No. 02-6320

IN THE

Supreme Court of the United States

JOHN J. FELLERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether police officers violated petitioner's Sixth Amendment right to assistance of counsel when, subsequent to petitioner's indictment, the officers deliberately elicited an inculpatory statement from him outside the presence of counsel.

2. Whether a second, related statement given by petitioner in response to police questioning one-half hour after his initial statement, without any intervening consultation with counsel but after the administration of warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should have been suppressed as fruit of the earlier Sixth Amendment violation.

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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), the order of the magistrate judge (J.A. 108-109), and the transcript of the oral ruling of the magistrate judge on the motion to suppress (J.A. 101-106) are not reported.

JURISDICTION

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

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

1. On February 23, 2000, a federal grand jury in the District of Nebraska returned an indictment charging petitioner with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 846. The conspiracy was alleged to have lasted from approximately July 1998 to June 1999. J.A. 7.

The day following the indictment, Deputy Sheriff Jeff Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael Garnett of the Lincoln Police Department went to petitioner's home in Lincoln, Nebraska to place him under arrest. J.A. 16. After identifying themselves as police officers, Bliemeister and Garnett entered petitioner's home. *Id.* at 16-17. Bliemeister informed petitioner that the officers "were there to discuss his involvement regarding the distribution of methamphetamine," that the grand jury had returned an indictment charging petitioner with conspiracy to distribute methamphetamine, and that the indictment concerned petitioner's association with Kathi Kuenning, Patrick Sardeson, Thomas Geffs, and Mark Farfalla. *Id.* at 18; *see also id.* at 45, 55, 61, 71, 86. As Bliemeister later admitted, he specifically told petitioner that the officers "wanted to discuss his involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with" those four persons. *Id.* at 47; *see also id.* at 46-47. Neither Bliemeister nor Garnett administered the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at petitioner's home. J.A. 46, 85. Petitioner responded to Bliemeister's invitation, telling the officers that he would talk to them. *Id.* at 86. Petitioner then acknowledged that he had used methamphetamine during a time in his life when he had associated with the four named persons. *Id.* at 18-21,

47-48, 73, 105. The police officers' conversation with petitioner lasted approximately fifteen minutes. *Id.* at 49, 87-88.

Bliemeister and Garnett then transported petitioner directly to the Lancaster County jail, a trip that lasted approximately twenty minutes, and placed petitioner in an interrogation room. J.A. 21, 23-24, 49-50. After Bliemeister administered the *Miranda* warnings, petitioner agreed to speak with the officers. *Id.* at 24-27. Bliemeister then questioned petitioner about the same four persons that Bliemeister had brought up during the immediately preceding encounter at petitioner's home—Kuenning, Sardeson, Geffs, and Farfalla. *Id.* at 29-34, 51-52, 89.

Armed with petitioner's prior admissions that he had associated with those persons, Bliemeister began by questioning petitioner about "his involvement with an individual by the name of Thomas Geffs." *Id.* at 29. Having already admitted, in the previous encounter at his home, that he had associated with Geffs, petitioner again acknowledged knowing Geffs. *Id.* In response to additional questioning by Bliemeister, however, petitioner denied that he ever had obtained methamphetamine from Geffs. *Id.* Bliemeister then moved his questioning to Sardeson, Kuenning, and Farfalla, similarly addressing petitioner's relationship with each person one at a time. *Id.* at 29-34. In each case, the officer appears to have asked petitioner whether he knew the person in question, even though petitioner had admitted his association with them just a half-hour earlier. *Id.* at 29-34, 51-52, 89. After reestablishing the fact of petitioner's relationships with Sardeson, Kuenning, and Farfalla, Bliemeister asked additional questions concerning various purported details of petitioner's relationships with each. Petitioner confessed that he had obtained methamphetamine from Kuenning and Sardeson, loaned money to Kuenning, shared methamphetamine with Sardeson, and used methamphetamine with Farfalla. *Id.* at 29-34, 37. Petitioner denied, however, selling methamphetamine. *Id.* at 37-38. Bliemeister additionally asked petitioner

about his involvement with a few persons not broached previously at petitioner's home. *Id.* at 34-35, 37-38, 52.

Finally, Detective Garnett asked petitioner questions about methamphetamine use. J.A. 35-36, 79. Petitioner repeated his earlier admission, made during the encounter at his home, that he had used methamphetamine. In response to further questioning, petitioner also discussed various details of that use. *Id.* at 33, 35-36. At the conclusion of the interview, Deputy Bliemeister reminded petitioner of the charges in the indictment, informed petitioner that he would be arraigned on those charges, and explained that petitioner would either have to pay for counsel or have counsel appointed for him. *Id.* at 38-39.

2. Before trial, petitioner moved to suppress the statements he had made both at his home and at the Lancaster County jail under this Court's decision in *Miranda*. The magistrate judge held a hearing at which both Bliemeister and Garnett testified. Based on that testimony, the magistrate judge found that Bliemeister's statements to petitioner during the encounter at his home were "designed to elicit a response." J.A. 103.

> [I]t is telling, I think, that the first statement made was, we need to talk with you—or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a response.
>
> In addition, it was . . . unnecessary for him to say what the indictment was all about[,] specifically mentioning individuals . . . who incidentally are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

Id. at 103-104. The magistrate also found that only a half-hour had elapsed between the time the officers and petitioner left petitioner's home and the time the officers commenced interrogation at the jailhouse. *Id.* at 104. Based on his findings, the magistrate judge held that, notwithstanding the administration of *Miranda* warnings at the jail, petitioner's jailhouse statement was tainted by the prior, unlawful encounter at his home. *Id.* at 104-105. The magistrate judge accordingly recommended suppression of petitioner's statement at his home as well as his subsequent jailhouse statement to the extent that the latter concerned the same persons discussed previously at petitioner's home (*e.g.*, Kuenning, Sardeson, Geffs, and Farfalla). *Id.* at 104-106.

3. The district court accepted the recommendation to suppress petitioner's statement at his home, and adopted the magistrate judge's findings as they related to that statement. J.A. 111, 115. The district court rejected, however, the magistrate judge's further recommendation that petitioner's jailhouse statement also be suppressed. *Id.* According to the district court, petitioner "made a knowing, intelligent, and voluntary waiver of his *Miranda* rights" before making his jailhouse statement. *Id.* at 115. Based on that fact, but without making any additional findings regarding the extent of any attenuation of the taint from petitioner's first statement, the district court found the jailhouse statement admissible under *Oregon* v. *Elstad*, 470 U.S. 298 (1985). J.A. 114-115. Bliemeister later testified at petitioner's trial, recounting petitioner's jailhouse statement for the jury, and petitioner was convicted of conspiracy to distribute and to possess with intent to distribute methamphetamine.

4. On appeal, petitioner contended that the elicitation by Deputy Bliemeister and Detective Garnett of the inculpatory statement at his home violated the Sixth Amendment, and that his jailhouse statement also should have been suppressed as fruit of that constitutional violation. Petitioner pointed out that, when the officers

confronted him at his home and in the absence of counsel, they well knew that a federal grand jury had already returned an indictment against him. Petitioner further argued that *Elstad* was inapplicable because his case involved a Sixth Amendment violation, and not simply a *Miranda* violation. Pet. C.A. Br. 27, 36-42.

The court of appeals affirmed. The court rejected petitioner's Sixth Amendment claim in a single sentence, holding simply that "the officers did not interrogate Fellers at his home." J.A. 123. The court of appeals further held that because petitioner made his jailhouse statement after having received *Miranda* warnings, the statement was admissible under *Elstad*. J.A. 121-123. Judge Riley concurred, disagreeing with the majority in one respect. In his view, the police officers violated petitioner's Sixth Amendment right to counsel when they confronted petitioner in his home: "Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine." *Id.* at 127. Judge Riley agreed, however, that petitioner's subsequent jailhouse statement was properly admitted because, in his view, violation of petitioner's Sixth Amendment right to counsel should not take the case outside the rationale of *Elstad*. *Id.* at 128.

SUMMARY OF ARGUMENT

I. The police officers violated petitioner's Sixth Amendment right to assistance of counsel by deliberately eliciting a post-indictment, inculpatory statement from him at his home, in the absence of counsel. The court of appeals rejected petitioner's Sixth Amendment argument in a single sentence, holding that the police officers did not "interrogate" petitioner at his home. That holding not only is based on an incorrect legal standard, but also cannot be squared with the factual record. A government officer violates the Sixth Amendment by deliberately eliciting post-indictment incriminating statements from an accused in the absence of counsel. *See, e.g.*, *Massiah* v. *United States*, 377

U.S. 201, 206 (1964). The officer need not affirmatively question a defendant to violate this Sixth Amendment principle. *See, e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977). Specifically, this Court has held that the Sixth Amendment bars government officers from employing tactics they know likely will induce post-indictment incriminating statements from an accused outside the presence of counsel. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 174 (1985); *United States* v. *Henry*, 447 U.S. 264, 274 (1980). Viewed through the correct legal prism, the officers' conduct at petitioner's home can only be characterized as deliberate elicitation within the meaning of this Court's Sixth Amendment jurisprudence.

II. Because the officers plainly violated petitioner's Sixth Amendment right to assistance of counsel by deliberately eliciting the first inculpatory statement, petitioner's subsequent jailhouse statement also should have been suppressed, as fruit of the prior violation. Evidence derived from a constitutional violation is subject to exclusion. Here, the ability of the police officers to obtain petitioner's jailhouse statement derived from their prior elicitation of a similar and related statement at petitioner's home, in violation of petitioner's Sixth Amendment right to assistance of counsel. This Court has long recognized that a principal reason why a suspect who has made an initial inculpatory statement will make a second such statement is that he believes he has little to lose through further self-incrimination. *See, e.g.*, *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). While the decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), rejected any presumption of Fifth Amendment *compulsion* based on these psychological pressures, the Court has never questioned the real-world effect of an initial confession on a suspect's willingness to make a subsequent inculpatory statement.

The burden is therefore on the government to prove that it had an independent source for petitioner's inculpatory statement, that it inevitably would have obtained that statement absent the prior Sixth Amendment violation, or

that the taint of that violation had sufficiently attenuated to justify admission of petitioner's jailhouse statement. Because the government has never argued either of the first two exceptions, the admission of petitioner's jailhouse statement turns on a taint-attenuation inquiry. That analysis normally encompasses multiple factors—the temporal proximity of the constitutional violation to the discovery of the evidence in question, the presence or absence of meaningful intervening events, and the purpose and flagrancy of the official misconduct. *See, e.g.*, *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975). Where the derivative evidence in question is an inculpatory statement made by the defendant, courts also consider whether government officers administered the *Miranda* warnings, although the Court has emphasized that this factor cannot be determinative alone. *Id.*

The court of appeals did not examine the taint-attenuation factors. Rather, it held petitioner's jailhouse statement admissible solely on the basis of *Elstad*, where this Court held that the administration of *Miranda* warnings is ordinarily sufficient to render a second confession admissible after an initial confession has been obtained in violation of *Miranda*. *Elstad*, however, does not govern this case. First, *Elstad* was based on the fact that the "primary illegality" at issue—the failure to administer *Miranda* warnings—did not involve a violation of the Constitution. Here, the primary illegality *is* a violation of the Constitution, namely the Sixth Amendment. The Court has made clear, both in *Elstad* and in similar decisions in the Fourth Amendment context, that when a constitutional violation is at issue, evidence derived from that violation is presumptively inadmissible. Second, *Elstad* concerned the Self-Incrimination Clause of the Fifth Amendment. The administration of *Miranda* warnings addresses the central concern of that Clause—that a defendant not be forced to incriminate himself through the introduction of his own compelled, incriminatory statements at trial. The Sixth Amendment, however, protects broader values of trial fairness and integrity of the adversarial system. The mere

provision of *Miranda* warnings *after* the violation of a defendant's Sixth Amendment right to assistance of counsel is insufficient to protect these values.

A proper consideration of all relevant factors here demonstrates that the taint of the initial Sixth Amendment violation had not sufficiently attenuated when petitioner made his jailhouse statement. That statement followed the prior, unconstitutionally obtained statement by only a half-hour, there was no meaningful intervening event, the officers' elicitation of the first statement was plainly unconstitutional, and petitioner never consulted with counsel before making his jailhouse statement. The government therefore cannot, on this record, sustain its burden of proving the admissibility of petitioner's jailhouse statement. Were the mere administration of *Miranda* warnings permitted to serve as a cure-all in contexts like this one, a defendant's right to assistance of counsel in post-indictment encounters with the police would be seriously undermined.

ARGUMENT

I. POLICE OFFICERS VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL BY DELIBERATELY ELICITING A POST-INDICTMENT INCULPATORY STATEMENT FROM HIM AT HIS HOME, IN THE ABSENCE OF COUNSEL.

A. The Sixth Amendment Right To Assistance Of Counsel Applies To Post-Indictment Encounters Between Law Enforcement Officers And Defendants In Which Officers Attempt To Elicit An Inculpatory Statement.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." In the United States, criminal prosecutions take place in an adversarial system of justice in which the government is represented by a professional prosecutor. The Sixth Amendment's Counsel Clause

> embodies a realistic recognition of the obvious truth that the average defendant does not have the

> professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious.

Johnson v. *Zerbst*, 304 U.S. 458, 462-63 (1938). By guaranteeing to defendants the skill and knowledge of legal counsel, the Counsel Clause "minimize[s] the imbalance in the adversary system." *United States* v. *Ash*, 413 U.S. 300, 309 (1973). The Sixth Amendment's equalization of the positions of the state and defendant serves a role indisputably "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

The right of the criminal defendant to assistance of counsel extends beyond the formal trial itself to all critical stages of the adversarial process.

> [D]uring perhaps the most critical period of the proceedings against . . . defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to [aid of counsel] during that period as at the trial itself.

Powell v. *Alabama*, 287 U.S. 45, 57 (1932); *see also Moulton*, 474 U.S. at 170. It is well settled, therefore, that "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The "attachment" of the right to counsel upon the initiation of judicial criminal proceedings derives both from the text of the Sixth Amendment, *see, e.g.*, *Moore* v. *Illinois*, 434 U.S. 220, 227 (1977), and from its purpose to ensure a properly functioning adversarial system of criminal justice. Once the

state initiates judicial proceedings against a defendant, "the government has committed itself to prosecute, and only then . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks and citation omitted).

The Sixth Amendment guarantees to the defendant, in particular, "the right to rely on counsel as a 'medium' between him and the State," at critical pretrial confrontations with the government. *Moulton*, 474 U.S. at 176; *see also Michigan* v. *Harvey*, 494 U.S. 344, 353 (1990). This Court has interpreted that guarantee broadly, in recognition of the fact that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967); *see also Gouveia*, 467 U.S. at 189. Thus, for example, the Court held in *Wade* that a pretrial identification lineup constitutes a critical stage at which a defendant is entitled to counsel. *See* 388 U.S. at 236-37. The Sixth Amendment right to assistance of counsel at critical pretrial stages is important because often it guarantees "effective representation by counsel at the only stage when legal aid and advice would help [the accused]." *Id.* at 225 (internal quotation marks and citations omitted). "The presence of counsel at such critical confrontations," accordingly, "operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Id.* at 227.

Post-indictment, pretrial confrontations at which the government attempts to elicit inculpatory statements from the accused constitute critical pretrial stages for purposes of the Sixth Amendment. *See, e.g.*, *Michigan* v. *Jackson*, 475 U.S. 625, 629-30 (1986); *United States* v. *Henry*, 447 U.S. 264, 269-70 (1980). Thus, almost forty years ago, in *Massiah* v.

United States, 377 U.S. 201, 206 (1964), this Court held that, once a defendant has been indicted, the government may not deliberately elicit incriminating statements from the defendant in the absence of counsel. The Sixth Amendment prohibits the admission at trial of any statement obtained in this manner. *See id.* The Court has repeatedly reaffirmed the important Sixth Amendment principle articulated in *Massiah*. *See, e.g.*, *Kuhlmann* v. *Wilson*, 477 U.S. 436, 457 (1986) ("[O]nce a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents 'deliberately elicit' incriminating statements from him in the absence of his lawyer."); *Moulton*, 474 U.S. at 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."); *Henry*, 447 U.S. at 274; *Brewer*, 430 U.S. at 400-01.

B. The Police Officers In This Case Deliberately Elicited A Post-Indictment Inculpatory Statement From Petitioner Outside The Presence Of Counsel In Violation Of The Sixth Amendment.

Here, Deputy Bliemeister and Detective Garnett went to petitioner's home after the government had initiated formal adversarial proceedings against him through an indictment. During this encounter, the officers obtained an incriminating statement from petitioner in the absence of counsel. The officers did not advise petitioner of his right to assistance of counsel. The court of appeals nevertheless rejected petitioner's claim that the officers violated his rights under the Sixth Amendment, holding simply that "the officers did not *interrogate* Fellers at his home." J.A. 123 (emphasis added). That holding is erroneous.

As an initial matter, to the extent 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, the court erred as a matter of law. The proper inquiry under the Sixth Amend-

ment is "whether the Government . . . interfered with the right to counsel of the accused by '*deliberately eliciting*' incriminating statements." *Henry*, 447 U.S. at 272 (emphasis added); *see also Massiah*, 377 U.S. at 206. This Court has never held that only *affirmative questioning* of an accused will constitute such deliberate elicitation. Indeed, in *Brewer*, the police detective did not ask the defendant *any* questions. Rather, the detective made statements to the defendant regarding the need to locate the body of the murder victim, followed by the admonition, " 'I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.' " 430 U.S. at 393. Nevertheless, the Court found the case indistinguishable from *Massiah* in any meaningful way. "There can be no serious doubt . . . that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." *Id.* at 399.

Since *Brewer*, the Court has confirmed that the Sixth Amendment prohibition on deliberate elicitation of inculpatory statements in the absence of counsel extends beyond "interrogation" (or affirmative questioning) by government officers. In *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4 (1980), the Court questioned whether "the term 'interrogation' is even apt in the Sixth Amendment context." Later that same Term, in *Henry*, the Court squarely rejected the government's argument that the Sixth Amendment bars only affirmative interrogation of an accused outside the presence of counsel. *See* 447 U.S. at 271-72 & n.10; *see also Kuhlmann*, 477 U.S. at 458 (noting that in *Henry*, "the informant had not questioned the defendant, . . . [but] had 'stimulated' conversations with [him] in order to 'elicit' incriminating information"). The government renewed the affirmative-interrogation argument five years later in *Moulton* and the Court again emphatically rejected it. "[T]he Solicitor General suggests that . . . *Brewer* . . . modified *Massiah* to require affirmative interrogation by the Government. *That* argument, however, was expressly rejected

when the Solicitor General made it in *Henry*." *Moulton*, 474 U.S. at 175 n.11 (citations omitted).

The Court's decisions make clear that the government violates the Sixth Amendment whenever it "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Henry*, 447 U.S. at 274; *see also Moulton*, 474 U.S. at 174 (same). This principle derives logically from the values and interests the Sixth Amendment is designed to protect. When government agents confront an accused after the parties have become formal adversaries in the criminal justice system, the accused is entitled to look to counsel to protect his interests. Absent an express waiver, the deliberate elicitation of an inculpatory statement from an indicted defendant in the absence of counsel interferes with that defendant's right to assistance of counsel. The fact that an officer ends his sentences with a period, rather than a question mark, makes no difference for purposes of a Sixth Amendment analysis.

Applying the correct standard, there can be no doubt that petitioner's Sixth Amendment right to assistance of counsel was violated during the encounter at his home. By the time Bliemeister and Garnett went to petitioner's home, a federal grand jury already had returned an indictment charging him with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it. Bliemeister testified that he told petitioner he and his partner were there "to discuss" those charges. Specifically, Bliemeister admitted that he told petitioner the officers "wanted to discuss [petitioner's] involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs." J.A. 47. Garnett confirmed that

> Deputy Bliemeister told Mr. Fellers that there were some things that we needed to talk about and went on to explain to Mr. Fellers that an indictment charging Mr. Fellers with conspiracy to deliver

> methamphetamine had been returned by the Grand Jury. At that time, Deputy Bliemeister also listed off the names of some people—other people who were also involved in that indictment.

Id. at 71. Bliemeister's statements to petitioner surely constitute deliberate elicitation of post-indictment inculpatory statements. At a minimum, an invitation to an indicted defendant to discuss pending charges in the absence of counsel "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Henry*, 447 U.S. at 274.

Three of the five judges who have considered petitioner's case have agreed with this common-sense conclusion, finding that the officers engaged in conduct designed to elicit inculpatory statements from petitioner. The magistrate judge—the only judge to witness the live testimony of Bliemeister and Garnett at the hearing on the motion to suppress—found that Bliemeister's initial statements to petitioner could only have been "designed to elicit a response." J.A. 103. The district court apparently agreed, adopting the magistrate judge's findings with regard to the statement elicited from petitioner at his home. *Id.* at 111, 115. The concurring judge at the court of appeals also agreed, concluding that "[a]lthough the officers . . . did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine." *Id.* at 127.

The only two judges who apparently did not agree that the officers violated petitioner's Sixth Amendment right to assistance of counsel employed an incorrect legal standard. Moreover, they offered no reason for effectively setting aside the lower-court factual findings regarding the officers' conduct. The record is undisputed and clear, and it demonstrates that Bliemeister told petitioner that the officers were there to "discuss" his methamphetamine use and distribution. That statement—apart from its form—is indistinguishable from a question addressing the same subject

and certainly created a situation likely to induce an inculpatory statement from petitioner. This Court should find that the officers deliberately elicited inculpatory statements from petitioner in the absence of counsel and thereby violated his Sixth Amendment right to assistance of counsel.

II. PETITIONER'S JAILHOUSE STATEMENT SHOULD HAVE BEEN EXCLUDED FROM HIS TRIAL BECAUSE IT WAS FRUIT OF THE PRIOR SIXTH AMENDMENT VIOLATION.

A. The Derivative-Evidence Rule Requires Exclusion Of Incriminating Statements Derived From A Prior Sixth Amendment Violation.

Under the well-settled derivative-evidence rule (or "fruit of the poisonous tree" doctrine), the violation of a criminal defendant's constitutional rights demands exclusion at trial of more than just the evidence obtained directly through that violation. *All* evidence derived from the constitutional violation is subject to exclusion. *See, e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). Thus, when the government uses unconstitutionally acquired evidence to obtain additional evidence against a defendant, the derivative-evidence rule provides that *all* such evidence must be excluded from the defendant's trial. As this Court explained (with regard to a statutory violation) in *Nardone* v. *United States*, 308 U.S. 338 (1939), "[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." *Id.* at 340 (internal quotation marks omitted).

The Court originally articulated and developed the derivative-evidence rule in cases involving violations of the Fourth Amendment. *See, e.g.*, *Brown* v. *Illinois*, 422 U.S. 590, 604-05 (1975) (suppressing two inculpatory statements); *Wong Sun*, 371 U.S. at 484-88 (suppressing inculpatory

statement and physical evidence). Subsequent decisions have made clear, nonetheless, that the rule is fully applicable to fruits of Sixth Amendment violations as well. In *Wade*, for example, which involved a violation of the respondent's Sixth Amendment right to assistance of counsel at a pretrial identification lineup, the Court held that admissibility of the subsequent *courtroom* identification was governed by the *Wong Sun* exclusion rule. *See Wade*, 388 U.S. at 239-41. The Court explained that "[a] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." *Id.* at 240. Similarly, in *Nix* v. *Williams*, 467 U.S. 431 (1984), which involved a violation of the "deliberate elicitation" principle at issue in this case, the Court analyzed an evidence-exclusion question under the necessary assumption that the traditional *Wong Sun* derivative-evidence rule applies in the Sixth Amendment context. "[T]he 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment as well as of the Fifth Amendment." *Nix*, 467 U.S. at 442 (citing, *e.g.*, *Wade*, 388 U.S. 218).

Indeed, the holding of *Nix*—that there is an inevitable-discovery *exception* to the derivative-evidence rule in the context of Sixth Amendment *Massiah* violations—makes sense only if the derivative-evidence rule would otherwise apply in the absence of such an exception. At issue in *Nix* was whether evidence pertaining to the discovery and condition of a murder victim's body was properly admitted at the defendant's trial, given that the police had discovered the body after deliberately eliciting pertinent, incriminating statements from the defendant in the absence of counsel. *See* 467 U.S. at 434. The Court had held earlier in *Brewer* that the defendant's statements had to be excluded from trial because the government had deliberately elicited them in violation of his Sixth Amendment right to counsel. *See* 430 U.S. at 400-01. *Brewer* left open, however, whether the subsequently discovered evidence should also have been

excluded. *See id.* at 406 n.12. Seven years later, the Court held in *Nix* that the evidence regarding the victim's body was properly admitted because the government inevitably would have discovered it. *See* 467 U.S. at 448-50. The *Nix* decision was significant because the Court had not previously recognized an inevitable-discovery exception to the derivative-evidence rule. *See id.* at 440-41. But if the derivative-evidence rule were not applicable in the Sixth Amendment context, there would have been no need for the Court even to address whether any inevitable-discovery exception should have been recognized.[1]

In the Sixth Amendment context, moreover, the derivative-evidence rule rests on an additional justification not present in the Fourth Amendment context. In Fourth Amendment cases, the rule is based primarily on a deterrence rationale—the same rationale as the Fourth Amendment exclusionary rule itself. Both Fourth Amendment exclusionary rules are "calculated to prevent, not to repair. [Their] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Brown*, 422 U.S. at 599-600 (internal quotation marks and citation omitted); *see also United States* v. *Leon*, 468 U.S. 897, 906, 910-11 (1984). But, as the Court has explained, the subsequent use *at trial* of the fruits of a Fourth Amendment violation does not itself intrude upon any interests protected by that constitutional provision. *See Leon*, 468 U.S. at 906.

The derivative-evidence rule in the Sixth Amendment context is justified, at least in part, by the same deterrence rationale as in the Fourth Amendment context. The exclusion of post-indictment statements deliberately elicited

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[1] Since *Nix*, the Court also has recognized that the independent-source exception to the derivative-evidence rule applies in the Sixth Amendment context. *See Murray* v. *United States*, 487 U.S. 533, 537 (1988) (noting that independent-source exception "has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations").

in the absence of counsel—along with any evidence derived from those unconstitutionally obtained statements—plainly deters government officers and prosecutors from interfering with a defendant's right to assistance of counsel in the first instance. Yet the Sixth Amendment derivative-evidence rule is grounded in more than deterrence. It is also based on the recognition that the integrity of the adversary system and a defendant's fair trial rights are impaired by the use at trial of fruits of a Sixth Amendment violation.

The core purpose of the right to assistance of counsel is to assure the defendant a fair trial. *See*, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Defendants are entitled to the assistance of counsel at critical pretrial confrontations with the government in large part because of the trial effect of such encounters—namely, that 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) (quoting *Wade*, 388 U.S. at 224). Thus, the Court held in *Massiah* that the defendant "was denied the basic protections of [the Sixth Amendment] guarantee when there was 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. The same rationale supports the exclusion of *the fruits* of a Sixth Amendment violation from trial. Like the admission of a statement deliberately elicited in violation of the Sixth Amendment, the use of the fruits of such a violation exploits the defendant's uncounseled status at the pretrial confrontation with the government to his subsequent disadvantage at trial.

B. Petitioner's Jailhouse Statement Derived From The Officers' Prior Violation Of His Sixth Amendment Right To Assistance Of Counsel.

Petitioner's statement at the Lancaster County jail derived from the prior Sixth Amendment violation and therefore should be excluded unless the government can satisfy one of the established exceptions to the derivative-

evidence rule.[2] Here, the same officers that unconstitutionally elicited a first statement from petitioner at his home then—shortly thereafter, and without any meaningful break in the events—obtained another statement from petitioner addressing subjects both identical to and stemming from those covered in the initial statement. After petitioner admitted at his home that he had been a methamphetamine user during a time in his life when he associated with his alleged co-conspirators, the police officers reestablished those admissions at the jailhouse and then proceeded to question petitioner about them in greater detail.

In similar cases, the Court has ruled that, once the defendant establishes that the government acquired evidence in violation of the Constitution, a presumption arises that any substantially similar evidence obtained by the police subsequent to the violation also derives from that violation. The presumption is rebuttable, but the burden falls on the government to show that the subsequently acquired evidence is not linked to the original constitutional violation. For example, in *Wade*, once the respondent demonstrated that the government had violated his Sixth Amendment right to assistance of counsel at a pretrial lineup, this Court placed the burden on the government to disprove the link between the pretrial identification and the subsequent courtroom identification by the same witness. *See* 388 U.S. at 240 & n.31. It is especially appropriate to place the burden on the government to prove an exception to

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[2] There are three exceptions to the derivative-evidence rule: (1) that the government had an independent source for the evidence in question, *see, e.g.*, *Silverthorne Lumber Co.*, 251 U.S. at 392; (2) that the government inevitably would have discovered the evidence through lawful means, *see, e.g.*, *Nix*, 467 U.S. at 444; or (3) that the link between the constitutional violation (or the evidence that is the direct product thereof) and the subsequently discovered evidence has "become so attenuated as to dissipate the taint" of the initial violation, *Nardone*, 308 U.S. at 341. The government bears the burden of persuasion with regard to these exceptions. *See, e.g.*, *Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*); *Nix*, 467 U.S. at 444.

the derivative-evidence rule in a case like petitioner's, where the *same* police officers who committed the original constitutional violation obtained the substantially similar evidence shortly after that violation. This Court has recognized that very point in its prior cases. For example, in *Murray* v. *United States*, 487 U.S. 533 (1988), the Court presumed that evidence initially discovered by police officers during an unconstitutional search would be inadmissible—notwithstanding that the same officers subsequently obtained the evidence pursuant to a valid search warrant—unless the government could satisfy the independent-source exception. *See id.* at 542.

Even without such a presumption, it is clear in this case that petitioner's second statement did derive from the prior violation of his Sixth Amendment rights. Not only did the police officers pursue with petitioner the same subjects covered previously at his home, but petitioner—who had not yet consulted with counsel and therefore lacked knowledge regarding the inadmissibility of his first statement—was likely to believe that any effort to avoid further clarification of his first inculpatory statement would be hopeless. An important reason why an uncounseled defendant who has made an initial inculpatory statement will make an additional such statement is his belief that there is little to be gained, and perhaps much to be lost, from attempting to avoid further self-incrimination. *See, e.g.*, *Darwin* v. *Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part, dissenting in part); *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). Police officers rely on this very psychological truth when interrogating suspects. *See, e.g.*, Arthur S. Aubry, Jr. & Rudolph R. Caputo, Criminal Interrogation 290 (3d ed. 1980) ("[T]here is one rule which . . . should be followed consistently in every interrogation conducted. The subject must be motivated to make the first admission, no matter how apparently small or trivial. If this admission is related to the crime and to the subject matter of the interrogation, there is every reason to expect that the first admission will lead to others, and eventually to the full confession.").

To be sure, an accused in these circumstances is not "perpetually disabled" thereafter from making an inculpatory statement that would be admissible in court. *Bayer*, 331 U.S. at 540-41. Sometimes, the particular circumstances will show that the taint of the original government misconduct has attenuated sufficiently to justify admission of the subsequent confession. For example, in *Bayer*, six months passed between the defendant's initial and subsequent confessions. *See id.* at 541. At times, though, no such attenuation is present and the second statement is therefore suppressed under the traditional derivative-evidence rule. *See*, *e.g.*, *Brown*, 422 U.S. at 605 & n.12 (holding that a second statement "was clearly the result and the fruit of the first" because, in part, the making of the first statement "bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination"); *see also Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979) (same). Where, as here, a second statement follows shortly after the first, common sense dictates that a link exists between the making of a first inculpatory statement and the defendant's willingness to make a subsequent such statement. This Court's cases recognize such a real-world connection. *See Brown*, 422 U.S. at 605 n.12; *Harrison* v. *United States*, 392 U.S. 219, 226 n.14 (1968); *Darwin*, 391 U.S. at 350-51 (Harlan, J.); *Bayer*, 331 U.S. at 540.[3]

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[3] Whether a confession that follows an initial, unlawfully obtained confession must be *excluded* is a separate question from whether (as in this case) a link *exists* between two such inculpatory statements, which requires the government to satisfy one of the established exceptions to the derivative-evidence rule. In decisions like *Bayer*, this Court recognized that a link does exist between a defendant's making of an initial incriminating statement and his willingness to make a subsequent confession, yet the Court simultaneously held that such a link should not always lead to exclusion of the second confession. We rely here on the Court's recognition of the link and address below the separate question concerning the *admissibility* of petitioner's subsequent jailhouse statement under the taint-attenuation exception to the derivative-evidence rule. *See infra*, Part II.C.

In an analogous situation involving multiple confessions where the government unlawfully obtained the first confession, the Court shifted the burden to the government to disprove the link between the defendant's making of the first confession and his subsequent statement. *See Harrison*, 392 U.S. 219. In *Harrison*, the defendant contended that the government's unlawful introduction of an illegally obtained confession at a previous trial was a factor leading him to make a second incriminating statement at that trial. This Court held that in these circumstances, where the government obtained the first statement unlawfully and thus erroneously admitted it at trial, it would be improper to impose upon the defendant the burden of proving that his second statement was impelled by the first:

> [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure a proof that the spring which he released was effective to the exclusion of all others." Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.

Id. at 224-25 (footnotes omitted). So too, in a case like petitioner's, the government "releases the spring" when its agents illegally obtain a first inculpatory statement from the accused and the same agents shortly thereafter confront the accused a second time on the same matters. Having made that first confession, the defendant operates thereafter under the "erroneous impression that he has nothing to lose . . . in a . . . decision to speak a second or third time." *Darwin*, 391 U.S. at 351 (Harlan, J.). It is therefore especially appropriate, at a minimum, to presume that the second inculpatory statement is in part a product of the first.

Having released the springs of conduct, the government must shoulder the burden of proving an exception to the derivative-evidence rule.

Oregon v. *Elstad*, 470 U.S. 298 (1985), does not hold—or even suggest—that a second confession never may be considered the fruit of a first voluntary confession. *Elstad* did not reject the Court's earlier recognition of the fact that a suspect who has made a first incriminating statement is likely to make another inculpatory statement to authorities thereafter. Rather, *Elstad* held only that a suspect's internal psychological pressures, standing alone, are insufficient as a legal matter to render a subsequent inculpatory statement *involuntary* within the meaning of the Fifth Amendment. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Id.* at 312.[4] There is a vast difference between asking whether the government *coerced* a defendant to confess (the Fifth Amendment question) and inquiring whether government conduct made it more likely that the defendant would repeat or elaborate upon an unconstitutionally obtained confession (the derivative-evidence question). While the Court in *Elstad* did describe the causal connection between that particular defendant's two confessions as "speculative and attenuated," *id.* at 313, nowhere did the Court purport to reject its numerous previous observations that the making of an initial

[4] *See also Elstad*, 470 U.S. at 311 ("[E]ndowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would . . . disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions."); *id.* at 314 ("[T]he mere fact that a suspect has made an unwarned admission does not warrant a presumption of *compulsion*." (emphasis added)).

inculpatory statement influences an accused's willingness to make additional such statements.[5]

Petitioner's case therefore falls squarely within the scope of the *Wong Sun* derivative-evidence rule. Accordingly, petitioner's jailhouse statement must be suppressed unless the government can satisfactorily demonstrate an exception to that rule.

C. The Government Has Not Satisfied Its Burden To Prove Attenuation Of Taint.

The government has not argued that it had an independent source for petitioner's jailhouse statement or that it inevitably would have obtained that statement. Rather, the government, like the court of appeals, relied below on this Court's decision in *Elstad* and its holding that the administration of *Miranda* warnings following an uncounseled confession is ordinarily sufficient to render a subsequent statement voluntary and admissible under the Fifth Amendment. *See* Gov't C.A. Br. 19-24; J.A. 121-123, 128. In other words, the government has argued that the administration of *Miranda* warnings removed the taint of the police officers' misconduct in confronting petitioner at his home in the absence of counsel. But as we explain below, the reasoning of *Elstad* cannot be imported wholesale into this context, for this case involves a violation of the Sixth Amendment's Counsel Clause, not a mere failure by the police to observe the requirements of the *Miranda*. For petitioner's subsequent jailhouse statement to be admissible then, the government bears the burden of proving that the taint from the initial violation of petitioner's Sixth Amendment right to assistance of counsel had sufficiently attenuated by the time of his jailhouse statement. *See, e.g.*, *Kaupp*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*) (government bears burden of proving purgation of taint). The government cannot sustain its burden on the present record.

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[5] We address below the relevance of *Elstad* to the separate taint-attenuation inquiry. *See infra*, Part II.C.2.

1. The Court's test for the attenuation of taint with regard to an incriminating statement does not turn on the voluntariness of the statement alone.

Under the principles articulated in derivative-evidence cases such as *Wong Sun*, the government must show that "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint' " of the prior constitutional violation. 371 U.S. at 487 (quoting *Nardone*, 308 U.S. at 341). Put another way, the central question is whether the challenged evidence was discovered "by exploitation of [the prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (internal quotation marks and citations omitted). When the challenged derivative evidence is a defendant's incriminating statement, the Court specifically has framed the inquiry as whether that statement was " 'sufficiently an act of free will to purge the primary taint.' " *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

"Free will," as used in the Court's derivative-evidence cases, means more than simply constitutional voluntariness (as in the absence of government coercion). To be sure, it is *necessary* that the government prove that a defendant's incriminating statement was made voluntarily for it to be admissible at the defendant's trial. If the statement instead has been coerced in some manner, there is no need to undertake a derivative-evidence inquiry at all. The Fifth Amendment prohibits the admission of the coerced statement. *See, e.g.*, *Dunaway*, 442 U.S. at 217.

While therefore *necessary*, the voluntariness of a defendant's inculpatory statement has never been understood to be *sufficient* to prove attenuation of the taint of a prior constitutional violation. For example, when the government obtains a confession from a defendant following an illegal arrest, this Court's cases

> firmly establish[] that the fact that the confession may be "voluntary" for purposes of the Fifth

> Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of an illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment purposes.

Taylor v. *Alabama*, 457 U.S. 687, 690 (1982); *see also Elstad*, 470 U.S. at 306; *Dunaway*, 442 U.S. at 217, 219; *Brown*, 422 U.S. at 604; *Wong Sun*, 371 U.S. at 486 n.12.

Under the Court's derivative-evidence cases, the government must show not just constitutional voluntariness, but also that the defendant's decision to make the inculpatory statement at issue has not been unduly influenced by the government's prior unconstitutional conduct. As the Court explained in *Brown*, "[i]n order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' " 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486)); *see also Elstad*, 470 U.S. at 306 ("Beyond [voluntariness], the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation."). Thus, a reviewing court must be convinced that the prior constitutional violation did "not play any meaningful part in the witness' willingness" to make an inculpatory statement. *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978).

Because the "free will" necessary to dispel the effect of a constitutional violation requires more than the absence of coercion, this Court held in *Brown* that the administration of *Miranda* warnings—an act intended to ensure that a defendant's subsequent statement to the police is not coerced—will ordinarily be insufficient by itself to purge the taint of a prior Fourth Amendment violation. *See* 422 U.S. at 601-03. In *Brown*, police officers unlawfully arrested the

defendant without probable cause. Approximately one hour after that arrest, the officers warned the defendant of his rights pursuant to *Miranda* and obtained an incriminating statement. Approximately five hours after that, the defendant was again read the *Miranda* warnings and the government obtained another incriminating statement substantially in accord with the first. The Illinois Supreme Court held that the *Miranda* warnings sufficiently purged the taint of the unlawful arrest. *See id.* at 592-97. This Court disagreed and reversed:

> It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

Id. at 603. In fact, the Court concluded, the Illinois Supreme Court's reliance on the *Miranda* warnings would *encourage* exploitation of a Fourth Amendment violation:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and

> seizures could be said to be reduced to 'a form of words.'

Id. at 602-03 (citations omitted).

Since *Brown*, and as recently as this Term, the Court has repeatedly reaffirmed that the mere administration of *Miranda* warnings cannot serve as a "cure-all," sufficient alone to purge the taint of a prior constitutional violation. *See Kaupp*, 123 S. Ct. at 1847 ("[W]e held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.' " (quoting *Brown*, 422 U.S. at 603)); *Taylor*, 457 U.S. at 690-91 (same); *Dunaway*, 442 U.S. at 216-17. Rather, when determining whether the taint of a prior constitutional violation has sufficiently attenuated to render a statement admissible, courts must also consider the temporal proximity between the constitutional violation and the defendant's incriminating statement, the presence or absence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *See Kaupp*, 123 S. Ct. at 1847; *Taylor*, 457 U.S. at 690; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 603-04. In each of these cases, the Court held that the confessions obtained following illegal arrests should have been excluded from the defendants' trials notwithstanding the intervening administration of *Miranda* warnings. *See Kaupp*, 123 S. Ct. at 1848; *Taylor*, 457 U.S. at 694; *Dunaway*, 442 U.S. at 218-19; *Brown*, 422 U.S. at 604-05.

Evaluation of the taint-attenuation factors also permits a court to determine whether exclusion of a defendant's inculpatory statement is justified under a deterrence rationale. In *United States* v. *Leon*, a Fourth Amendment decision, the Court explained that "the 'dissipation of the taint' concept . . . 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.' " 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). When the derivative evidence at issue is an incriminating

statement by the defendant, the deterrence and free-will inquiries are essentially two sides of the same coin. If the constitutional violation meaningfully enhances the government's ability to obtain the statement from the defendant, police officers will have an incentive to engage in the unconstitutional conduct. Exclusion of the statement thus serves a deterrence rationale. *See, e.g.*, *Dunaway*, 442 U.S. at 218 ("When there is a close causal connection between the illegal seizure and the confession, . . . exclusion of the evidence [is] more likely to deter similar police misconduct in the future."). As the Court's decision in *Brown* demonstrates, however, the deterrence rationale is ill-served by a taint-attenuation test turning solely on constitutional voluntariness. *See* 422 U.S. at 602-03. A defendant who confesses voluntarily within the meaning of the Fifth Amendment may nevertheless have been meaningfully influenced in his decision to speak by the unconstitutional conduct preceding that confession. *See id.* at 603.

2. The court of appeals erred by relying on *Elstad*, rather than the traditional factors of taint attenuation, to resolve petitioner's Sixth Amendment argument for exclusion of his jailhouse statement.

Contrary to this Court's derivative-evidence decisions, the court below accorded controlling importance to the provision of the *Miranda* warnings to petitioner and his subsequent waiver of the rights stated therein. To reach this result, the court relied on *Elstad*. *See* J.A. 121 ("Contrary to Fellers' contention otherwise, we conclude that *Oregon* v. *Elstad* renders admissible the statements made by Fellers at the jail." (citation omitted)); *id.* at 128 (Riley, J., concurring) ("I do not believe this [Sixth Amendment] violation takes Fellers's case outside the rationale of *Oregon* v. *Elstad*." (citation omitted)).

In *Elstad*, police officers obtained an initial, voluntary confession from the defendant in contravention of the procedures prescribed by *Miranda*, failing to advise defen-

dant of the *Miranda* warnings prior to interrogating him. Shortly thereafter, the police officers provided the warnings to the defendant and obtained a second, voluntary confession. *See* 470 U.S. at 300-02. This Court held that the second incriminating statement did not need to be excluded as fruit of the prior *Miranda* violation, and therefore had been properly admitted at the defendant's trial. *See id.* at 317-18. The court of appeals' reliance on *Elstad* here to find petitioner's jailhouse statement admissible is erroneous for at least two reasons.

a) Petitioner's case, in contrast to *Elstad*, involves a constitutional violation.

An important premise of the *Elstad* decision was that the primary illegality in that case—the *Miranda* violation—was not itself a constitutional violation. As this Court explained in *Elstad*, "[r]espondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." 470 U.S. at 305. But, as this Court continued, "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1.

For this reason, the Court rejected the defendant's argument at its very root, concluding that the traditional derivative-evidence rule does not apply with its normal breadth where the primary illegality—a simple failure to administer *Miranda* warnings—does not amount to a constitutional violation. As the Court explained, "the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307; *see also id.* at 308 ("Since there was no actual infringement of the suspect's constitutional rights [in *Michigan* v. *Tucker*, 417 U.S. 433 (1974)], the case was not

controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."). In contrast, in prior cases applying the derivative-evidence rule like *Brown* (in the Fourth Amendment context) and *Wade* (in the Sixth Amendment context), the primary illegality had been an actual constitutional violation. As the *Elstad* Court recognized, official misconduct of constitutional magnitude "traditionally mandate[s] a broad application of the 'fruits' doctrine." 470 U.S. at 306.

Finding no basis for application of the traditionally broad fruits doctrine in the *Miranda* context, the *Elstad* Court instead articulated a more narrow exclusion standard for self-incriminating statements obtained following a *Miranda* violation. If the statement initially acquired in violation of *Miranda* is made voluntarily, then the subsequent statement need only be "knowingly and voluntarily made" to be admissible. *Id.* at 309; *see also id.* at 318 ("The relevant inquiry is whether, in fact, the second statement was also voluntarily made."). "The failure of police to administer *Miranda* warnings does not mean that statements received have actually been coerced." *Id.* at 310. Thus, so long as the first statement is voluntary, there is no concern that Fifth Amendment "coercion has carried over into the second confession." *Id.* For this reason, *Elstad* held that courts need not consider the traditional factors relevant to whether a sufficient break has taken place between an initially coerced confession and a subsequent confession, *e.g.*, the temporal proximity of the two statements. *See id.* Rather, *Elstad* holds that if officers carefully administer *Miranda* warnings after an initial *Miranda* violation, but prior to a defendant's subsequent statement, "thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.' " *Id.* at 311 (quoting *Wong Sun*, 371 U.S. at 486).

This Court's decision in *Dickerson* v. *United States*, 530 U.S. 428 (2000), did not retroactively alter the meaning of *Elstad* and convert the *Miranda* violation at issue in that case into a constitutional violation. Indeed, *Dickerson*

specifically addressed *Elstad* and reaffirmed it. *See id.* at 441 (quoting *Elstad*, 470 U.S. at 306, for statement that the " '*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself' "). *Dickerson* did confirm that the *Miranda* decision "announced a constitutional rule," *id.* at 444, but it never held that a simple failure to administer *Miranda* warnings itself violates the Fifth Amendment. Rather, *Dickerson* clarified that the "constitutional rule" of *Miranda* is one governing the *admissibility at trial* of statements obtained during custodial interrogation: "This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction." *Id.* at 437; *see also id.* at 434-35. As *Dickerson* explained, the *Miranda* rule is constitutionally based notwithstanding the fact that it excludes more than just the involuntary statements covered by the Fifth Amendment Self-Incrimination Clause. *Miranda* was based on a recognition that "the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great *when the confession is offered in the case in chief to prove guilt.*" *Id.* at 442 (citation omitted) (emphasis added). For this reason, the *Miranda* "decision's core ruling"—which *Dickerson* affirmed had constitutional status—was "that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-44.[6]

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[6] The Court's recent decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirms the first basis of the *Elstad* decision—*i.e.*, that no constitutional violation was at issue there. The four-Justice plurality in *Chavez* held that a simple failure to provide *Miranda* warnings does not violate a suspect's Fifth Amendment rights. *See id.* at 2003-04 (plurality opinion). Justice Kennedy, writing on behalf of himself and Justice Stevens, agreed with the plurality on this point. *See id.* at 2013 (Kennedy, J., concurring in part, dissenting in part). The *Chavez* plurality also quoted *Elstad* for the proposition that " '[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.' " *See id.* at 2003 (plurality opinion).

This important premise of the *Elstad* decision—the lack of a primary constitutional violation—is not present in petitioner's case. Here, as we demonstrate in Part I, *supra*, the police officers violated the Constitution when they deliberately elicited a post-indictment, inculpatory statement at petitioner's home in the absence of counsel. Thus, like the Fourth Amendment violation in *Brown*, the primary illegality at issue in petitioner's case "mandate[s] a broad application of the 'fruits' doctrine." *Elstad*, 470 U.S. at 306. In a case like petitioner's, therefore, where government officers violate a defendant's Sixth Amendment right to counsel, the admissibility of a subsequent confession should be adjudicated by considering the factors to which the courts have traditionally looked when determining attenuation under the derivative-evidence rule. That attenuation inquiry is neither limited to nor controlled by the police's administration of the *Miranda* warnings prior to a second confession.

b) Petitioner's case concerns the Sixth Amendment, whereas *Elstad* pertains specifically to the Fifth Amendment.

The court of appeals' reliance on *Elstad* in petitioner's case is also erroneous because the *Elstad* holding is additionally premised on the role *Miranda* warnings play in buttressing the privilege against self-incrimination. *Elstad* does not purport to account for the distinct values of the Sixth Amendment right to assistance of counsel. This distinction is critical, as the Court has noted that each derivative-evidence inquiry should reflect "the distinct policies and interests" of the constitutional right at issue. *Brown*, 422 U.S. at 602. The central concern of the Fifth Amendment is that a defendant not be compelled to incriminate himself through the introduction at trial of his own involuntary statements. *See Elstad*, 470 U.S. at 306-07. When government officers obtain an initial voluntary statement without first providing the *Miranda* warnings, subsequent administration of those warnings ordinarily ensures that any confession provided thereafter is volun-

tary. *See Elstad*, 470 U.S. at 310-11. In this manner, any potential *Fifth Amendment* taint remaining from the initial *Miranda* violation is purged.

In contrast, when government officers deliberately elicit a post-indictment incriminating statement from a defendant in the absence of counsel, the subsequent administration of *Miranda* warnings does not purge the *Sixth Amendment* taint of the prior encounter. The Sixth Amendment right to assistance of counsel embodies a " 'realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' " and thus "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Maine* v. *Moulton*, 474 U.S. 159, 169 (1985) (quoting *Zerbst*, 304 U.S. at 462-63). " 'Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . [The defendant] requires the guiding hand of counsel at every step in the proceedings against him.' " *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)). When police officers deliberately elicit an inculpatory statement from the accused outside the presence of counsel, they deprive the accused of the "guiding hand" guaranteed by the Sixth Amendment at a critical stage.

Once officers obtain an initial statement from an indicted and uncounseled defendant, the pretrial confrontation becomes substantially slanted in favor of the government. The officers should understand what the uncounseled defendant surely does not—that the initial statement is inadmissible at any trial of the defendant. The officers also understand, however, that the defendant's ignorance of his legal rights with respect to the confrontation will leave him with the "erroneous impression that he has nothing to lose . . . in a . . . decision to speak a second or third time." *Darwin* v. *Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part, dissenting in part); *see also*

United States v. *Bayer*, 331 U.S. 532, 540 (1947); *supra*, p.21 (citing description of criminal interrogation practices).

To be sure, a defendant's fear that the "cat is out of the bag" is insufficient to demonstrate *actual coercion* under the Fifth Amendment. Thus, the subsequent administration of *Miranda* warnings can in some circumstances purge the Fifth Amendment taint potentially remaining from an unlawfully obtained initial confession. *See Elstad*, 470 U.S. at 318. But a police officer's provision of *Miranda* warnings does not by itself purge the Sixth Amendment taint from that very officer's earlier, deliberate elicitation of a post-indictment, incriminating statement in the absence of counsel. The *Miranda* warnings merely inform the accused that he need not make further statements without counsel present. The warnings do not remedy the prior Sixth Amendment violation. *Cf. Brown*, 422 U.S. at 601 ("[T]he *Miranda* warnings thus far have not been regarded as a means . . . of remedying . . . violations of Fourth Amendment rights."). The warnings also do not provide a meaningful substitute for the guiding hand of counsel sufficient to ensure that the government's prior circumvention of the accused's Sixth Amendment right has not continued to influence meaningfully the defendant's decision to speak to government officials. And the warnings certainly do not restore "equality in [the] adversary confrontation" by eliminating any possibility "that the accused might be misled by his lack of familiarity with the law." *United States* v. *Ash*, 413 U.S. 300, 317 (1973).

As this Court recognized in *Johnson* v. *Zerbst*,

> [t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

304 U.S. 458, 465 (1938). Extending *Elstad* to the Sixth Amendment context would place determinative reliance on

the defendant's ignorant failure to claim his right to counsel prior to making a second confession in circumstances where the negative consequences of that ignorance have been exacerbated by the government's misconduct in the first instance. For these reasons, the rule of *Elstad*—that administration of the *Miranda* warnings ordinarily should suffice to render a second confession admissible—should have no application in the Sixth Amendment context.[7]

3. The government cannot sustain its burden to prove attenuation of the taint.

This case, then, is governed by the Court's derivative-evidence cases, and the government must demonstrate that the taint from the police officers' violation of petitioner's Sixth Amendment right to counsel sufficiently attenuated by the time of petitioner's jailhouse statement. As we have explained, this Court normally has examined several relevant considerations in undertaking the taint-attenuation inquiry: the temporal proximity of the constitutional violation to the discovery of the derivative evidence in question, the presence or absence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *See, e.g.*, *Kaupp*, 123 S. Ct. at 1847. When the derivative evidence is an inculpatory statement made by the defendant, the Court also considers the observance of *Miranda*, but that fact is not determinative. *See, e.g.*, *id.* Given the "clear force of the evidence" on the

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[7] In *Patterson* v. *Illinois*, 487 U.S. 285, 296 (1988), the Court held that when the police provide *Miranda* warnings to an accused, a subsequent decision by the accused to make a statement ordinarily will be considered a knowing and voluntary waiver of the accused's Sixth Amendment right to assistance of counsel. That holding cannot aid the government here. Petitioner has never contended that his jailhouse statement should be excluded because of a violation of his Sixth Amendment right during his jailhouse meeting with the officers. Rather, petitioner's contention is that the statement must be excluded as evidence derived from the officers' earlier violation of the Sixth Amendment Counsel Clause at his home, *prior* to the officers' provision of *Miranda* warnings.

present record, *id.* at 1848, the government cannot satisfy its burden.

First, the magistrate judge found that only a half-hour passed between the statement deliberately elicited from petitioner in violation of his Sixth Amendment right to assistance of counsel and his subsequent statement at the Lancaster County jail. During this entire period, petitioner remained in the custody of Deputy Bliemeister and Detective Garnett. The exceedingly brief time period in petitioner's case is shorter than past cases where the Court has found the temporal proximity factor to favor exclusion of a subsequent confession. *See, e.g.*, *Taylor* v. *Alabama*, 457 U.S. 687, 691 (1982) (six hours between illegal arrest and confession); *Brown*, 422 U.S. at 604 (less than two hours between illegal arrest and first statement).

Second, no meaningful intervening event took place between the officers' confrontation of petitioner at his home and the subsequent questioning at the jailhouse. *See, e.g.*, *Kaupp*, 123 S. Ct. at 1848; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 604. Of particular importance here, given the Sixth Amendment context, is the fact that petitioner never actually consulted with counsel between the making of the first and second statements. The lingering Sixth Amendment taint in this case was defendant's ignorance of his legal rights, the consequences of which were exacerbated by the government's deliberate elicitation of the statement at petitioner's home. One means of purging this taint would have been for petitioner actually to consult with counsel. No such meeting took place here. There also was no other intervening circumstance (*e.g.*, an arraignment before a judge at which counsel was appointed) that "could possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691; *cf. Brown*, 422 U.S. at 611 (Powell, J., concurring in part) ("would require some demonstrably effective break, . . . such as actual consultation with counsel or . . . presentation before a magistrate," to

attenuate taint of official conduct that is flagrantly abusive of constitutional rights).

The third factor—the purpose and flagrancy of the official misconduct—is of particular importance here. In *Massiah* and subsequent cases, this Court has set forth a clear and easily understood rule. Absent a waiver, police officers may not deliberately elicit post-indictment, inculpatory statements from a defendant in the absence of counsel. Deputy Bliemeister blatantly violated that constitutional rule, telling petitioner that he and his partner wanted to discuss with petitioner the controlled substances charges on which he had been indicted the previous day. As the magistrate judge found, Bliemeister's statements only could have been designed to elicit an inculpatory statement from petitioner. Moreover, there is no question that Bliemeister knew of petitioner's indictment because the officer notified petitioner of its very existence. Petitioner's case presented no unusual complexities at the outer reaches of the *Massiah* jurisprudence such as, for example, a question regarding whether the officers had a good-faith belief that they were merely eliciting statements regarding an offense for which petitioner had not yet been charged. *See, e.g.*, *Texas* v. *Cobb*, 532 U.S. 162 (2001). In short, Bliemeister's conduct constituted nothing less than a total and blatant disregard of this Court's decisions. *See Brown*, 422 U.S. at 605 (concluding that illegal arrest "had a quality of purposefulness" when the "impropriety of the arrest was obvious").

The only factor supporting the government here is the police officers' subsequent administration of *Miranda* warnings prior to the jailhouse interrogation of petitioner. In this respect, the case is similar to the Court's per curiam decision in *Kaupp* earlier this Term. There, the Court explained: "The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.' " 123 S. Ct. at

1847 (quoting *Brown*, 422 U.S. at 603). On that record, this Court held that the confession at issue must be suppressed barring the identification of some undisclosed evidence on remand. *See id.* at 1848. Indeed, in *Brown*, *Dunaway*, and *Taylor* too, the Court held that confessions were inadmissible despite the administration of *Miranda* warnings. There is no reason that the provision of the warnings to petitioner, especially considering the Sixth Amendment context, should take his case outside the rationale of these decisions.

In sum, it cannot be said that petitioner's second statement was "sufficiently an act of free will to purge the primary taint" of the prior Sixth Amendment violation. *Brown*, 422 U.S. at 602 (internal quotation marks and citations omitted). As this Court's cases recognize, an important reason why a defendant who has made an initial inculpatory statement will make a second such statement is his (often mistaken) belief that he has nothing to lose. In petitioner's case, of course, he had *everything* to lose by making a second statement, given the inadmissibility of his prior statement. Counsel could have advised him of the consequences of repeating or elaborating upon that statement. By deliberately eliciting the initial incriminating statement in the absence of counsel and then interrogating petitioner at the jail, the police officers exploited the very condition the Sixth Amendment right to counsel is meant to address. Ignorant of his legal rights, petitioner was considerably more likely to make the jailhouse statement. This taint was not eliminated by the passage of "substantial time," by " 'any meaningful intervening event,' " or by the nature of the prior violation. *Kaupp*, 123 S. Ct. at 1848 (citation omitted).

Moreover, to the extent the taint inquiry " 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost,' " *Leon*, 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J.)), exclusion is amply justified here. If police

officers were permitted to cure such a clear violation of a defendant's Sixth Amendment rights as in the circumstances of petitioner's case simply by administering the *Miranda* warnings soon after the violation, the police would no doubt quickly discover how to circumvent the constitutional principles at issue here. Any incentive on the part of the police to avoid violation of the Sixth Amendment "would be eviscerated by making the warnings . . . a 'cure-all.' " *Brown*, 422 U.S. at 602 (holding same in Fourth Amendment context). For these reasons, the Court should hold that petitioner's jailhouse statement must be suppressed as fruit of the prior Sixth Amendment violation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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