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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN J. FELLERS, :

Petitioner :

v. : No. 02-6320

UNITED STATES :

- - - - -X

Washington, D.C.

Wednesday, December 10, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-6320, John J. Fellers v. the United States.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Unlike the two cases in which you heard argument yesterday, and unlike Oregon v. Elstad, the original inculpatory statement in this case was elicited not merely in violation of a prophylactic rule, but of the Constitution itself, specifically the Sixth Amendment right of an accused to the assistance of counsel throughout his criminal prosecution, a right designed to protect equality in the adversarial process by a --

QUESTION: What is your authority, Mr. Waxman, for saying that this is different from the Miranda warnings in the sense that it's -- it's an immediate violation rather than something -- something like Miranda?

MR. WAXMAN: Well, it's -- Your Honor, I

1 guess I have a two-fold answer. First of all, the --
2 the constitutional right involved is the Sixth
3 Amendment right, unlike in Miranda, the Fifth
4 Amendment right of self-incrimination. And in -- in
5 Oregon v. Elstad and Chavez v. Martinez, this Court
6 recognized that although the Fifth Amendment
7 self-incrimination right is not completed until the
8 statement or its fruits are introduced at trial, the
9 primary illegality, as this Court has used the
10 phrase, is the coercion of the confession, and the
11 Elstad rule doesn't apply where the primary
12 illegality is constitutionally-proscribed conduct.

13 And here, this Court has not formally
14 decided whether the Sixth Amendment is violated at
15 the time the uncounseled, post-indictment statement
16 is deliberately elicited, or only when the statement
17 or fruits are admitted, that briefs of both sides
18 rehearse for the Court somewhat conflicting
19 statements in different opinions.

20 We rely on the cases cited in footnote 5
21 on page 8 of our reply brief, but for purposes of
22 this case, Your Honor, it doesn't matter, because in
23 Elstad, this Court made clear, and reiterated in
24 Chavez, that although the Fifth Amendment violation
25 is incomplete at the time a confession is coerced,

1 nonetheless the fruits of that confession have to be
2 suppressed under the derivative evidence rule, unless
3 the Government carries its burden to prove sufficient
4 attenuation of taint. And therefore, even if the
5 conduct deliberately eliciting from Mr. Fellers his
6 inculpatory statement at a time when the officers
7 knew he had been indicted, and the prosecution knew
8 that he had a right to the advice of counsel, the
9 fruits of that statement under Nix and Wade have to
10 be suppressed. That's a rule that this Court has
11 applied in Fourth Amendment, Fifth Amendment, and
12 Sixth Amendment cases.

13 QUESTION: Do police officers generally
14 know this distinction, that when an indictment has
15 been handed down, suddenly the Sixth Amendment is in
16 the case as well as the Fifth? There's an element of
17 fiction to it in that the person doesn't have a
18 lawyer yet. As a bright line rule, I guess, we need
19 some point to know when proceedings have commenced,
20 but I - I still think there's an element of fiction
21 in it.

22 MR. WAXMAN: Well, Justice Kennedy, I
23 don't -- I don't think I would call it fiction. I'm
24 no more able to -- to testify than the member of this
25 Court would be as to exactly what training the police

1 are told. But this Court has long established, long
2 maintained that the Sixth Amendment cuts very bright
3 lines. It is specific to the offense and it begins
4 only when, but when, the state makes the unilateral
5 determination to change its formal relationship with
6 an individual from one in which the individual may or
7 may not be under investigation, but the --

8 QUESTION: Mr. Waxman, you -- you're
9 making a -- a very technical distinction, if I
10 understand you correctly. If we focus on the suspect
11 in the case of no indictment yet, who has been
12 arrested, and the person who has been indicted and
13 then arrested, and they're both alone with the same
14 police officers in the same jail cell, and they're
15 both subjected to the same interrogation. Why should
16 the derivative evidence rule apply to the one or not
17 the other? If we're talking about constitutional
18 rights, it seems to me that these two individuals are
19 similarly situated.

20 MR. WAXMAN: Well, they -- they aren't,
21 Your Honor, and I don't think this is a matter of
22 technicality or formality. It is a matter of
23 formalism, but the two different amendments -- the
24 Fifth Amendment privilege against self-incrimination,
25 and the Sixth Amendment right to the assistance of

1 counsel throughout criminal prosecution, protect very
2 different things. The first protects voluntariness,
3 and the second protects the right of someone as to
4 whom the Government has formally set its face and
5 invoked a formal adversarial process.

6 QUESTION: The point is why -- why should
7 that make a difference other than the convenience of
8 the bright line? As in Justice Ginsburg's
9 hypothetical, it could be the same drug ring, the
10 same investigation, just the grand jury has -- hasn't
11 got around to indicting the second defendant until
12 the next day and then their rights are different.

13 MR. WAXMAN: Your -- Your Honor, it's --
14 it is entirely true that if the Court agrees with --
15 agrees with our submission here, that the Government
16 can very easily conform its conduct simply by not
17 conducting uncounseled interrogations or elicitation
18 prior to changing its status. But the -- the -- we
19 have to examine, this Court has exhorted counsel over
20 and over again to be clear about what the underlying
21 right is protected in determining what the
22 appropriate remedy is.

23 And the right here is not coercion. The
24 right here is not just addressed at police. It's
25 addressed at the prosecution. And there is a

1 difference. You may call it technical, but it is in
2 fact the hallmark of our adversary system that once
3 the Government decides to invoke a formal adversary
4 process, it proceeds on the supposition that each
5 side deals with each other, A, at arm's length, and
6 B, assisted by the advice of counsel, who will
7 prevent each side, and in particularly the defendant,
8 from, as this Court has explained in -- from
9 conviction resulting from his own ignorance of his
10 legal and constitutional rights, and that's what's
11 being protected.

12 The unindicted individual, as to whom the
13 Government may be conducting an investigation,
14 doesn't have that formal right, but once the
15 Government invokes our adversarial system, it invokes
16 a set of protections that protect, not an
17 individual's right to be protected from coercion or
18 involuntariness -- that's protected no matter when
19 the custodial -

20 QUESTION: Well, how -- how far does this
21 right go, Mr. Waxman? Are you -- are you saying that
22 police officers can't talk to someone who has been
23 indicted?

24 MR. WAXMAN: Oh no, of course not. Your
25 Honor has made clear for the - in his opinion for the

1 Court in Patterson v. Illinois -- I believe it was
2 Your Honor -- in any event, the Court made clear in
3 Patterson v. Illinois that the Sixth Amendment right
4 to the assistance of counsel doesn't prevent the
5 Government from eliciting statements from an indicted
6 defendant. It requires that the accused either have
7 counsel or make a waiver of the right to counsel, and
8 the Court --

9 QUESTION: Well, but it's - it's - I'm -
10 I'm talking about a situation where, say the police
11 simply say something to a -- an indicted defendant.
12 There's no violation of a right there, is there?

13 MR. WAXMAN: There only is a violation of
14 a right, Your Honor, if what -- if the police
15 statements and conduct amount to what this Court has
16 deemed deliberate elicitation. That is, that what
17 the Court has said in a half a dozen cases is that
18 the Government may not do without counsel is
19 deliberately elicit incriminating statements in the
20 absence of his lawyer.

21 QUESTION: And you think that's what
22 happened here?

23 MR. WAXMAN: I am -- I am absolutely
24 certain that that's what happened here, and the --

25 QUESTION: That was the finding of the

1 magistrate and the --

2 MR. WAXMAN: Yes. The magistrate who
3 heard that police officers, Justice O'Connor, found
4 specifically that officers --

5 QUESTION: He found deliberate eliciting
6 of the comments at the first statement?

7 MR. WAXMAN: Yes. He said it was, quote,
8 designed to elicit a response -- I'm quoting from
9 page 103 of the joint appendix --

10 QUESTION: Is that a factual finding or --

11 MR. WAXMAN: It is.

12 QUESTION: -- or a legal conclusion? I
13 mean, it seems to me he can -- he can find as a fact
14 what the officer said, but whether it constitutes
15 deliberate elicitation within the meaning of our - of
16 our opinion, it seems to me, is a legal question.

17 MR. WAXMAN: Well, it's - I think, Your
18 Honor, Justice Scalia, it's -- this is a mixed
19 question of law and fact under Miller v. Fenton and
20 Thompson v. Keohane. But because --

21 QUESTION: And the Eighth -- the Eighth
22 Circuit said, the Eighth Circuit is the closest court
23 to this one, and I thought that the Eighth Circuit
24 said, and that it's a threshold question in this
25 case, that it wasn't anything like interrogation, and

1 that that's -- wasn't that the -- the --

2 MR. WAXMAN: The Eighth --

3 QUESTION: -- prime ground of the Eighth
4 Circuit?

5 MR. WAXMAN: Justice Ginsburg, the Eighth
6 Circuit -- two judges, the majority, the panel in the
7 Eighth Circuit, concluded that it wasn't
8 interrogation. The concurring judge --

9 QUESTION: But wouldn't we have to answer
10 that --

11 MR. WAXMAN: -- pointed out, Judge Riley
12 pointed out, that under the Sixth Amendment, unlike
13 the Fifth, interrogation is not the standard. The
14 standard is deliberate elicitation, or, as this Court
15 has also phrased it, whether the prosecution, quote,
16 intentionally creates a situation likely to induce
17 the accused to make incriminating statements without
18 the advise of counsel.

19 QUESTION: I thought the Eighth Circuit's
20 position was that all this was was the police
21 informing the defendant that he had been charged with
22 this and this crime.

23 MR. WAXMAN: That is -- the -- the -- I
24 don't believe the Eighth Circuit made any such
25 finding, but the magistrate who heard the two

1 officers testify and evaluated their credibility made
2 a determination, Justice Scalia, that is a mixed
3 question of fact and law. The inquiry under the
4 Sixth Amendment, deliberate elicitation or
5 intentional creation of a situation, or purposeful
6 conduct, which are the words this Court has used,
7 involve a determination, among other things, about
8 the credibility of what the officers said.

9 And when the magistrate concluded that
10 they -- that their conduct was designed to elicit a
11 response, and that it was not made for any purpose
12 other than to get a response --

13 QUESTION: Well, was - was there any
14 debate or controversy about what they in fact said?

15 MR. WAXMAN: There was no debate about
16 what they said, but -- but there was a credibility
17 finding made by the magistrate, because the --

18 QUESTION: If there was -- if there was no
19 factual dispute, why - why did -- why was credibility
20 involved?

21 MR. WAXMAN: Well, when you have -- when
22 you -- because there is a subjective intent here, the
23 subjective intent of whether Officer Bliemeister, he
24 came to the house knowing that this man had been
25 indicted, and said, we are here to discuss with you

1 your involvement with methamphetamine and your
2 involvement with four individuals.

3 QUESTION: Well, why -- why should
4 subjective intent make any difference here? I mean,
5 the -- the effect on the -- on the accused is exactly
6 the same.

7 MR. WAXMAN: Your Honor, I'm -- I'm simply
8 reciting back for -- for you the court's
9 instructions, and -- and saying that if the standard
10 is deliberate elicitation and intentionally creating
11 a situation, it essentially, in terms of providing a
12 line, it proscribes what the police may not
13 deliberately do, and --

14 QUESTION: Well --

15 MR. WAXMAN: -- but deliberateness, I
16 think, is a finding of the magistrate, which -- to
17 which the Eighth Circuit and this Court owe
18 deference.

19 QUESTION: But deliberateness may refer to
20 nothing more than intending the statement that was
21 made, and whether it elicits or not, or whether it
22 constitutes elicitation -- what a terrible word --
23 whether it constitutes elicitation, it seems to me,
24 can be judged objectively, can't it?

25 MR. WAXMAN: Your Honor, perhaps, but

1 designed to elicit, it strikes me as including a
2 subjective component. But even if I'm wrong, I
3 submit that the magistrate was correct as an a priori
4 matter in saying, look, these people -- these
5 officers -- these agents of the prosecution, came to
6 this man's house. They not only knew he had been
7 indicted, Officer Bliemeyer had been the witness --

8 QUESTION: Bliemeister, I think.

9 MR. WAXMAN: Bliemeister -- had been the
10 witness before the grand jury, and he comes --

11 QUESTION: Mr. -- Mr. Waxman, I -- I will
12 assume that that is correct. I mean, I -- the record
13 looks to me just as you're describing it. But
14 assuming that, do you think there is any practical
15 difference between what Deputy Bliemeister did here
16 and what the officer did in Elstad?

17 MR. WAXMAN: I don't remember what the
18 officer did in Elstad.

19 QUESTION: Well, in -- in Elstad, the --
20 there were two officers, one went with the mother of
21 the suspect into the kitchen to tell her why they
22 were there. The other one -- excuse me -- stayed in
23 another room with the -- with the boy who was the
24 suspect and started telling them what they were there
25 to -- to investigate, there was a burglary next door.

1 And at the end of the conversation that's quoted in
2 the opinion he said, you know, I -- I think you may
3 know something about that, and the boy said, yes he
4 did. And it seems to me that the elicitation there
5 was functionally about the same as the elicitation
6 here.

7 MR. WAXMAN: Well, that --

8 QUESTION: But I want to know whether you
9 agree.

10 MR. WAXMAN: I -- I actually don't agree.
11 I think -- I think for other reasons, that is, the --
12 the fact that this is a Sixth Amendment it doesn't
13 matter. But I do think --

14 QUESTION: Well --

15 MR. WAXMAN: -- when the police officers
16 come and say, we are here to discuss with you the
17 following things, which happened to be the precise
18 things that he has just been indicted for, that is a
19 paradigm -- paradigmatic deliberate elicitation.

20 QUESTION: Well, yeah, but --

21 MR. WAXMAN: And --

22 QUESTION: -- to -- to say to a kid, you
23 know, I think you may know something about this, and
24 the person making that statement's a cop, sounds like
25 elicitation to me.

1 MR. WAXMAN: Well, if -- if -- Mr. --
2 QUESTION: Functionally -- if -- if
3 functionally it is, let's assume -- I -- I tend to
4 think it is -- and -- and functionally in each case,
5 whether it's Fifth Amendment right or Sixth Amendment
6 right, the statement doesn't come in unless there is,
7 among other things, a voluntary waiver of the right
8 to the presence of counsel then and there. And in --
9 in each case we didn't have it. It's hard for me to
10 see why in functional terms it should make a
11 difference whether we're talking about Sixth or Fifth
12 and why there should be a difference between this
13 case and Elstad.

14 MR. WAXMAN: Because the functional
15 analysis depends on the right being protected. The
16 Fifth Amendment right does not embed a policy against
17 deliberate elicitation of information from suspects.
18 In fact, our system embraces that. And if there was
19 a violation in Elstad, it was --

20 QUESTION: Well, neither does the Sixth.
21 The -- what the Sixth says is, before you try
22 anything like that, you've either got to have his
23 counsel present or his counsel permission or his
24 waiver of it. What's the difference?

25 MR. WAXMAN: It -- the difference is

1 what's being protected. What's being protected in
2 the Fifth is coercion. What's being protected in the
3 Sixth in this instance is precisely what --

4 QUESTION: Well, Mr. Waxman, isn't it also
5 true that in one case there was an indictment, in the
6 other there wasn't?

7 MR. WAXMAN: Well, yes. And what the
8 Sixth Amendment protects in terms, Justice Souter, is
9 that in all criminal prosecutions, the accused shall
10 enjoy the right to the assistance of counsel.

11 QUESTION: And -- and recognize he's got
12 that right because there was the indictment. And in
13 the Fifth Amendment case, the Miranda case, we
14 recognized that he's got that right, because this
15 Court has said that's the only way you're going to
16 make the Fifth Amendment work. So we start with the
17 assumption that he's got the right, and that in fact
18 the elicitation or statements that produce his
19 statement are -- are -- are improper. His statement
20 is inadmissible unless there's a waiver of the right
21 to the presence of counsel at that time.

22 MR. WAXMAN: Absolutely. And that gets us
23 right to Elstad, and the line that this Court drew in
24 Elstad at the very outset of its opinion, which is
25 that the consequences of an interrogation in

1 violation of Miranda differ importantly from the
2 consequences of a violation of the Constitution
3 itself, that is, primary illegality that goes
4 directly, without prophylaxis, to what the
5 Constitution proscribes. And this Court said over
6 and over and over again in *Elstad* that we will not
7 apply a derivative evidence rule where the violation
8 is only the former, but we will apply it in the
9 latter.

10 And that is the key distinction in this
11 case. The distinction is not that the statements
12 that they elicited from Mr. Fellers at his home
13 didn't also violate Miranda, if he was in custody and
14 the court found that he was, they did.

15 QUESTION: But most of our Miranda cases,
16 we recognize that the -- the police nationwide
17 understand the dynamics of Miranda. I have no
18 empirical basis, and apparently you don't know
19 either. My assumption is most police officers would
20 be very surprised if there's a difference between
21 Fifth and Sixth --

22 MR. WAXMAN: But --

23 QUESTION: -- their Fifth and Sixth
24 Amendment obligations in -- in this -- in these
25 circumstances.

1 MR. WAXMAN: But Justice Kennedy, I submit
2 to you that it doesn't matter as a matter of
3 constitutional prophylaxis. It may very well -- what
4 the police officers know is, they knew they had to
5 give him his Miranda warnings there. That we can be
6 sure of. And they also knew that there would be
7 consequences for not doing it, and this is not just
8 the police. If it -- if it please the Court, this is
9 the prosecution. Once there is an indictment, the
10 police are not acting on their own. The police are
11 part of the government prosecution, and if police
12 don't know that, and are trying to game the system
13 the way we heard it yesterday, it's the burden of the
14 prosecution -- the prosecution and the Government to
15 make sure that they do understand that.

16 What we're talking about here is the
17 preservation of -- as this Court has said it --
18 equality -- equality of each side once the Government
19 unilaterally define -- changes its posture with
20 respect to someone so that that person is accused,
21 and when it does that, it has to make -- it has to
22 take steps to avoid interfering with the ability of
23 the defendant at all critical stages and all
24 confrontations to proceed based on ignorance or
25 misapprehension of his rights or the legal

1 consequences.

2 I realize this sounds like --

3 QUESTION: Mr. Waxman, can I -- Mr.
4 Waxman, can I just clarify that we do have the
5 threshold question in this case, right? Because as
6 it stands in the Eighth Circuit, you don't even have
7 a foot in the door because there was no
8 interrogation, it was only -- so we have to overturn
9 the Eighth Circuit on that point before we get to
10 what you're now talking about.

11 MR. WAXMAN: Yes, Your Honor. Now, the --
12 the Eighth Circuit was incorrect, because it applied
13 the wrong standard. It asked whether there was
14 interrogation, when this Court made clear in Rhode
15 Island v. Innis that that is not the test under the
16 Sixth Amendment for good reasons, and in any event,
17 this was the, quote, functional equivalent of
18 interrogation. I mean --

19 QUESTION: Well, because of the Eighth
20 Circuit's position on the original statements, it
21 really didn't address the subsequent jailhouse
22 statements in any proper fashion, did it?

23 MR. WAXMAN: No. It -- it said -- what
24 the Eighth Circuit said is, look, we don't think that
25 there was a primary illegality, and therefore, we

1 don't have to discuss --

2 QUESTION: Right.

3 MR. WAXMAN: -- what the fruits
4 consequences are.

5 QUESTION: So I suppose -- if we were to
6 agree with you on the first statements and conclude
7 they were deliberately elicited, we'd have to remand,
8 I suppose --

9 MR. WAXMAN: I don't think so, Your Honor.

10 QUESTION: -- on the second question.

11 MR. WAXMAN: Because the question
12 presented in the petition, the second question
13 presented in the petition is, okay, assuming that
14 there was a violation of the Sixth Amendment in the
15 first interrogation, does the invocation, the mere
16 invocation of Miranda warnings, cleanse that taint?

17 QUESTION: No, it wasn't that --

18 QUESTION: Well, except the Eighth Circuit
19 didn't address that second question.

20 QUESTION: Right.

21 MR. WAXMAN: That's correct.

22 QUESTION: Well, would you like to say
23 something about it --

24 MR. WAXMAN: I would.

25 QUESTION: -- because I -- in looking at

1 it, I want -- would like you to address the
2 particular argument. First, the questioning at the
3 house was about whether he'd ever participated in
4 taking drugs with these people. The relevant
5 question was whether he distributed drugs at the
6 station. They did ask him if he wanted a lawyer. He
7 did consciously waive it. And therefore, in fact,
8 since this case is about a right to a lawyer, maybe
9 if he'd had a lawyer it would have made a difference,
10 but it's hard to see how the decision not to have the
11 lawyer flowed from the first.

12 MR. WAXMAN: Well --

13 QUESTION: So they're different subject
14 matters. Time passes and it's pretty attenuated to
15 say that that first violation led him to the second.
16 All right. Those are the arguments, et cetera.

17 MR. WAXMAN: Okay.

18 QUESTION: What do you say?

19 MR. WAXMAN: I'll -- I'll answer Justice
20 O'Connor's question first and then your question.
21 Justice O'Connor, the -- the -- the point here is
22 that this Court has uniformly held that where there
23 is conduct that constitutes primary illegality in
24 violation of the Fourth, Fifth, or Sixth Amendments,
25 not just a prophylactic rule, but the constitutional

1 requirement itself, the remedy is, you apply the
2 derivative evidence rule, which puts the burden on
3 the Government to prove that the taint has
4 sufficiently attenuated.

5 QUESTION: But certainly the -- the -- the
6 defendant can waive his right to counsel later on,
7 and he did.

8 MR. WAXMAN: He absolutely can. And our
9 case doesn't --

10 QUESTION: And he did.

11 MR. WAXMAN: He --

12 QUESTION: Do you think it's tainted
13 simply because if we find a violation originally?

14 MR. WAXMAN: Our -- our case, Your Honor,
15 doesn't depend on any argument or showing that the
16 second statement was either involuntary or that the
17 waiver of the right to counsel was not knowing and
18 intelligent. Our submission is that the second
19 statement is the fruit of the poisonous tree, just as
20 if it were a piece of inanimate evidence. There's
21 nothing wrong if somebody said -- with what the -- if
22 police going and finding the body in the Nix case,
23 the Christian burial case, but it's tainted because
24 they got the -- that information derived from a
25 violation of the Sixth Amendment. I had not up here

1 --

2 QUESTION: But he can certainly waive his
3 Sixth Amendment right later. I just don't understand
4 why what you say necessarily follows. We've never
5 held that squarely, have we?

6 MR. WAXMAN: Well, you -- you have never
7 held in a Sixth Amendment --

8 QUESTION: No.

9 MR. WAXMAN: You've never held the -- the
10 precise question that's presented here for sure. But
11 you have held that where there is conduct that
12 violates the Sixth Amendment, this is Nix and Wade,
13 the fruits of that conduct, regardless of what
14 happens thereafter, are excludable as fruit of the
15 poisonous tree, unless the Government shoulders its
16 taint-attenuation burden.

17 And you have also held in a variety of
18 cases that, starting with Wong Sun, that where the
19 fruit is testimonial evidence, it too has to be
20 excluded with the understanding that the administer
21 -- the intervening administration of Miranda warnings
22 are potent evidence, but they are not sufficient in
23 and of themselves to establish taint attenuation.
24 You said it in Brown. You said it last term in Kaupp
25 v. Texas. You've said it in Dunaway and any number

1 of other cases.

2 QUESTION: How is the second statement the
3 fruit of the first?

4 MR. WAXMAN: The first statement in the
5 first -- I mean, as a -- that -- this is a sort of a
6 common sense, practical analysis, but in the first
7 statement he was -- he acknowledged that he had used
8 methamphetamines and he had associated with the four
9 individuals that the police officer named. And you,
10 Justice Breyer, the indictment was conspiracy to
11 possess methamphetamines with intent to distribute
12 and to distribute. He made very inculpatory
13 statements.

14 Thirty minutes later, he executes a
15 Miranda warning -- waiver -- in the station house,
16 and he is asked, okay, tell us more about this
17 possession and tell us person by person about your
18 association with those four people. They then go on
19 and ask more questions about other people, but in
20 this case, the link between the two is as direct as
21 one can possibly imagine. I mean, this Court has
22 established a -- has long recognized a presumption
23 that where the -- when the Government acquires
24 evidence in violation of the Constitution, any
25 substantially similar evidence obtained by the police

1 subsequent to that derives from it unless the
2 Government can prove it doesn't. That was waived.

3 QUESTION: I can under -- I can understand
4 the position, although I'm not entirely persuaded by
5 it, that where -- when you are violate -- have
6 violated the Fifth Amendment and gotten a confession
7 that's already on the table, the second confession is
8 sort of the fruit of that, because the person thinks,
9 what the heck, I've already confessed, I may as well
10 -- that's the argument that it's the fruit.

11 MR. WAXMAN: The taint --

12 QUESTION: But I don't -- but I don't see
13 how the waiver of -- of counsel the second time is
14 the -- is the fruit of the improper approach the
15 first time. I mean, I -- I don't see somebody
16 saying, what the heck, I waived counsel the first
17 time, I may as well waive it the second.

18 MR. WAXMAN: Your Honor, the taint --

19 QUESTION: That doesn't follow the way --
20 the way confession does.

21 MR. WAXMAN: The taint, which this Court
22 in Elstad, in part IIa of its opinion in Elstad, said
23 was insufficient -- IIb -- was insufficient to prove
24 involuntariness, is in fact what demonstrates that
25 there is fruit of the poisonous tree here in the

1 link, and that is the accepted, common sense
2 proposition that an uncounseled accused, from whom
3 the Government deliberately elicits an unwarned,
4 incriminatory statement after it institutes
5 adversarial proceedings, is erroneously likely to
6 believe that there is little to be gained and much to
7 be lost from attempting to avoid further
8 incrimination.

9 QUESTION: Well, now, but is there -- is
10 there some authority for that specific proposition
11 that you just said?

12 MR. WAXMAN: This Court recognized it in
13 Bayer, in Brown, in --

14 QUESTION: Did it say -- I -- I'm -- you --
15 you just recited kind of a litany. Did the Court
16 recite that sort of a litany in Bayer?

17 MR. WAXMAN: Well, in Brown, for example,
18 it said that the second warrant statement, quote, was
19 clearly the result and fruit of the first. The fact
20 that Brown had made one statement believed by him to
21 be admissible bolstered the pressures for him to give
22 the second, or at least vitiated any incentive on his
23 part to avoid self-incrimination.

24 QUESTION: But that -- that's a -- that's
25 a first statement. That's -- you're -- you're

1 talking here about a waiver of counsel and you're
2 saying that's the same thing.

3 MR. WAXMAN: It is the same thing. In
4 that case they were talking about the second
5 statement, which was preceded by a waiver of counsel,
6 and making not the, Your Honor, not the legal
7 judgment that the second statement was there for
8 coerced or involuntary, but the practical -- what
9 this Court has described as the psychological and
10 practical disadvantage of having confessed a first
11 time can be regarded as a fruit of the first.

12 QUESTION: Yeah, but isn't the -- the --
13 isn't the -- correct me if I'm wrong. I think your
14 theory is that the waiver itself is likely to be a
15 fruit because a person is going to say, I've already
16 let the cat out of the bag, what do I need a lawyer
17 for. Is -- is --

18 MR. WAXMAN: Yes. That's -- as --

19 QUESTION: -- that your position?

20 MR. WAXMAN: -- as -- as Justice Harlan
21 stated in his concurrence in Darwin, which is only a
22 concurrence, but I think is sort of the --

23 QUESTION: Well, but that -- that's -- the
24 cat out of the bag is what we rejected in Elstad.

25 MR. WAXMAN: You rejected it, Your Honor,

1 as evidence or as constituting or -- or eliciting a
2 presumption of involuntariness. But you did it only
3 after -- in part IIa of your opinion in Elstad, you
4 said, derivative evidence rule doesn't apply. Fruits
5 are not going to be excluded from Elstad -- from a
6 Miranda violation. Now, the Court said in part IIb,
7 now we have to deal with the contention that he says
8 it's involuntary, and his only evidence that it's
9 involuntary is that it was the cat out of the bag and
10 there was this psychological compulsion.

11 That's too attenuated and hypothetical to
12 constitute a presumption of compulsion, but it is
13 precisely what this Court has recognized in Brown and
14 Dunaway and Bayer and Taylor and Harrison as being a
15 psychological fact --

16 QUESTION: And that should make the case
17 -- that case that we heard yesterday easier than this
18 one if that's the standard, because there, the first
19 unwarned set of questions was much more intense, much
20 more detailed than in this case.

21 MR. WAXMAN: Right. And the -- the only
22 burden in the -- in the case yesterday that I don't
23 have is that the primary illegality was a violation
24 of Miranda, and not of the Fifth Amendment
25 prohibition against coerced confessions itself.

1 Thank you.

2 QUESTION: Thank you, Mr. Waxman.

3 Mr. Dreeben, we'll hear from you.

4 ORAL ARGUMENT OF MICHAEL R. DREEBEN

5 ON BEHALF OF THE RESPONDENT

6 MR. DREEBEN: Mr. Chief Justice, and may
7 it please the Court:

8 On the central legal issue in this case,
9 the critical fact is that, at the jailhouse, after
10 petitioner was transported from his home, petitioner
11 received a full set of Miranda warnings, which
12 apprised him of his right to counsel, and knowingly,
13 voluntarily, and intelligently waived his right to
14 counsel.

15 QUESTION: Did the Eighth Circuit ever
16 decide whether there was a knowing and voluntary
17 waiver at the jailhouse?

18 MR. DREEBEN: Yes. I believe that the
19 Eighth Circuit did, Justice O'Connor, because the
20 Eighth Circuit applied Oregon v. Elstad to reject
21 what appears to be a Miranda-style argument that
22 petitioner made in addition to his Sixth Amendment
23 argument.

24 QUESTION: I thought that perhaps since
25 they didn't think the first statement posed a problem

1 that they never really got to the crux of the
2 jailhouse inquiry.

3 MR. DREEBEN: Well, I -- I think in -- in
4 part, Justice O'Connor, your reading of the opinion
5 is correct. The court did say that under Patterson,
6 the Sixth Amendment argument that petitioner is
7 making in this Court doesn't get out of the starting
8 gate, because there was no interrogation, it used the
9 word interrogation. There was an issue about whether
10 interrogation is equivalent to deliberate
11 elicitation, and I'll try to address that.

12 But before the court got to the Sixth
13 Amendment question, it addressed on pages 121 and 122
14 of the joint appendix the argument based on Elstad,
15 and the argument that the petitioner made was that
16 the statements made at the jailhouse should be
17 suppressed -- and this is on page 121 of the joint
18 appendix -- because the primary taint of the
19 improperly elicited statements made at his home was
20 not removed by the recitation of his Miranda rights
21 at the jail.

22 And then the court went on to discuss
23 Oregon v. Elstad in detail and rejected that holding,
24 that argument. And the way that I interpret that
25 passage is that the court affirmed the district

1 court's explicit finding of a knowing, voluntary, and
2 intelligent waiver, and applied Elstad to reject that
3 claim.

4 QUESTION: Just so I understand what the
5 Sixth Amendment rule is, if the Sixth Amendment
6 prohibits the state from eliciting statements when
7 the defend -- when proceedings have begun, outside
8 presence of counsel, is it wrong for them to give the
9 Miranda warning and if he's then silent, then go
10 ahead and say, now you've had your Miranda warning,
11 would you like to talk to us? Is that consistent
12 with the Sixth Amendment rules that we impose? That
13 is to say, can you elicit the statement after you've
14 given the waiver, consistently with the Sixth
15 Amendment right?

16 MR. DREEBEN: Yes. Patterson v. Illinois
17 specifically addressed the question of what does it
18 take for officers to obtain a waiver of counsel. The
19 only point where I would disagree, Justice Kennedy,
20 with your summary is that presence of counsel is not
21 required. The defendant has the right to choose
22 whether to have or to waive counsel.

23 And in Patterson, the Court held that the
24 Miranda warnings conveyed to a suspect who has been
25 indicted all of the information needed to make a

1 knowing and a voluntary and intelligent waiver of
2 counsel in custodial interrogation. That's what
3 petitioner got.

4 QUESTION: And they can attempt to elicit
5 that waiver consistently with the Sixth Amendment?

6 MR. DREEBEN: That's correct. They can
7 approach the defendant, apprise him of his rights,
8 and if the defendant then makes a knowing and
9 intelligent waiver of his rights --

10 QUESTION: No, that wasn't my question.
11 Can they -- can they advise him of those rights, he's
12 silent, and then try to elicit the statement? Say,
13 now we've apprised you of your rights and we want you
14 to talk to us. Is that consistent with the Sixth
15 Amendment?

16 MR. DREEBEN: I think so, if that's
17 construed as seeking a waiver of his right to
18 counsel. Of course, there has to be a finding that
19 there was in fact a waiver of the right to counsel.
20 The police officers can't simply read Miranda
21 warnings, provide no interruption whatsoever to make
22 sure that the defendant actually understood them, and
23 then barge right ahead.

24 Now, there are cases where the courts have
25 to decide whether there was an implicit waiver of

2 case like that, because the Miranda waiver form in
3 the record clearly indicates --

4 QUESTION: But, Mr. Dreeben, maybe I'm
5 wrong on the facts, but you're relying on the waiver
6 at the station house?

7 MR. DREEBEN: That's correct.

8 QUESTION: Do you agree that prior to that
9 waiver there had already been a violation of the
10 Sixth Amendment?

11 MR. DREEBEN: No, Justice Stevens. Our --

12 QUESTION: Well, then -- then you don't
13 need the waiver.

14 MR. DREEBEN: That -- that is true. I --
15 my submission is on the critical legal question.
16 Even if the Court finds against us on what I would
17 acknowledge is a close question about whether the
18 interaction at the home constituted deliberate
19 elicitation under the Sixth Amendment --

20 QUESTION: Assume it was deliberate
21 elicitation. Would you say it was a violation then?

22 MR. DREEBEN: No, I wouldn't say that it
23 was a -- an actual violation of the Sixth Amendment
24 at the time. The Sixth Amendment is a trial right.
25 The right to counsel has to be evaluated by reference

1 --

2 QUESTION: So even if there was no waiver
3 at the home, there -- there still was no violation of
4 the Constitution?

5 MR. DREEBEN: Not at that time. I -- I
6 want to make it perfectly clear, Justice Stevens --

7 QUESTION: It seems to me a rather extreme
8 position.

9 MR. DREEBEN: Well, I -- I don't think it
10 is extreme, because I'm going to follow it up with
11 what I think Your Honor is getting to, which is, can
12 the police simply go to an indicted suspect's home,
13 ignore his right to counsel, and engage in
14 questioning? And the answer is, generally no,
15 sometimes yes. The generally no is that once the
16 defendant has been indicted, the right to counsel
17 provides a -- a direction to the police not to
18 interfere with or circumvent the right to counsel.

19 QUESTION: Well, what is the sometimes
20 yes?

21 MR. DREEBEN: Sometimes yes is that, this
22 Court has recognized in its seminal case in this
23 area, the Massiah case, and then again in *Maine v.*
24 *Moulton*, that the Sixth Amendment, as it is
25 offense-specific, does not preclude the police from

1 investigating ongoing criminal activity that's not
2 charged.

3 QUESTION: Well, but this is -- this was
4 an offense-specific interrogation if it -- if was an
5 interrogation.

6 MR. DREEBEN: Yes. I -- and this case
7 doesn't involve the --

8 QUESTION: It seems to me there's an
9 analogy to civil cases here. Supposing you just had
10 a civil lawsuit pending against the person and after
11 it's filed, wouldn't there be an ethical obligation
12 on -- on behalf of the plaintiff not to send agents
13 out to question your adversary in the proceeding?

14 MR. DREEBEN: There may be a`ethical
15 obligation, even if the party is not known to be
16 represented at the time, although --

17 QUESTION: If he's known not to be
18 represented, that's my case.

19 MR. DREEBEN: He's known not be
20 represented, I think it's a closer question whether
21 -- whether the ethics rules would -- would bar the
22 approaching of the defendant. But this Court has
23 made --

24 QUESTION: Who -- who -- who would you go
25 to? If he hasn't appointed counsel and --

1 MR. DREEBEN: Well, Justice Stevens --

2 QUESTION: -- and he's filed the case --
3 he's filed the case pro se. Who would you approach
4 if you don't approach him?

5 MR. DREEBEN: I think, Justice Stevens --

6 QUESTION: Now, I'm assuming that the --
7 the Government is the plaintiff in the case. That --

8 MR. DREEBEN: The implication is that you
9 couldn't approach him. And this Court has clearly
10 made it evident that whatever the ethical rules might
11 be with respect to private conduct, the Sixth
12 Amendment rules are not governed by them. And the
13 Sixth Amendment rule, in this area at least, is
14 relatively clear. The police can approach an
15 unrepresented defendant, advise him of his rights,
16 and obtain a waiver of the right to counsel.

17 QUESTION: Well, can the police approach a
18 person and deliberately elicit statements without
19 advising him of his right to counsel after
20 indictment?

21 MR. DREEBEN: Not on the charged offense,
22 Justice O'Connor, and have the information admitted
23 at trial. The -- the threshold question --

24 QUESTION: Well, have we looked to whether
25 the statement was deliberately elicited? Has that

1 been our understanding of what we'd look to?

2 MR. DREEBEN: That -- that has been the
3 way that this Court has formulated the test, and I
4 would suggest that if --

5 QUESTION: And so should we apply that
6 test here to those early statements?

7 MR. DREEBEN: Yes, but I think the Court
8 should clearly reformulate it to make it in the
9 context of overt interrogation by the police, known
10 police officers, to be an objective test. The
11 deliberate elicitation standard, as so phrased, gives
12 rise to some confusion, because it does suggest that
13 there's a subjective component to it, where
14 deliberate elicitation does have a different
15 application than interrogation for purposes of
16 Miranda with respect to undercover agents. The Court
17 has made clear that once a suspect is indicted, the
18 police cannot use an undercover agent, not known or
19 identified as such to the defendant, to circumvent
20 his right to counsel. And in that respect,
21 deliberate elicitation is broader.

22 But in footnote 12 of *Maine v. Moulton*
23 where the Court was discussing deliberate elicitation
24 in some detail, the Court made clear that intent is
25 hard to prove, and it's really not the main issue

1 here anyway. What we should be interested in is
2 whether the Government must have known that its
3 conduct would be likely to elicit incriminating
4 statements, and that is essentially the same as the
5 Rhode Island v. Innis standard for interrogation. In
6 fact, it's a little bit more onerous for the
7 defendant, because it says, must have known, and the
8 Rhode Island v. Innis standard is should have known.

9 In any event, the Government submits that
10 the Court should make it clearer that when you're
11 dealing with identified police officers interacting
12 with suspects post-indictment, the Rhode Island v.
13 Innis standard, the objective test should be the
14 definition of deliberate elicitation. Then the
15 question becomes, was there deliberate elicitation on
16 the record in this case?

17 What happened is, the officers arrived at
18 petitioner's home. The officers knew petitioner.
19 This was not somebody that they had never met before.
20 They'd met him on prior occasions. And they said in
21 one continuous statement, we're here to discuss your
22 methamphetamine activities, we have a warrant for
23 your arrest --

24 QUESTION: Didn't they say, we're here to
25 discuss with you?

1 MR. DREEBEN: Justice --

2 QUESTION: Wasn't it Bliemeister's
3 statement, I'm here to discuss with you?

4 MR. DREEBEN: Justice Souter, on three
5 occasions when Officer Bliemeister was asked to say
6 what he said in his own words, he said, we're here to
7 discuss your methamphetamine activities. On one
8 occasion, when defense counsel in cross-examination
9 reformulated what Officer Bliemeister said, and said,
10 didn't you say you're here to discuss with petitioner
11 his methamphetamine activities, Officer Bliemeister
12 answered yes. Both the magistrate judge and the
13 district court did not use the with you language in
14 describing what the officer said.

15 And to the extent that this case turns on
16 a rather subtle distinction in language, I think the
17 distinction is relevant, because what the officers
18 were essentially doing is introducing the topic of
19 what they were going to tell petitioner, namely, your
20 methamphetamine activities have landed you in
21 trouble, we're here to arrest you, we have an
22 indictment for your arrest. And then petitioner
23 began to speak primarily --

24 QUESTION: Telling -- telling is not
25 discussing. I mean, I don't see why the phrase, with

1 you, is essential when the only person in the room is
2 -- is -- is you --

3 (Laughter.)

4 QUESTION: -- and somebody comes in and
5 says, I'm here to discuss, you know, whatever. Who
6 else are you going to discuss it with then?

7 (Laughter.)

8 MR. DREEBEN: I don't think there was any
9 ambiguity about the object of the statements, but the
10 question of what the officers were intending to do is
11 somewhat informed by the way they phrased it.

12 QUESTION: No, but the -- the usual sense
13 of the word discuss is something that involves other
14 than -- something involving more than a monologue.
15 So I mean, I -- as Justice Scalia said, I -- it might
16 make it clearer if he had said with you each time,
17 but without the with you, discuss implies give and
18 take.

19 QUESTION: At -- at least if there's nobody
20 else in the room. I mean, if there's a crowd of
21 people and you say, I'm here to discuss something,
22 maybe you're going to discuss it with the other
23 people. That's fine, but -- but it -- this was
24 one-one-one.

25 MR. DREEBEN: I readily acknowledge that

1 this is a case that could be reasonably decided more
2 than one way, but I would submit that if you look at
3 what the officers did, the officers in the -- at his
4 home, basically informed him about the fact that he
5 was under arrest and indicted. He spoke
6 uninterrupted except by one completely irrelevant
7 question to the topic of the indictment, until the
8 officers interrupted him, cut him off, and said it's
9 time to go, John, you know. And John said, can I
10 please get some shoes on? And they accompanied him
11 downstairs, he got shoes, then they took him down to
12 the jailhouse. No questions about the topics that
13 were later discussed at the jailhouse.

14 QUESTION: Well, if we were to conclude
15 that there was a violation of the so-called
16 deliberate elicitation standard, modified or not,
17 then what, with regard to the subsequent conversation
18 of the jail, after the warnings had been given?

19 MR. DREEBEN: Then I think, Justice
20 O'Connor, that this Court should apply its rule in
21 Oregon v. Elstad that the knowing, voluntary, and
22 intelligent waiver of the right to counsel
23 constitutes an independent act of free will that
24 breaks any causal link that might otherwise have been
25 posited between the statements that were made in the

1 initial unwarned session --

2 QUESTION: And you think that that
3 determination has been made knowing and voluntariness
4 as to the jailhouse statement --

5 MR. DREEBEN: I --

6 QUESTION: -- by the court below.

7 MR. DREEBEN: Not only do I think that it
8 was made explicitly in the district court and
9 implicitly in the court of appeals, but I don't
10 believe that petitioner contests it. I don't believe
11 that petitioner's position is that the waiver of
12 rights was actually tainted. What I understand
13 petitioner's position to be is that there was a
14 violation of a primary constitutional norm at home
15 when -- when petitioner was interrogated or
16 statements were deliberately elicited. Accordingly
17 --

18 QUESTION: The fruits --

19 MR. DREEBEN: Exactly. The same fruits
20 rule ought to apply that applies under the Fourth
21 Amendment and then petitioner relies on Fourth
22 Amendment precedents, which the Government does not
23 think are -- are applicable here.

24 QUESTION: I - I think -- I think he would
25 say it is a fruit because it is not totally

1 voluntary, given the fact that he had already let the
2 cat out of the bag. I -- I -- I don't think -- I
3 don't think he would acknowledge that the second
4 waiver -- that the waiver of counsel in the second
5 interrogation was entirely free, given what had
6 preceded.

7 MR. DREEBEN: Well, Justice Scalia, I'll
8 have to let petitioner's briefs speak for what --

9 QUESTION: Well, we -- we've destroyed his
10 right of rebuttal, so --

11 (Laughter.)

12 QUESTION: And that's the question
13 basically, because I think that's an important
14 question and -- and the question is whether there is
15 a right to a lawyer, and when the Government violates
16 the right to the lawyer, like the Fourth Amendment or
17 any other amendment, they can't use a fruit. Now,
18 Oregon v. Elstad is talking about a right that isn't
19 complete until you fail to introduce the -- until you
20 use it as testimony at trial, and therefore Oregon v.
21 Elstad is a different, and considerably more lenient
22 test. I confess I always would have thought until
23 this moment that our Court cases said you apply the
24 fruits because the violation is complete.

25 Now, it seems to me in advocating the

1 second, you're advocating a considerable change, but
2 whether it's a change or not a change, I want to know
3 the reason for it.

4 MR. DREEBEN: There are two critical
5 reasons, Justice Breyer, why Oregon v. Elstad should
6 apply in this context. The first is that the right
7 that the defendant did not get, by hypothesis now, at
8 home, was the right to make an informed waiver of the
9 right to counsel. When the defendant got the Miranda
10 warnings at home, that fully cured any deficiency in
11 knowledge that the defendant previously had about his
12 right to counsel, and enabled him to make an act of
13 free will that broke any causal link between the
14 first statements and the second statements.

15 And the second crucial reason why Elstad
16 should apply here is Elstad is not simply limited to
17 reasoning that is only applicable in the context of
18 compulsion under the Fifth Amendment. It also
19 clearly and explicitly said, it's very speculative
20 and attenuated to posit that a defendant who spoke at
21 one time is therefore going to believe that the cat
22 is out of the bag and I should speak again, I don't
23 really have a choice.

24 QUESTION: Right. But as to the first, my
25 Constitution says you have a right to a lawyer, not

1 -- of course you can waive it, like anybody -- other
2 right. But that's quite different than the Fifth
3 Amendment right, which is a right not to testify
4 against yourself, which is in complete to a trial.

5 As to the second, of course, attenuation
6 is relevant. It's relevant under the tree -- fruits
7 doctrine. It's relevant under Elstad. So if you
8 prove attenuation, fine. So, given those two things,
9 why do we have to change the law here? Or is it a
10 change?

11 MR. DREEBEN: Well, I don't think it's a
12 change, Justice Breyer, because the Court has never
13 addressed the specific dynamic involved in this case
14 under the Sixth Amendment of a defendant who makes an
15 unwarned statement --

16 QUESTION: Well, the Nix v. Williams case
17 bears on it to some extent, doesn't it?

18 MR. DREEBEN: It does --

19 QUESTION: That was a Sixth Amendment
20 case.

21 MR. DREEBEN: Yes, Justice O'Connor, and I
22 -- I accept, although I think it's fair to say that
23 Nix did no more than assume that there would be a
24 fruits rule as to physical evidence.

25 QUESTION: Yeah. And the Court in Nix

1 made it pretty clear that we assumed there would be a
2 fruits suppression.

3 MR. DREEBEN: Correct. As to physical
4 evidence.

5 QUESTION: But applied some other reason
6 to let the body --

7 MR. DREEBEN: Well, the Court -- the Court
8 there relied on inevitable discovery.

9 QUESTION: Right.

10 MR. DREEBEN: Here, our basic position is
11 that the voluntary testimony of the defendant himself
12 is different from physical fruits or from the
13 situation involving a tainted line-up, which was
14 involved in Wade, and that the decision, made
15 voluntarily and intelligently by a defendant to waive
16 counsel, is a per se break in any causal chain that
17 would be positive.

18 And our second argument is that the Court
19 has already rejected in Elstad the idea that there is
20 a causal link between a defendant's letting a cat out
21 of the bag in the first statement and then being
22 confronted with the question whether to waive his
23 rights in the second.

24 QUESTION: Mr. Dreeben, do -- do I
25 understand correctly that essentially you are saying

1 that Mr. Waxman in wrong in bracketing the Sixth
2 Amendment with the Fourth Amendment, that it belongs
3 with the Fifth Amendment? And one, it seems to me,
4 large difference between the two of you is Mr. Waxman
5 describes the Sixth Amendment violation of -- as
6 occurring on the spot. You have said in your brief
7 it's just like the Fifth Amendment. It's sort of
8 inchoate until the Government seeks to introduce it
9 at a trial. Is that still your view, so that the --
10 the right to counsel isn't complete -- the violation
11 isn't complete until the Government makes an effort
12 to introduce it at trial?

13 MR. DREEBEN: It is. My view that the
14 violation is not complete until the evidence is
15 introduced at trial, but I think where I put the
16 Sixth Amendment is not numerically accurate, but it's
17 somewhere in between the Fourth and the Fifth
18 Amendment rules, in that there are circumstances in
19 which I believe that there is a fruits rule attached
20 to conduct that infringes a Sixth Amendment norm.
21 The right itself may not be a completed violation
22 until evidence that results from infringing a Sixth
23 Amendment norm is actually used against the
24 defendant. Adversarial fairness is the goal of the
25 Sixth Amendment. If it is not infringed, neither is

1 the Constitution.

2 QUESTION: Because if -- if the -- we
3 describe that right, that Sixth Amendment amendment
4 right as a right to counsel at every critical stage
5 in the criminal proceeding, then that sounds like
6 there's a critical stage and you haven't been told
7 and haven't waived your right to a lawyer, the
8 violation is complete.

9 MR. DREEBEN: No, I don't think so,
10 Justice Ginsburg. And one example that I think makes
11 the point very clear is this Court's ineffective
12 assistance of counsel cases. Those cases require not
13 only that a lawyer performs deficiently, below any
14 reasonable professional standard, but also that there
15 be an effect on the fairness of the trial in the form
16 of prejudice. It's a two-part standard. There is no
17 constitutional violation merely by interfering with
18 the right to counsel. Another case that makes that
19 point --

20 QUESTION: Well, there's a constitutional
21 deficiency. I mean, we're playing with words. What
22 we're saying in the counsel cases is, if we have to
23 go back and unring the bell, we want something more
24 than simply the deficiency. We want to know that
25 requiring a new trial or whatever is likely to make a

1 difference.

2 The question here is -- is asked, I think,
3 Justice Ginsburg's question is asked on a prospective
4 basis. And that is, at the time the -- the police
5 question without counsel, is that a violation of the
6 -- of the Sixth Amendment?

7 MR. DREEBEN: And my --

8 QUESTION: Your -- your answer a moment
9 ago was, the only violation of the Sixth Amendment
10 was the denial of the -- of the opportunity to waive.
11 But he's got to have an opportunity to waive
12 something, and I suppose that implies that he has, at
13 least on a prospective basis, a right to the presence
14 of counsel there if the police are going to question
15 him, absent a -- a waiver.

16 MR. DREEBEN: I -- I think that there's a
17 lot in your question, Justice Souter, but I -- I
18 think I basically agree with the thrust of it. He
19 does have the right to choose whether to have counsel
20 or not after he's been indicted when the police
21 approach him for interrogation. The question in this
22 case is, what do you do if that didn't happen? And
23 --

24 QUESTION: Of course, the -- the other way
25 to look at is upside down. I mean, if -- if you

1 concede that there's a Sixth Amendment violation
2 immediately, you're still free to argue that -- that
3 in -- in the Miranda case, there's also a Fifth
4 Amendment violation immediately. Now, you couldn't
5 do that with Elstad, but after Dickerson, you can
6 certainly argue that.

7 MR. DREEBEN: Well, as we discussed
8 yesterday, Justice Scalia --

9 QUESTION: Yes, I know.

10 MR. DREEBEN: I -- I believe that the
11 violation in a Miranda case consists precisely of the
12 admission of the defendant's statements in the
13 Government case in chief. The Fifth Amendment is an
14 evidentiary rule. That's what the nature of the
15 violation is. It's not a conduct-based rule.

16 QUESTION: Well, and that has a textual
17 support in the constitutional language itself.

18 MR. DREEBEN: That -- that's correct.

19 QUESTION: But you don't have quite the
20 same thing on the Sixth Amendment?

21 MR. DREEBEN: No, but I don't think that
22 it matters because we're conceding that the Court
23 engages in fruits analysis. Our primary position in
24 this case on the legal issue is that the defendant's
25 independent, untainted decision to waive counsel is a

1 act of --

2 QUESTION: But Mr. Dreeben, it's -- the
3 thought runs through my mind that if he were to waive
4 counsel in front of a judge in a trial setting, the
5 judge would ask him a lot of questions and be sure
6 the waiver was intelligent and voluntary and so
7 forth. And you're suggesting, at the time he's first
8 indicted when the police approach him, he doesn't
9 need any of that guidance as all. If he just answers
10 the question, that's sufficient.

11 MR. DREEBEN: Well, that -- that is --

12 QUESTION: It's a rather dramatic
13 difference in the kind of waiver of this very
14 important right.

15 MR. DREEBEN: True. But that's what the
16 Court held over Your Honor's dissent in Patterson v.
17 Illinois. The Court explicitly considered the issue
18 of what kind of a waiver is necessary, and the Court
19 held that the issuance of Miranda warnings provides
20 the defendant with all the information that he needs
21 to know.

22 QUESTION: But, of course, you didn't even
23 have the Miranda warning here --

24 MR. DREEBEN: No, but --

25 QUESTION: -- at the home.

1 MR. DREEBEN: And we're not claiming that
2 there was a waiver of the right to counsel. Our --
3 our claim for whatever favor it may meet with the
4 Court is that there was no deliberate elicitation of
5 statements. We're not claiming a waiver at the home.
6 We are unequivocally claiming a waiver at the
7 jailhouse.

8 QUESTION: Don't you think it is a rather
9 -- rather strange that the judges are as careful as
10 they are in a trial setting, whereas the police can
11 just do what they did here? Does that -- doesn't
12 trouble you?

13 MR. DREEBEN: No, I don't think it's
14 strange at all, because as the Court explained in
15 Patterson, the question of a waiver is a functional
16 question that turns on what the role of counsel might
17 be at a particular setting. Now, the role of counsel
18 at trial is considerably more complex in dealing with
19 evidentiary matters and legal claims than the role in
20 pre-trial interrogation.

21 QUESTION: Actually, in -- in a situation
22 like this, the whole outcome of the proceeding is
23 determined by what happened in his home.

24 MR. DREEBEN: Well, in this particular
25 case, and this is my third and final point, if the

1 Court should determine that the waiver of rights is
2 not a per se independent act that attenuates any
3 taint, on any record the Court should not find that
4 there is any taint that is unattenuated. The
5 violation at home, if there was any, was an extremely
6 mild violation. If the defendant let the cat out of
7 the bag, it was really at most one paw, not an entire
8 cat.

9 (Laughter.)

10 MR. DREEBEN: The -- the defendant barely
11 spoke at all about his activities relating to the
12 charges that were identified in the indictment. He
13 said that he had business and personal problems and
14 he was a methamphetamine user, and he rambled on for
15 a while until the police cut him off. At the station
16 house, he was asked specifically person by person
17 what his relationship was with the individual and
18 what the activities were, and of course, he gave more
19 elaborate information at that time, but -- and this
20 is critical too. It was not information that
21 admitted the charges in the indictment. This wasn't
22 a case where a defendant said, well, I've confessed
23 once, I might as well confess again now that I have
24 my Miranda warning. This was an individual who spoke
25 about his problems at his home, then he gets down to

1 the station house and he's essentially talking about
2 all the things that make him not liable, criminally
3 liable under the indictment.

4 It was an instance in which, I would
5 submit, the motive for the defendant to talk was not
6 that the cat was out of the bag, but that he was
7 hoping to minimize any suggestion of guilt and
8 persuade the officers that the indictment was not
9 properly founded.

10 And finally, of course, the officers never
11 exploited any prior statement and they did give him a
12 thorough, complete administration of Miranda
13 warnings, and under the circumstances of this case,
14 even if the Court were to apply a taint analysis
15 sometimes, or to assume that a taint analysis
16 applies, the facts of this case demonstrate enough
17 attenuation so that the jailhouse statements should
18 be admitted, while the statements at home were
19 suppressed.

20 QUESTION: Are -- are you arguing that the
21 fruits rule does not apply, or are you arguing that
22 this is not the fruits?

23 MR. DREEBEN: I am arguing that a fruits
24 rule applies under the Sixth Amendment. I'm
25 conceding that by virtue of the Court's assumption in

1 Nix v. Williams and its holding in United States v.
2 Wade. But the case of a defendant's own voluntary
3 statements should be treated as a special case under
4 a fruits rule in which there is per se attenuation in
5 the form of an independent act of free will that
6 intervenes between the violation and the ensuing
7 waiver. And that comes about when the defendant
8 receives full and complete information about his
9 rights. There is no suggestion of involuntariness in
10 his waiver and he decides to speak.

11 The ultimate test in attenuation law is
12 was there an independent act of free will when you're
13 speaking of a confession that breaks the causal link
14 to the prior illegality. Here, we submit as a matter
15 of law under Oregon v. Elstad's reasoning, there was.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Dreeben. The case is submitted.

19 (Whereupon, at 11:07 a.m., the case in the
20 above-entitled matter was submitted.)

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