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PRE-TRIAL CRIMINAL PROCEDURE

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EXCLUSIONARY POLICY DEVELOPMENTS

Miranda

The United States Supreme Court continued[1] last term's rejection of expansive *Miranda* exclusionary sanctions. Insofar as the practical impact upon the interrogations process is concerned, *Oregon v. Elstad*[2] may be the most significant interpretation of *Miranda* yet. The issue presented was the effect of an initial failure to provide *Miranda* warnings on a subsequent statement made after the warnings were given. The practical question presented is under what circumstances can law enforcement officers commence custodial interrogation without *Miranda* warnings, obtain a statement, give *Miranda* warnings, and then obtain a statement to be used in evidence. The question often has been resolved at the trial and appellate court levels by deciding whether the first statement, obtained in violation of *Miranda*, "taints"[3] the second statement, with the government having the burden of proving the absence of taint. *Elstad* appears to reject this approach.

The facts are necessary to appreciate the scope of the holding, as well as to gain insight into the majority's continuing[4] approach of finding

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1. See, e.g., New York v. Quarles, 104 S. Ct. 2626 (1984) (public safety exception); Berkemer v. McCarty, 104 S. Ct. 3138 (1984) (inapplicability of *Miranda* to forcible stops), discussed in Lamonica, Developments in the Law, 1983-1984—Pre-Trial Criminal Procedure, 45 La. L. Rev. 501, 518 (1984).

2. 105 S. Ct. 1285 (1985)

3. See discussion, id. at 1289-90; see also cases cited, id. at 1294 n.2. The "fruit of the poisonous trees" and "cat out of the bag" metaphors provide little analytical guidance and are not used here.

4. In New York v. Quarles, 104 S. Ct. 2626 (1984), the Court was willing to find interrogation and *Miranda* application under circumstances where a contrary decision would have been reasonable. Compare State v. Levy, 292 So. 2d 220 (La. 1974). In *Elstad*, the Court appeared eager to find custody and thus *Miranda* application, although again, under the circumstances, a finding of lack of custody under *Miranda* would have been reasonable. Compare Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095 (1969). That the state "conceded the issue of custody," of course, should not control the legal question. 105 S. Ct. at 1297.

Miranda applicable while refusing to afford an exclusionary sanction.

With an arrest warrant, officers arrived at the eighteen-year-old Elstad's home to arrest him for participating in the burglary of a neighbor's residence. Elstad's mother answered the door and led the officers to her son's bedroom. Upon dressing, Elstad accompanied one officer to the living room, and another officer asked the mother to accompany him into the kitchen so that he could explain that they had a warrant for her son's arrest. The other officer then sat down with Elstad in the living room, asked him if he knew why they were there ("no"), if he knew a named suspect ("yes"), and if he had heard of the burglary ("yes"). The officer then told Elstad that he felt he was involved in the burglary. Elstad looked at the officer and stated, "Yes, I was there."[5] About one hour later, at the sheriff's office, Miranda warnings were given and Elstad gave a statement which was "typed, reviewed, . . . [and] signed by Elstad and both officers."[6] Subsequently Elstad added to the incriminating statement. Elstad conceded that no threats or promises were made at his house or at the sheriff's office.[7]

The trial court found that "[the] written statement was given freely, voluntarily and knowingly . . . [and] was not tainted in any way by the previous brief statement."[8] The Oregon Court of Appeals reversed, concluding, "[R]egardless of the *absence of actual compulsion*, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. . . . [T]his impact . . . must be dissipated in order to make a subsequent confession admissible."[9] After the Oregon Supreme Court denied review, the United States Supreme Court granted certiorari, "to consider . . . whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, *solely* because the police had obtained an earlier *voluntary* but unwarned admission from the defendant."[10]

The questions addressed by the Court go beyond the issue presented. Justice O'Connor did not limit the discussion to whether failure to give initial *Miranda* warnings, alone, requires exclusion of a subsequent statement. In going beyond that narrow question, ambiguity is created as to the opinion's scope and significance. Justice O'Connor concluded:

> A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement *ordinarily*

5. 105 S. Ct. at 1289.
6. Id.
7. Id.
8. Id. at 1290.
9. Id. (emphasis added).
10. Id. (emphasis added).

> should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the *finder of fact may reasonably conclude* that the suspect made a rational and intelligent choice whether to waiver or invoke his rights.[11]

This rationale clearly eliminates a presumption that the subsequent statement after subsequent *Miranda* warnings and waiver is involuntary. It further, however, might be construed to create a presumption that the statement is voluntary under such circumstances. That this may be Justice O'Connor's intention is reflected by her conclusion that the 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."[12] Yet, at the conclusion of the opinion the stated holding is much narrower: "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is *not thereby disabled from waiving* his rights and confessing after he has been given the requisite *Miranda* warnings."[13]

One reason for the confusion is that the opinion is unclear as to whether it is dealing with a standard of review for appellate courts to employ in reviewing the mixed question of law and fact found by trial courts or whether it is establishing a *legal* standard for determining voluntariness for both the trial and reviewing courts. Such a distinction is critical. It is one thing to say when an appellate court reviews the findings of a trial court (as in *Elstad*), the finder of fact may reasonably conclude that the suspect "waived his rights" and reasonably defer to the judgment of the original fact finder. It is a wholly different matter to establish a legal standard for the fact finder that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions [*Miranda* violations] that precluded admission of the earlier statement."[14] This effectively creates a presumption that noncoercive *Miranda* violations have no effect on the subsequent statement's voluntariness, absent some exceptional circumstance shown by the defendant.

Recognizing that "[t]he relevant inquiry is whether, *in fact*, the second statement was also voluntarily made"[15] and the lack of a need for "imputing"[16] effect, one need not necessarily conclude that *Elstad* creates a new legal standard with respect to voluntariness. Rather, it

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11. Id. at 1296 (emphasis added).
12. Id. at 1295 (emphasis added).
13. Id. at 1298 (emphasis added).
14. Id. at 1296.
15. Id. at 1298 (emphasis added).
16. Id.

merely limits *Miranda*'s exclusionary sanction by eliminating a presumption that a violation of *Miranda* affects subsequent voluntariness. The decision may be further limited if the quoted statement about the subsequent warning's ordinary effect sets forth a standard that the appellate court should employ in *reviewing* the trial courts finding in the difficult mixed question of law and fact involved in determining voluntariness.

Recalling the historical context in which the *Elstad* issue arises is helpful to evaluate the exclusionary policy analysis. Under the fourth amendment, confessions are excluded due to existing exclusionary policy predicated primarily upon deterring improper police conduct.[17] As a result, a voluntary statement, as well as the more trustworthy physical evidence, may be excluded. Voluntariness is only an incidental, not a primary, concern in a fourth amendment exclusionary policy analysis.

Direct fifth amendment violations traditionally[18] have been addressed in terms of whether the statement, including a subsequent statement, was voluntary. If a statement is voluntary it is admissible. Deterring improper police conduct is only an incidental concern. Thus, it does not automatically follow that violations of *Miranda*'s prophylactic rules (which go beyond voluntariness) require an exclusionary policy designed primarily to deter improper police conduct, i.e., the fourth amendment approach.

When a fourth amendment violation and a *Miranda* violation are combined, the distinct purposes of two exclusionary policies are highlighted. For example, assume an unconstitutional arrest takes place followed immediately by a statement without *Miranda* warnings and a subsequent statement obtained after *Miranda* warnings. The first statement is inadmissible under both the fourth amendment and *Miranda*. The second statement might be admissible under the fourth amendment if the state proves the defendant's statement was "sufficiently an act of free will [such that] the primary taint [was purged]."[19] Making this determination "requires not merely that the statement meet the Fifth Amendment standard of voluntariness."[20] "Even if the statements were found to be voluntary under the Fifth Amendment, the Fourth

17. After United States v. Leon, 104 S. Ct. 3405 (1984), it is clear that the deterrence rationale is the primary if not sole basis for the exclusionary rule. See discussion in Lamonica, supra note 1.

18. Louisiana has had long experience with this issue. See, e.g., State v. Hash, 12 La. Ann. 895 (1857); State v. Stuart, 35 La. Ann. 1015 (1883); State v. Phelps, 138 La. 11, 69 So. 856 (1915); and in a more modern context State v. Thornton, 351 So. 2d 480 (La. 1977).

19. Under the Court's rationale the statement will be tainted and the prosecution will have to introduce evidence which proves that the statement was an "act of free will." Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 416-17 (1963).

20. Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 2261 (1975).

Amendment issue remains."[21] Voluntariness does not control because the fourth amendment exclusionary rule has as its purpose to deter lawless conduct and to "[close] the doors of . . . courts to any use of evidence unconstitutionally obtained."[22] The fifth amendment's exclusionary policy antedates that of the fourth amendment, and is predicated primarily upon voluntariness and trustworthiness.[23] The burden of proving voluntariness and the waiver of *Miranda* rights still remains on the state.[24] A prior voluntary statement given in violation of *Miranda* is a significant fact in making such a determination, but fourth amendment exclusionary policy may not be completely applicable to the fifth amendment issue, much less to the violation of one of *Miranda*'s prophylactic rules. While there is language supporting contrary views,[25] the *Elstad* majority apparently is relying upon traditional voluntariness, exclusionary policy concerns. An additional voluntariness factor recognized is a refusal to allow a factual or legal assumption with respect to the psychological impact of the first *Miranda*-violated statement: "The relevant inquiry is whether, *in fact*, the second statement was also voluntarily made. As in any such inquiry, the *finder of fact* must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."[26]

If *Miranda* is to be maintained as an efficient and realistic way of dealing with the more difficult voluntariness issue, *Elstad*'s impact must be carefully considered. A central purpose of *Miranda* was to provide a simpler yet reasonably realistic determination of voluntariness in most custodial interrogations. When *Miranda* is violated the voluntariness determination may be more difficult. *Elstad* does not undercut *Miranda*'s purpose if finders of fact, with the assistance of adversary counsel, realistically evaluate whether the subsequent statement came after a knowing and intelligent waiver of *Miranda* and was voluntary. While there is no need to presume the first, unwarned statement was compulsive, there is also no need to presume that it was not. As with any complex mixed question of law and fact, realistic fact-finding on a case-by-case basis is imperative.

Significantly, the Court did not address the effect of *Miranda* violations when a suspect invokes his right to remain silent or his right

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21. Id. at 601-02, 95 S. Ct. at 2261.

22. Id. at 599, 95 S. Ct. at 2259, quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 416 (1963).

23. See, e.g., State v. Glover, 343 So. 2d 118 (La. 1977).

24. See, e.g., La. R.S. 15:451, 452 (1981).

25. See *Elstad*, 105 S. Ct. at 1299 (Brenan, J., dissenting). Justice O'Connor characterized Justice Brennan's dissent in "apocalyptic tone . . . distort[ing] the reasoning and holding . . . [and] worse, invit[ing] trial courts and prosecutors to do the same." 105 S. Ct. at 1298 n.5.

26. 105 S. Ct. at 1298 (emphasis added).

to counsel. In such circumstances, particularly with respect to requests for counsel, there may be a greater need for a more expansive exclusionary policy to assure compliance with the demands. Those issues however cannot properly be resolved by automatic or mechanical application of an exclusionary sanction. Similarly, the proper resolution may require more than the voluntariness concerns expressed in *Elstad*.

In light of article I, section 13[27] which elevates *Miranda*-type rights to constitutional protections in Louisiana and in light of the Louisiana Supreme Court's treatment of these protections as an integral part of voluntariness, the impact of *Elstad* is less clear. In *State v. Callihan*,[28] Justice Dixon, speaking for the court, apparently created a *per se* requirement of giving *Miranda* warnings for establishing voluntariness: "One of those legal requirements [of voluntariness] is that defendant be given the 'Miranda' warnings before custodial interrogation begins."[29]

If this position is maintained, then the first statement, unlike that in *Elstad*, will be treated as involuntary as a matter of *law*, and then traditional voluntariness analysis would be appropriate.

Searches Upon Less Than Probable Cause

New Jersey v. T.L.O.[30] provides another example of the Court adopting a restrictive exclusionary policy under the fourth amendment. The Court granted certiorari "to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities."[31] Since the Court concluded that no fourth amendment violation took place, that issue was not reached. Rather, the Court articulated "the proper standard for assessing the . . . [constitutionality] of searches conducted by public school officials."[32] The opinion may be of broader significance, however, because its rationale allows an extensive evidentiary search upon less than probable cause that a crime had been or was being committed.

The Court concluded that the fourth amendment unreasonable search and seizure prohibition applies to searches conducted by public school

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27. La. Const. art. I, § 13 provides:
When any person has been arrested or detained in connection with the investigaton or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

28. 320 So. 2d 155 (La. 1975).

29. Id. at 158. See discussion, Lamonica, The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pre-Trial Criminal Procedure, 37 La. L. Rev. 535, 544 (1977).

30. 105 S. Ct. 733 (1985).

31. Id. at 736.

32. Id.

officials, but that "'probable cause' is not an irreducible requirement of a valid search,"[33] and that "the warrant . . . is unsuited to the school environment."[34] Rather, the Court adopted the balancing approach first articulated in *Terry v. Ohio*.[35] "Where a careful balancing of government and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[36]

T.L.O. involved the search of a purse of a student suspected of violating the school's *rule* against smoking in a lavatory. Upon a thorough search, cigarettes and marijuana were found. Prior to the search, there was no reason to believe that a crime had taken place and possessing cigarettes did not violate school rules. The Court concluded, "[t]he initial decision to open the purse was justified by . . . [the] well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory."[37] The marijuana was discovered "in plain view"[38] and justified a more thorough search.

Significantly, the Court determined that ordinarily "a search of a student by a teacher or other school official will be, 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law *or the rules of the school.*"[39]

The Court recognized that it was not deciding "whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies,"[40] whether there is a different standard authorizing searches when made in conjunction with or at the request of law enforcement agencies[41] or "whether individualized suspicion is an essential element of the reasonableness standard adopt[ed],"[42] thus barring general searches of students or places where they store property.

The United States Supreme Court noted that the Louisiana Supreme Court had held "that the Fourth Amendment applies in full to in-school searches by school officials and that a search conducted without probable

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33. Id. at 743.
34. Id.
35. 392 U.S. 1, 88 S. Ct. 1868 (1968).
36. 105 S. Ct. at 743.
37. Id. at 737.
38. Id.
39. Id. at 744 (emphasis added).
40. Id. at 741 n.5.
41. Id.
42. Id. at 744.

cause is unreasonable."[43] Since *State v. Mora* appears predicated in part on the state constitution, it, of course, is not clear what impact *T.L.O.* will have on it. The legislature has authorized school searches for enumerated contraband as well as "other materials or objects the possession of which is a violation of"[44] school board policy. The statute, however, requires the teacher, principal, or administrator to have "articulable facts which lead him to a reasonable belief that the items sought will be found."[45] This language appears to conform to the principles of *T.L.O.* which are founded upon *Terry*. Because the statute provides that it shall not "be construed to afford a student an expectation of privacy which would not otherwise exist,"[46] it does not appear to provide protections beyond those enumerated in the constitution.

Good Faith Exception in Louisiana

Two Louisiana courts of appeal have now accepted the *United States v. Leon* exclusionary rule exception. In *State v. DiMaggio*,[47] a fifth circuit panel found the views expressed in *Leon* "refreshing"[48] and applied them without considering whether the Louisiana Constitution requires a different exclusionary policy. In *State v. Wood*,[49] Judge Hall, writing for a second circuit panel concluded:

> There is no good reason why this state should not now apply the exception to or limitation of the exclusionary rule established by the United States Supreme Court in Leon. . . . It advances the legitimate interests of the criminal justice system without sacrificing the individual rights guaranteed by the constitution.[50]

Both courts examined the probable cause question carefully, rather than assuming *arguendo* its absence, and found no probable cause in the warrants. Commendably, this approach furthers the appellate courts' role in providing guidance to lower courts and law enforcement personnel and thus avoids the significant criticism of the good faith exception that the reviewing courts' guidance, as well as the fourth amendment's further development, will be frozen.[51]

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43. 105 S. Ct. 738-39 n.2, citing State v. Mora, 307 So. 2d 317 (La. 1975), vacated, 423 U.S. 809, 96 S. Ct. 20 (1975), on remand, 330 So. 2d 900 (La. 1976), cert. denied, 429 U.S. 1004 (1976).

44. La. R.S. 17:416.3(A) (Supp. 1985).

45. Id.

46. Id.

47. 461 So. 2d 439 (La. App. 5th Cir. 1984).

48. Id. at 443.

49. 457 So. 2d 206 (La. App. 2d Cir. 1984).

50. Id. at 210.

51. See, e.g., United States v. Leon, 104 S. Ct. 3405, 3423 (1984).

By carefully addressing the issuing authority's actions and finding them substandard, guidance continues to be provided to the issuing authority. Neither court, however, expressly addressed or emphasized that *Leon* creates a standard for *review*, not a standard for the issuing magistrate.[52]

State v. Taylor[53] presents an interesting related matter. The issue was the application of the "good faith" exception to an arrest made on a recalled warrant, incorrectly communicated to arresting officers. The court cites with approval authorities reaching the broader conclusion that if there is an invalid warrant communicated, the good faith exception does not apply.[54] The holding is narrow, however, because the second circuit imputed knowledge of the fact that the warrant was recalled to the police because "of the information on file in its records department."[55] Furthermore, the court imputed this knowledge to "all successive officers who deal with the defendant."[56]

The court was not required to decide the effect of the good faith exception on a communicated warrant where it is not factually appropriate to impute knowledge. Previously this problem was addressed in terms of the absence of probable cause. Since Leon no longer requires exclusion based upon the mere absence of probable cause in warrant cases, further consideration appears appropriate. It will be necessary to decide whether this type situation is to be considered a warrant or nonwarrant case. In deciding that difficult issue, the concern should be whether an exclusionary sanction is necessary to ensure that information is carefully disseminated over the highly sophisticated communication networks. In light of the scope and impersonal nature of such communications and the difficulties in assuring accountability, greater concern may be appropriate.

Taylor also highlights the dilemma courts may increasingly find in light of limited views of exclusionary policy. Judge Norris admonished, "[w]e share the lower court's consternation at the reprehensible and uncalled for acts of these sophisticated and highly trained officers. Blatant warrantless searches and fraudulent affidavits cannot be tolerated even though in rare instances, as here, they fall short of actually violating the rights of an accused."[57] If public admonition proves ineffective, other controls, including administrative or supervisory sanctions, may prove necessary.

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52. See discussion, Lamonica, supra note 1, at 504.
53. 468 So. 2d 617 (La. App. 2d Cir. 1985).
54. Id. at 624-25.
55. Id. at 625.
56. Id.
57. Id. at 632.