petitioner about the charges and arrest warrant, and inconsistent with any effort to elicit incriminating statements. After stating that he was there "to discuss" petitioner's involvement in methamphetamine distribution, Bliemeister told petitioner in one "continuous * * * statement," J.A. 61, that he had been indicted for conspiring to distribute methamphetamine, that the officers had a warrant to arrest him on that charge, and that the indictment concerned petitioner's alleged involvement with Kuenning, Sardeson, Geffs, and Farfalla. J.A. 18, 61, 86, 112. As the district court found, J.A. 112, the officers did not ask petitioner a single question relating to the charged offense while at petitioner's house. Even after petitioner began speaking, he discussed only his personal and business problems. Petitioner made no reference to drug distribution. Tellingly, the officers made no attempt to steer him to the subject of drug distribution or to his relationship with Kuenning, Sardeson, Geffs, and Farfalla. Petitioner's discussion was essentially a monologue interrupted by a single question from Officer Garnett that "[d]id [not] have anything to do with narcotics trafficking." J.A. 73-74.

There is no indication that the officers attempted to prolong petitioner's statement in the hope he eventually would incriminate himself. After petitioner had spoken a short while, the officers cut petitioner off and told him it was time to leave. J.A. 21, 58-59. Bliemeister's conduct fell far short of being an "investigative technique[] that [is] equivalent to interrogation." *Kuhlmann*, 477 U.S. at 457. It is readily distinguishable from conduct that this Court has found did rise to that level. *Brewer*, 430 U.S. at 393 (officer used psychological ploy to play on murder suspect's religious sensitivities and psychological disorder with emotional plea to afford victim's parents "a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and mur-

dered"); *Henry*, 447 U.S. at 270-275 (incarcerated paid informant engaged in conversations with incarcerated defendant "without arousing [his] suspicion" in a context that had the potential to "elicit information that an accused would not intentionally reveal to persons known to be Government agents"); cf. *Arizona* v. *Mauro*, 481 U.S. 520, 529 (1987) (where defendant "was not subjected to compelling influences, psychological ploys, or direct questioning," his "volunteered statements cannot properly be considered the result of police interrogation" for purposes of *Miranda*).

C. The Court Of Appeals Did Not Usurp The District Court's Fact-Finding Role

Finally, there is no basis for petitioner's suggestion (Br. 15) that the court of appeals acted improperly by "effectively setting aside the lower-court factual findings regarding the officers' conduct." The court of appeals did not disturb the district court's findings of historical fact, and indeed, its recitation of the facts (J.A. 120-121) is consistent with that of the district court (J.A. 111-112). The ultimate question whether police conduct constitutes interrogation or deliberate elicitation is, however, not a question of historical fact, but a mixed question of law and fact that the court properly reviewed de novo.[7] See generally *Thompson* v. *Keohane*, 516 U.S. 99, 111-113 (1995) (whether defendant was in "custody" for *Miranda* purposes "call[ed] for application of the controlling legal standard to the historical facts," and thus issue is a

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[7] See, *e.g.*, *United States* v. *Johnson*, 4 F.3d 904, 909-910 (10th Cir. 1993) (determination whether statement was "deliberately elicited" is reviewed de novo), cert. denied, 510 U.S. 1123 (1994); *United States* v. *Spruill*, 296 F.3d 580, 585 (7th Cir. 2002) (same); cf. *United States* v. *Briggs*, 273 F.3d 737, 740 (7th Cir. 2001) (whether statement is functional equivalent of interrogation for *Miranda* purposes is reviewed de novo); *United States* v. *Vega-Figueroa*, 234 F.3d 744, 749 (1st Cir. 2000) (same); *United States* v. *Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000) (same).

"mixed question of law and fact qualifying for independent review" on appeal) (internal quotation marks omitted); *Miller* v. *Fenton*, 474 U.S. 104, 116-117 (1985) (whether confession was "voluntary" is legal issue subject to de novo review).

II. A Voluntary Statement Obtained After An Accused Has Validly Waived His Right To Counsel Is Admissible, Even If The Police Had Earlier Obtained An Uncounseled Post-Indictment Statement

Petitioner contends (Br. 7-9, 16-37) that if the Court finds that the uncounseled statement he made at his arrest was deliberately elicited by the police, his later statement at the jail also must be suppressed as the fruit of the poisonous tree—even though petitioner made his jailhouse statement after he received *Miranda* warnings and validly waived his right to have counsel present during the police interrogation. Petitioner claims that the elicitation of his initial statement was a Sixth Amendment violation; that his later jailhouse statement was the fruit of his earlier statement because the first statement let the cat out of the bag and created "psychological pressures" that affected his "willingness to make a subsequent inculpatory statement" (Pet. Br. 7); and that the government can avoid suppression of the second statement only by satisfying one of the established exceptions to the exclusionary rule. The extension of "fruits" analysis that petitioner proposes would depart from the rule that this Court adopted in the analogous Fifth Amendment context in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). It also misconceives both the function of the Sixth Amendment and the significance of petitioner's waiver of counsel at the jailhouse. And it would impose unjustified costs on society by precluding the admission of reliable and voluntary confessions obtained after a valid waiver of the right to counsel. The approach taken in *Elstad* in the Fifth Amendment context is equally

valid in the Sixth Amendment context, and it should be adopted in this case.

A. *Oregon* v. *Elstad* Provides The Appropriate Rule When The Police Obtain Voluntary, Warned Statements After Previously Obtaining Unwarned Statements

In *Oregon* v. *Elstad*, *supra*, this Court confronted an analogous claim under the Fifth Amendment that a suspect's giving of an initial statement without *Miranda* warnings tainted his later provision of a second statement after he received *Miranda* warnings and waived his rights. In *Elstad*, the police went to Elstad's house to arrest him for burglary. Without administering *Miranda* warnings, one officer asked Elstad whether he knew why the police had come, and Elstad admitted that he was at the scene of the burglary. One hour later, when Elstad was at the jailhouse, the same officers who had taken the earlier statement administered *Miranda* warnings. Elstad then waived his rights and made additional incriminating statements. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, this Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement," a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." 470 U.S. at 314. The Court explained that, in the absence of police coercion, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318.

Although this case arises under the Sixth Amendment, the approach taken in *Elstad* is sound in this context as well. Assuming that the officers' statements when arresting petitioner amounted to the deliberate elicitation of information from an accused who had not waived his right to counsel, the officers' later provision of *Miranda* rights gave petitioner the information he needed to decide whether to assert his right to counsel. See *Patterson*, 487 U.S. at 296-298; see also p. 31, *infra*. In *Elstad*, the Court reasoned that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Elstad*, 470 U.S. at 308. The same is true with respect to the accused's decision whether to deal with questioning by the police "with the aid of counsel, or go it alone." *Patterson*, 487 U.S. at 291. Following a defendant's voluntary, knowing, and intelligent waiver of counsel, his statements should be held admissible. There is no greater need here than in *Elstad* for an additional analysis of the factors that would bear on an attenuation of the taint in other contexts. Cf. *Elstad*, 470 U.S. at 304-314 (rejecting fruit-of-the-poisonous-tree analysis under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and also rejecting any requirement that there be a break in the chain of events, beyond the giving of *Miranda* warnings, before the subsequent warned and voluntary confession may be admitted).

Petitioner correctly notes (Br. 34) that the Fifth and Sixth Amendments serve "distinct values," and, consequently, operate differently in certain contexts. For example, the Fifth Amendment applies to custodial interrogation even before the bringing of formal charges, while the Sixth Amendment covers questioning even when the defendant is not in custody or aware that he is speaking to an agent of the government. See *McNeil* v. *Wisconsin*, 501 U.S. 171, 178 (1991); *Patterson*, 487 U.S. at 296-297 n.9. Nevertheless, because the assistance of counsel serves a similar role during pretrial

questioning by the police regardless of whether the right to counsel arises under the Fifth or Sixth Amendment, *Patterson*, 487 U.S. at 298-299 & n.12, "it should be no surprise," *id.* at 299 n.12, that the Court's jurisprudence concerning a suspect's pretrial rights under the two provisions is analogous in important respects and that the Court has often applied doctrine developed in one field to the other.

Significantly, the Court has held that advising an accused of his *Miranda* rights is generally sufficient to permit a knowing and intelligent waiver of the Sixth Amendment right to counsel during police questioning because of the "strong similarity between the level of knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights." *Patterson*, 487 U.S. at 299 n.12.[8] Likewise in developing prophylactic rules to protect Fifth Amendment rights, the Court has "noted the relevance of various Sixth Amendment precedents," *Michigan* v. *Jackson*, 475 U.S. 625, 630 (1986) (citing *Edwards* v. *Arizona*, 451 U.S. 477, 484 n.8 (1981)), and it has incorporated the Fifth Amendment rule of *Edwards*, dealing with police-initiated questioning of a suspect who has asserted his right to counsel, into the Sixth Amendment, see *Jackson*, 475 U.S. at 636. The Court similarly incorporated the Fifth Amendment rule permitting a defendant to be impeached with statements taken in police-initiated questioning after the invocation of the *Miranda* right to counsel into the parallel Sixth Amendment setting. *Harvey*, 494 U.S. at 350-351. See also *McNeil*, 501 U.S. at 183 (Kennedy, J., concurring) (Court should "devote some attention to bringing its Fifth and Sixth Amendment

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[8] *Patterson* did not address whether "an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid," because the defendant in that case had been so informed. 487 U.S. at 295-296 n.8. The same is true here.

jurisprudence into a logical alignment"). As explained below, in this context as well, an analysis of the relevant considerations shows that *Elstad*'s Fifth Amendment rule—that a voluntary statement made by a defendant who waives his rights after receiving *Miranda* warnings is admissible notwithstanding his making of an earlier voluntary statement in which he had not been advised of his rights—is equally valid under the Sixth Amendment.

B. Petitioner's Claim That The Sixth Amendment Is Violated At The Moment When The Police Obtain Post-Indictment Statements Without A Valid Waiver Of Counsel Does Not Warrant A Departure From the *Elstad* Rule

Petitioner argues that *Elstad* does not apply in the Sixth Amendment context because, unlike in *Elstad*, there is a constitutional violation that occurs at the time of the taking of the initial, unwarned statement. Pet. Br. 34; see *id.* at 8, 16-19. In explaining in *Elstad* why the "broad application" of the "fruits" doctrine in Fourth Amendment cases is unsuited to the *Miranda* context, the Court did note that the *Miranda* exclusionary rule, unlike the Fourth Amendment one, may be triggered even in the absence of a constitutional violation. 470 U.S. at 306-307, 308. But the distinction that petitioner would draw between this case and *Elstad* is unsound, because there is no completed violation of the Sixth Amendment right to the assistance of counsel simply because police engage in post-indictment questioning of the accused without a valid waiver of counsel. Rather, a Sixth Amendment violation does not occur unless the resulting information is used against the defendant at trial.

As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public

prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). In order to protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel beyond the trial itself to "certain 'critical' pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (citations and internal quotation marks omitted). In doing so, the Court has not treated the right to counsel as a freestanding constitutional norm. Rather, this Court has emphasized that the "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658; *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984). Post-indictment questioning of an accused, this Court has determined, is a critical stage of the proceedings. Because the introduction at trial of uncounseled and unwarned post-indictment statements undermines the ability of counsel to render assistance that contributes to a fair trial, this Court has held that "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant without an express waiver of the right to counsel." *Harvey*, 494 U.S. at 348; see pp. 11-12, *supra.*

A completed violation of the Sixth Amendment, however, does not occur at the moment that statements are deliberately elicited from a defendant without a valid waiver of the right to counsel. As the Court wrote in *Massiah*, a defendant is "denied the basic protections of th[e] [Sixth Amendment] guarantee *when there [i]s used against him at his trial* evidence of his own incriminating words, which federal

agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added). There, the government had argued that agents "were completely justified in making use of [the informant's] cooperation by having [him] continue his normal associations and by surveilling them," *ibid.*, which had resulted in the informant taping statements made by the accused without *Miranda* warnings and outside the presence of counsel. The Court explicitly declined to pass on the propriety of the investigative activity, instead addressing only its admissibility at trial: "We do not question that in this case * * * it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements * * * could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Id.* at 207; see *Moulton*, 474 U.S. at 179 (same).

Other cases also support the proposition that out-of-court conduct of government agents does not itself complete a violation of the right to counsel so long as the conduct does not impair the defendant's right to a fair trial. For example, this Court held in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), that it did not violate the Sixth Amendment right to counsel for an undercover agent to attend defense strategy meetings with an accused and his attorney. The Court emphasized that, because the agent had not communicated what was said to others on the prosecution team, there was no "realistic possibility" of injury to the defendant's fair trial interests and thus "there can be no Sixth Amendment violation." *Id.* at 558; see *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing *Weatherford* for the proposition

that "where interference with assistance of counsel has no effect on trial, no Sixth Amendment violation lies").[9]

That understanding is supported by an examination of the Sixth Amendment as a whole. The rights guaranteed by the Amendment—the accused's right to a speedy and public trial by an impartial jury, his right to be informed of charges, his right to be confronted by the witnesses against him, and his right to compulsory process to obtain witnesses in his favor—are, at the core, rights designed to ensure a fair trial. Although the actions of law enforcement before trial may impair the defendant's Sixth Amendment rights, those guarantees generally can be violated only when the defendant's ability to receive a fair determination of guilt has been fatally compromised. See *California* v. *Green*, 399 U.S. 149, 157 (1970) (Confrontation Clause guarantees "right to 'confront' the witnesses *at the time of trial*") (emphasis added); cf. *Ross* v. *Oklahoma*, 487 U.S. 81, 86 (1988) (holding that allegation of denial of right to impartial jury must focus "on the jurors who ultimately sat"); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (to show denial of right of compulsory process from government deportation of witnesses, defendant "must at least make some plausible showing of how their testimony would have been both material and favorable to his defense" at trial); *Strunk* v. *United States*, 412 U.S. 434, 439 (1973) ("failure to afford a public trial, an impartial jury, notice of charges, or compulsory

[9] The Sixth Amendment right to counsel is not solely concerned with the effect on a fair trial; it applies also in the entry of a guilty plea, *Lockhart* v. *Nelson*, 488 U.S. 33 (1988), and at sentencing, *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Right to counsel violations can occur in those proceedings. But those proceedings involve the ultimate determination of criminal liability and punishment, and in that sense are more analogous to trial than to pretrial proceedings.

service can ordinarily be cured by providing those guaranteed rights in a new trial").[10]

Consistent with those principles, as Justice Stevens has explained, "[t]he Sixth Amendment right to counsel * * * is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting) (citations and internal quotation marks omitted). That view is confirmed by commentators. See, *e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 889 (1981) ("*Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against *him* at his trial.'") (quoting *Massiah*, 377 U.S. at 207); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 Mich. L. Rev. 907, 932 (1989) ("nothing unconstitutional occurs until illegal evidence is used").[11]

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[10] The denial of the right to a speedy trial cannot, of course, be cured by a prompt re-trial. See *Strunk*, 412 U.S. at 434; *Doggett* v. *United States*, 505 U.S. 647 (1992). But ordinarily, a speedy trial dismissal reflects a finding that trial prejudice is either shown or its presumption was not successfully rebutted, *e.g.*, *Doggett*, 505 U.S. at 654-658, and dismissal of the indictment with prejudice thus is consistent with the fair-trial purpose of the Sixth Amendment. To the extent that the Speedy Trial Clause independently protects values other than the fairness of the trial, see *Strunk*, 412 U.S. at 434, it differs from the right to counsel, which this Court has made clear exists for the purpose of securing the defendant's right to a fundamentally fair trial. *Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 684-685.

[11] Some of the cases petitioner cites (Br. 12) contain dicta indicating that a Sixth Amendment violation is complete "as soon as the State's agent engage[s] [the accused] in conversation about the charges pending

There is, therefore, no basis for declining to apply *Elstad* in the Sixth Amendment context on the theory that, in this case, there was a violation of the Constitution at the time that Deputy Bliemeister spoke with petitioner at his house without advising him of his right to counsel. In line with the purpose of the Sixth Amendment right to counsel to assist an individual in meeting the prosecution's case in a fair trial, *Strickland*, 466 U.S. at 685, the focus of the Amendment is on effects at trial. The exclusion of statements made without a valid waiver of counsel preserves the adversary balance, without the need for treating the elicitation of the statements as a constitutional violation that requires suppression of statements that the accused made *after* validly waiving counsel.

C. Even Assuming A Sixth Amendment Violation, Suppression Of Subsequent Statements Made After A Valid Waiver Of Counsel Is Not Justified On A Derivative-Evidence Theory

Even if there were some basis for viewing the violation of the Sixth Amendment as complete at the time that deliberately elicited statements are obtained, the approach taken in *Elstad*, rather than the multi-factor attenuation-of-the-taint test petitioner advocates, see Pet. Br. 8, 26, 37, should be applied to determine the admissibility of subsequent statements made after a knowing and intelligent waiver of the

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against him." *Moulton*, 474 U.S. at 177-178 n.14; *Kuhlmann*, 477 U.S. at 457; *Henry*, 447 U.S. at 274. In those cases, however, the Court did not squarely address when a violation of the right to counsel occurs. Indeed, in those decisions, the Court framed the issue in a manner suggesting that a violation would occur *only* when improperly obtained statements were introduced at trial. See *Moulton*, 474 U.S. at 161 ("[t]he question presented in this case is whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to * * * a secret government informant[] after indictment"); *Henry*, 447 U.S. at 265 (same).

right to counsel. The *Elstad* Court emphasized that "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves 'interests and policies' that are distinct from those it serves under the Fifth." 470 U.S. at 306 (quoting *Brown* v. *Illinois*, 422 U.S. 590, 601 (1975)). The Court in *Elstad* concluded that, in light of the different interests at stake in Fourth and Fifth Amendments cases, there was no basis for adopting wholesale in the *Miranda* context the broad derivative-evidence exclusion developed for Fourth Amendment violations. See *id.* at 305-309, 318. Analysis of the appropriate rule for second confessions in the Sixth Amendment context, must, therefore, focus on the nature of the right at issue. See *United States* v. *Bayer*, 331 U.S. 532, 541 (1947).

The nature of the right to the assistance of counsel warrants employing an approach analogous to *Elstad*. The admission of subsequently obtained statements after administration of *Miranda* warnings does not offend Sixth Amendment values. The Sixth Amendment serves to "protect[] the unaided layman at critical confrontations with his adversary." *Gouveia*, 467 U.S. at 189. In the context of postindictment interrogation, the *Miranda* warnings convey to the accused at the time of questioning "the sum and substance of the rights that the Sixth Amendment provide[s]." *Patterson*, 487 U.S. at 293. The *Miranda* warnings make the accused "aware of his right to have counsel present during the questioning" and also "make [him] aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning" by informing him "that any statement that he made could be used against him in subsequent criminal proceedings." *Ibid.* The warnings thus "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." *Id.* at 294. An accused is entitled to know of those rights before forgoing counsel. Initial deliberately

elicited statements, made without *Miranda* warnings and a valid waiver, therefore must be excluded. But because the lack of *Miranda* warnings is the "condition[] that precluded admission of the earlier statement," *Elstad*, 470 U.S. at 314; see generally *Harvey*, 494 U.S. at 349, the "remov[al]" of that condition by providing the *Miranda* warnings neutralizes any police error and can render the later statement admissible. After the warnings have been given, and a suspect voluntarily and intelligently waives his rights, the decision to speak without counsel represents an independent act of free will.

This does not make *Miranda* warnings a "cure-all" (Pet. Br. 29, 41). The warnings, of course, do nothing to permit the admission of the first, unwarned and uncounseled, statement. And, as to a second statement given after the accused knowingly and intelligently waived counsel, the government must still establish that the waiver of rights was voluntary. *Patterson*, 487 U.S. at 292 n.4. Badgering or misleading conduct by authorities may preclude such a showing. *Harvey*, 494 U.S. at 353-354. Interference with a defendant's access to counsel also raises Sixth Amendment concerns. *Burbine*, 475 U.S. at 428. And where investigators obtain the unwarned initial statement through coercion or the application of excessive psychological pressure, the defendant may not be able to make a knowing and voluntary decision to speak because the "continuing effect of the coercive practices" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944)) may carry over to the second encounter despite the warnings. Cf. *Elstad*, 470 U.S. at 310 (requiring a break in the chain of events "[w]hen a prior statement is actually coerced"). But there can be no claim that unadorned police questioning about charges or a simple invitation to discuss them, without the use of pressure tactics or direct interference with an accused's desire for counsel, could taint a later otherwise-valid post-warning waiver of counsel.

Petitioner's central argument why *Miranda* warnings are presumptively inadequate to render subsequent statements admissible rests on the claim that the psychological and practical constraints of having made an initial statement prevent an accused from making a knowing and voluntary decision to refrain from speaking to investigators even after he has received warnings. See Pet. Br. 7, 21, 22, 23, 24-25, 36, 40. Essentially, petitioner contends, because he let the "cat * * * out of the bag" (Br. 36) in his initial statement, he was necessarily more likely to "make a subsequent inculpatory statement" (Br. 7) as he was under the "erroneous impression that he ha[d] nothing to lose . . . in a . . . decision to speak a second or third time." Br. 35 (quoting *Darwin* v. *Connecticut*, 391 U.S. 346, 351 (1968) (per curiam) (Harlan, J., concurring in part and dissenting in part)).

The defendant in *Elstad* propounded the same "cat out of the bag" theory, and this Court rejected it as a matter of law, holding that a defendant's knowledge that he already has incriminated himself does not compromise the voluntariness of a later post-warning statement. 470 U.S. at 309-314. The Court explained that it has "never held that the psychological impact of voluntary disclosure of a guilty secret * * * compromises the voluntariness of a subsequent informed waiver." *Id.* at 312. A voluntary waiver is valid, even if the defendant is "unaware that his prior statement could not be used against him." *Id.* at 316. The same conclusion applies here. The administration of *Miranda* warnings furnishes the defendant with the necessary information about his rights. Even if the accused earlier spoke to authorities and were laboring under the misunderstanding that his initial statement was admissible, and even assuming that the accused felt some need to explain the earlier statement, the *Miranda* warnings make clear that the accused is perfectly free to wait until after he has met with counsel before speaking further.

Contrary to petitioner's claim (Br. 24), *Elstad*'s rejection of the "cat out of the bag" theory did not rest simply on the conclusion that "a suspect's internal psychological pressures" did not qualify as state compulsion sufficient to implicate the Fifth Amendment, but represented a more basic rejection of the validity of the theory. The Court reasoned that "the causal connection between any psychological disadvantage created by [an initial] admission and [an] ultimate decision to cooperate is speculative and attenuated at best." 470 U.S. at 313-314. The Court emphasized that a defendant's motivation in deciding to waive counsel and provide a statement is essentially unknowable, *id.* at 314 ("[i]t is difficult to tell with certainty what motivates a suspect to speak"), and could stem from a variety of personal factors unrelated to his prior statement, including remorse, a desire to curry favor with the authorities, or a pre-arrest conversation with a family member or friend. *Ibid.* Indeed, the decision may be entirely instinctive and have no rational motivation at all. Recognizing this, the Court "has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Id.* at 311 (quoting *Bayer*, 331 U.S. at 540-541); cf. *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975) ("a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity").

Petitioner claims (Br. 21-22) that this Court's cases have recognized that defendants who have already made statements will feel there is "little to be gained * * * from attempting to avoid further self-incrimination," and that such a subjective belief creates a link between a first deliberately elicited statement taken without a valid waiver of counsel,

and a second statement taken with a valid waiver of counsel. None of those earlier cases detracts from the holding in *Elstad* that the cat-out-of-the-bag theory is too speculative to serve as the foundation for a finding that a second warned statement is the fruit of a first unwarned statement. The leading case—*United States* v. *Bayer*, 331 U.S. at 540-541—observed only that once a defendant's "secret" is out, he cannot get "the cat back in the bag" and "[i]n such a sense, a later confession always may be looked upon as fruit of the first." *Id.* at 540. But the Court articulated that point in order to *reject* it. In its analysis, the Court did not presume any taint flowing from the defendant's knowledge of his prior confession. Instead, the Court emphasized that the Fourth Amendment fruits cases on which the court of appeals had relied "did not deal with confessions * * * and do not control this question." *Id.* at 541. The Court then examined whether the restraints imposed on the defendant at the time of his statement invalidated its use, and it found that they did not. Any disadvantage that the accused subjectively may have felt from his earlier confession played no role in the Court's analysis of whether his "confession voluntarily given after fair warning [was] invalid as evidence against him." *Ibid.* As for *Darwin* v. *Connecticut*, *supra* (cited at Pet. Br. 21), the Court's brief per curiam opinion did not even mention the "cat out of the bag theory," but simply found the defendant's later confession involuntary. The concept that a defendant might confess again because he "might think he has little to lose" was voiced only by Justice Harlan in his separate opinion. 391 U.S. at 350-351 (Harlan, J., concurring in part and dissenting in part).[12]

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[12] Petitioner also relies (Br. 22) on this Court's Fourth Amendment cases in which confessions following illegal arrests were found to be suppressible fruits. See *Brown*, 422 U.S. at 605 & n.12; *Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979). In both *Brown* and *Dunaway*, the

Petitioner's reliance (Br. 22, 23) on *Harrison* v. *United States*, 392 U.S. 219 (1968), is also misplaced. In *Harrison*, the defendant made a decision to testify at trial after "the Government had illegally introduced into evidence three confessions, all wrongfully obtained" that the defendant had admitted to shooting the victim during a botched burglary. *Id.* at 222. The Court noted that, but for the illegal admission into evidence of those statements, the defendant would have been unlikely to have testified or to have "admitted being at the scene of the crime and holding the gun when the fatal shot was fired." *Id.* at 225. Harrison thus made the admission only after his initial statement had been used against him at trial. A defendant's decision to react to trial evidence that has already been introduced says little or nothing about a defendant's ability to make a free decision at the jailhouse about whether to speak with authorities without counsel. *Harrison* therefore does not undercut the conclusion that follows from *Elstad*: notwithstanding a prior statement, when the *Miranda* warnings have informed the accused that there is no need to speak further to police without the assistance of counsel, his decision to speak without counsel should be respected as the individual's free choice.

D. There Is No Other Reason For Applying A Broad Fruits Analysis, Developed In Other Contexts, To This Sixth Amendment Context

Petitioner argues (Br. 16-19) that the broad exclusion of derivative evidence developed in this Court's Fourth

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Court remarked that the giving of second statements by the arrestees was "clearly the result and the fruit of the first." *Ibid.* But the dominant fact in both cases was that, at the time that the defendants gave their statements, they remained in police custody following their illegal arrests. The Court's additional observation on the relationship of the two statements was not necessary to the fruits analysis. Any broader reading of those cases would conflict with *Elstad*.

Amendment cases should be incorporated wholesale into right-to-counsel jurisprudence. Under *Brown* v. *Illinois*, *supra*, when a defendant has provided a confession that is potentially tainted by an unlawful arrest, a court is to examine "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct," 422 U.S. at 603-604 (footnote and citations omitted), in order to determine whether the confession is "sufficiently an act of free will to purge the primary taint," *id.* at 602 (quoting *Wong Sun*, 371 U.S. at 486). *Miranda* warnings are "an important factor," but do not automatically mean that "the Fourth Amendment violation has not been unduly exploited." *Id.* at 603. See *Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (per curiam). The Fourth Amendment approach should be rejected in this context.

The Court has recognized the different purposes of the Fourth Amendment exclusionary rule and the Sixth Amendment, see, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 374-376 (1986), and those differences warrant a different approach to the exclusion of purported derivative evidence in the form of the accused's statements following a valid waiver of the right to counsel. The Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Because the constitutional violation is already complete and cannot be cured, the "admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation," by application of a judicially created exclusionary rule. *United States* v. *Janis*, 428 U.S. 433, 443 (1976). The giving of *Miranda* warnings can never undo or "cure" a completed Fourth Amendment violation; when

the police question a defendant whom they are holding in violation of the Fourth Amendment, the questioning in at least some degree constitutes an "exploitation of the illegality" of the unlawful search or seizure because, but for the illegal search or seizure, police would never have had occasion to question him. *Brown*, 422 U.S. at 600; see also *id.* at 603 (*Miranda* warnings "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited").

In contrast, the giving of *Miranda* warnings can effectively "remove the conditions" (*Elstad*, 470 U.S. at 314) that render inadmissible earlier statements deliberately elicited from a defendant without a valid waiver of the right to counsel. This Court has cautioned that subsequent testimony "is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized" because "[t]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give." *Id.* at 308-309 (quoting *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978) (emphasis in *Elstad*)). Because the suspect who has been advised of his rights ordinarily "is free to exercise his own volition in deciding whether or not to make a statement to the authorities," *id.* at 308, the warnings and the accused's waiver of counsel break any link to the underlying Sixth Amendment concern that precluded admission of the first statement. There is no need for a multi-factor analysis to insure that the second confession was a product of the defendant's free decision to forgo counsel. The Sixth Amendment interest in providing the accused a fair trial is vindicated entirely by excluding the first statement from the government's case in chief, leaving the trial court free to honor the accused's voluntary and informed decision to waive counsel during the police questioning that led to the second statement.

This Court's Sixth Amendment cases in the area of "fruit of the poisonous tree" analysis also are of no assistance to petitioner. In *Nix* v. *Williams*, 467 U.S. 431, 442 (1984), the defendant contended that evidence of the location and condition of the murder victim's body was the product of the deliberate elicitation of statements in violation of his right to counsel, and, therefore, that the evidence about the body should not have been admitted at his trial. *Id.* at 441. While indicating that "fruits" analysis has been applied under the Sixth Amendment, *id.* at 442 (citing *United States* v. *Wade*, 388 U.S. 218 (1967)), this Court rejected the defendant's claim by recognizing and applying the inevitable discovery exception to the exclusionary rule and holding that the murder victim's body would have been inevitably discovered. *Id.* at 440-450. In *Wade*, the Court determined that a post-indictment lineup was a critical stage under the Sixth Amendment, and, after finding that an uncounseled lineup had occurred, remanded for the lower courts to determine whether a witness's in-court identification of defendant was tainted by the earlier uncounseled and inadmissible post-indictment lineup. 388 U.S. at 239-243.

The derivative evidence in *Nix* consisted of the location and condition of an inanimate object—a murder victim's body. With respect to such physical evidence, the primary inquiry is the degree of the objective causal relationship between the discovery of the evidence and the unlawful elicitation of uncounseled statements. No subjective question of free will enters the analysis, because once a defendant makes a statement that is inadmissible under the Sixth Amendment, he is powerless to prevent the authorities from uncovering physical evidence to which the inadmissible statement might lead. The courtroom identification in *Wade* was said to be potentially inadmissible because the witness's identification may have "crystallize[d]" during a lineup conducted without the presence of counsel, and, because counsel was

not present, he could not effectively cross-examine the witness so as to reveal any earlier skewing of his identification. 388 U.S. at 240-241. The Court, accordingly, required the government to establish an "independent origin" for the in-court identifications. *Id.* at 242.

In this case, by contrast, the alleged fruits evidence consists of a second statement voluntarily made by an accused after receiving *Miranda* warnings and knowingly and intelligently waiving his right to counsel. As a result of the warnings, petitioner knew that he could avoid police questioning simply by invoking his right to counsel. He also knew that he could deprive the authorities of a second statement simply by declining to speak. And at trial, nothing about petitioner's first statement compromised the role of counsel, because that statement was inadmissible. In this setting, unlike in *Nix* or in *Wade*, the analysis should turn on the defendant's informed choice to waive his right to counsel before making a statement. As in *Elstad*, the provision of advice about the defendant's rights and his ensuing voluntary waiver is sufficient to justify admissibility.

E. The Costs Of Excluding Subsequent Statements Made After A Valid Waiver Of Counsel Outweigh Any Countervailing Interests

Suppression of the second statement under a broad "fruits" analysis would also impose significant social costs without offsetting benefits to the protection of constitutional rights. The suppression of statements made after a voluntary, knowing, and intelligent waiver of the Sixth Amendment right to counsel has substantial costs for the sound administration of justice. As this Court has repeatedly observed, "[a]dmissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532

U.S. 162, 172 (2001) (citations and internal quotation marks omitted). Voluntary confessions that are made after the accused has been advised of his rights and has decided to forgo counsel are highly probative and reliable evidence of guilt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.") (quoting *Bruton* v. *United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting)). Excluding such confessions damages the truth-seeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free.

There is no sufficient justification for imposing these costs. At most, deterrence has only an attenuated role to play in this context, because the Sixth Amendment right to counsel places restrictions on "the use of the evidence for trial, not the method of its collection prior to trial." *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting); *Cronic*, 466 U.S. at 658. *Massiah* itself disavowed any intention to shape the out-of-court conduct of investigators, and simply announced a rule of admissibility.[13] See 377 U.S. at 207. But even if deterrence were a relevant consideration, investigators already have adequate incentives to refrain from speaking with indicted defendants before giving *Miranda* warnings and obtaining a valid waiver. The inadmissibility of an unwarned statement from the prosecution's case in chief itself

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[13] Indeed, there are situations in which police should be permitted to proceed with questioning without counsel—for example, where an accused is thought to know the location of a sick or vulnerable kidnapping victim, cf. *Brewer*, 430 U.S. at 393, or of an imminent attempt to kill a witness, cf. *Moulton*, 474 U.S. at 179-180. Resulting statements would be inadmissible, however, if the questioning related to the charge for which the accused stood indicted. See generally Schulhofer, 79 Mich. L. Rev. at 889 ("*Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against *him* at his trial' ") (quoting *Massiah*, 377 U.S. at 207).

provides a significant incentive to give *Miranda* warnings before speaking with indicted defendants. Cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"). Police officers who engage in interrogation before giving *Miranda* warnings also run the risk of a judicial finding that the statement was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In that event, the initial statement would be unusable for any purpose, physical evidence derived from the statement might have to be suppressed, and before any subsequent statements were admissible, the court would have to carefully examine such factors as lapse of time and the presence or absence of intervening circumstances to decide whether the coercion "ha[d] carried over into the second confession." *Elstad*, 470 U.S. at 310. In contrast, officers who give *Miranda* warnings and obtain explicit waivers before speaking with the accused are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases 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). Thus, contrary to petitioner's claim (Pet. Br. 30, 40-41), rejection of his position will still leave officers with strong incentives to give *Miranda* warnings and to refrain from unwarned interrogation of indicted defendants.[14]

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[14] Both the Federal Bureau of Investigation and the Drug Enforcement Administration require agents to provide *Miranda* warnings and obtain a waiver before interviewing persons who have been charged with a crime. See FBI, *Legal Handbook for Special Agents* § 7-3.2 (1994) ("The [*Miranda*] warnings and waiver are required where a person has been previously charged with a crime by indictment, information or presentment for an initial appearance and is subsequently interviewed

In sum, excluding voluntary statements made after an otherwise-valid waiver of the right to counsel would come "at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest" in the assistance of counsel. *Elstad*, 470 U.S. at 312; see also *McNeil*, 501 U.S. at 181 (the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable").

III. Petitioner's Second Statement Is Admissible Even Under The Broad Derivative-Evidence Exclusionary Rule Petitioner Advocates.

Even if this Court were to conclude that the officers' initial interaction with petitioner violated his Sixth Amendment rights, and even if it concludes it is appropriate to apply the broad derivative-evidence exclusionary rule that petitioner advocates, the Court nonetheless should affirm the decision of the court of appeals permitting use of petitioner's post-warning statement. As noted, in the Fourth Amendment context, to determine whether a subsequent statement was sufficiently independent to dissipate the taint of the illegal search or seizure, the Court has examined the "temporal proximity" of the constitutional violation to the discovery of the derivative evidence in question, "the presence of intervening circumstances, and * * * the purpose and flagrancy of official misconduct," to determine whether the confession was "an act of free will [sufficient] to purge the primary taint." *Kaupp*, 123 S. Ct. at 1847 (quoting *Brown*, 422 U.S. at 603, and *Wong Sun*, 371 U.S. at 486). The

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about the pending charge or a closely related offense."); *DEA Agents Manual* § 6641.32 (2002) ("Prior to interviewing any defendant, he/she must be advised of his/her constitutional rights.").

Court has cautioned, however, that "[t]he workings of the human mind are too complex" to permit resort to a single "talismanic test," and emphasized that "whether a confession is the product of a free will * * * must be answered on the facts of each case" and "[n]o single fact is dispositive." *Brown*, 422 U.S. at 603. Viewed as a whole, the facts of this case demonstrate that the second statement was not the fruit either of police misconduct or of the first statement, but an independent and informed act of free will.

First, when the officers spoke to petitioner at his house, they engaged in no conduct that could have influenced his later decision, after receiving *Miranda* warnings, to waive counsel and answer questions. The officers, who were dressed in plain clothes and were not carrying weapons visibly, J.A. 16, 66, 70, did not offer petitioner any promises or inducements, did not apply any pressure, and did not even seek to persuade him of the wisdom of cooperating. Deputy Bliemeister's statement of the charges petitioner faced and the persons with whom petitioner was believed to have conspired *at most* constituted an invitation to speak, presented in an unthreatening manner as petitioner sat sipping iced tea on his living-room sofa. J.A. 19. The officers' restrained conduct in no way could have overborne petitioner's will or otherwise impaired his ability to make an autonomous decision to waive his rights after he had been advised of them. Cf. J.A. 104 (magistrate judge concluded that petitioner "voluntarily agreed to talk with the officers" at the jailhouse). Although petitioner emphasizes (Br. 22, 38) that only approximately a half hour passed between petitioner's statement at his house and his interview at the jail and the same officers were involved in both encounters (Br. 20-21), this Court has recognized that, even without a change in personnel, "relatively short" periods are sufficient to dispel the taint of illegality if, as here, the encounter with police was not "under the strictest of custodial conditions." *Rawlings* v.

Kentucky, 448 U.S. 98, 107-108 (1980) ("relatively short" 45-minute period that elapsed between illegal detention and Mirandized statement was sufficient to purge taint where suspects were detained "quietly in the living room" and police were courteous).

Petitioner errs in contending (Br. 39) that Deputy Bliemeister's conduct was particularly flagrant and constituted "nothing less than a total and blatant disregard of this Court's decisions." Bliemeister's brief statement of the charges against petitioner during the initial encounter at petitioner's house "does not rise to the level of * * * flagrant misconduct requiring prophylactic exclusion of petitioner's [subsequent] statements." *Rawlings*, 448 U.S. at 109-110. In marked contrast to cases in which this Court has found suppression to be warranted, the conduct at issue here was neither clearly illegal nor performed with the apparent intention of overpowering the defendant's will to resist. Compare *Brown*, 422 U.S. at 604-605 (arrest and search at gunpoint conducted without a warrant and unsupported by probable cause was performed in a manner apparently "calculated to cause surprise, fright, and confusion"); *Kaupp*, 123 S. Ct. at 1847 (warrantless arrest of a minor at 3 a.m., followed by his "removal from [the] house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene"). If Deputy Bliemeister had said that he wished to "tell" petitioner about the indictment and arrest warrant rather than saying he wished to "discuss" them, then Bliemeister would simply have complied with the Federal Rules and could not even arguably be viewed as having deliberately elicited statements from petitioner. The mere choice of a single word, even if infelicitous, does not transform an otherwise unremarkable notification of charges into a flagrant constitutional violation. Cf. *Innis*, 446 U.S. at 303 ("we cannot say that the officers should have known that it

was reasonably likely that [the defendant] would * * * respond" to "a few offhand remarks").

Second, contrary to petitioner's assertions, see Br. 21, 40, petitioner's second statement did not "address[] subjects * * * identical to * * * those covered in the initial statement." Br. 20. In the statement petitioner made at his house, he discussed personal problems he had been having, including a divorce, business problems with a former business partner, and methamphetamine use. J.A. 48. While petitioner may have acknowledged that he had associated in some manner with at least some of the individuals named by Deputy Bliemeister (see J.A. 18-19, 47), petitioner said nothing about drug distribution or the "fronting" of money, nor did he link any of them to methamphetamine distribution. J.A. 48, 62, 87, 92, 104-105. To the extent that petitioner made damaging admissions in his second statement (*e.g.*, that he had bought drugs from some of the persons named by the officers, that he had "loaned" money to Kuenning, that he had associated with each of the persons the officers mentioned), he was divulging entirely new information that he had an undiminished incentive to conceal, and could not plausibly have supposed that he had "nothing [more] to lose" (Pet. Br. 40) by answering questions at the jail. Appreciating that fact, even the magistrate judge—the only jurist involved in the proceedings below who believed that *any* portion of the second interview should be suppressed—concluded that petitioner's statements about the "distribution of methamphetamine" and his "fronting money" "[o]bviously * * * need not be suppressed." J.A. 104-105.

Petitioner's claim to be "[i]gnorant of his legal rights" (Br. 40; see also Br. 21) is questionable given his extensive experience with the criminal justice system (see p. 16 & n.5, *supra*) and widespread popular knowledge that there are restrictions on the admissibility of statements given without

the benefit of *Miranda* warnings. But even accepting that claim, it requires little legal sophistication to understand that an admission that one *used* an illegal drug is not tantamount to an admission that one *trafficked in* the drug, or that an admission that one *knew* people suspected of drug trafficking is not tantamount to an admission that one *engaged in drug trafficking* with them. Petitioner's appreciation of these distinctions is demonstrated by his second statement, in which he cited his drug use to deflect the suggestion that he had obtained methamphetamine in order to distribute it. Indeed, petitioner's basic defense at trial was that he was a methamphetamine user, not a methamphetamine distributor. See, *e.g.*, 1 Trial Tr. 50-51; 4 Trial Tr. 725. Moreover, the fact that petitioner repeatedly lied during the jailhouse interview about having sold methamphetamine, and lied about the purposes for which he had given others money, is an indication he was not speaking as a result of psychological pressure arising from his earlier statement, but because he wished to give police the most favorable explanation for his activities.

Third, there is no evidence that the officers attempted to exploit petitioner's first statement in order to obtain the second. There is no indication that the officers even mentioned the first statement to petitioner during the jailhouse interview, or reminded him of particular statements he had made, let alone that they attempted to convince petitioner that he had nothing more to lose by providing a full account of his actions. See *Elstad*, 470 U.S. at 316 (in holding subsequent statements admissible, noting that the officers did not "exploit the unwarned admission to pressure respondent into waiving his right to remain silent").

Fourth, petitioner's second statement was preceded by full *Miranda* warnings and a valid written waiver of those rights. See J.A. 9. Petitioner was specifically notified that he did not have to speak with the officers without counsel

present, and confirmed that he understood that warning. Petitioner did not ask to speak to an attorney, nor is there any indication the officers suggested that it would be in his interest not to consult with an attorney before speaking with them. J.A. 77-78. There is therefore no reason to believe petitioner felt that he was under some obligation to explain away his prior statement before consulting with counsel. The valid waiver further diminishes any likelihood that petitioner was induced to speak by the knowledge that he already had made a statement to the officers. See *Rawlings*, 448 U.S. at 107 (fact that "petitioner received *Miranda* warnings only moments before he made his incriminating statements" is "important * * * in determining whether the statements at issue were obtained by exploitation of" a constitutional violation). Thus, based on all of the relevant factors, petitioner's decision to speak with the officers at the jailhouse was "an act of free will [sufficient] to purge [any] primary taint." *Kaupp*, 123 S. Ct. at 1847 (second bracketed word added) (quoting *Wong Sun*, 371 U.S. at 486).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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