Missouri Law Review

Volume 69
Issue 4 *Fall 2004*

Article 17

Fall 2004

Eating the Poisonous Fruit: The Eighth Circuit Will Not Exclude Derivative Evidence from a Miranda Violation

Kerry F. Schonwald

Eating the Poisonous Fruit: The Eighth Circuit Will Not Exclude Derivative Evidence from a *Miranda* Violation

United States v. Villalba-Alvarado[1]

I. INTRODUCTION

Today almost anyone who has ever turned on a television is familiar with the four *Miranda* warnings. However, the general public is probably not aware of what happens when those rights are violated. From the time the United States Supreme Court handed down the *Miranda v. Arizona*[2] decision, courts have struggled to determine what evidence should be excluded as a result of a *Miranda* violation.[3] When the Supreme Court stated that *Miranda v. Arizona* announced a constitutional rule in *Dickerson v. United States*,[4] many of these struggles ended.[5] However, the lower courts have split about whether evidence derived from a *Miranda* violation is subject to the *Wong Sun v. United States*[6] fruit-of-the-poisonous-tree doctrine.[7] Recently, the Supreme Court had the opportunity to rule on this issue, but the case yielded no majority opinion and the circuits remain divided.[8] In *United States v. Villalba-Alvarado*,[9] the Eighth Circuit Court of Appeals joined the Third and Fourth Circuits in holding that the poisonous fruit doctrine does not apply to physical evidence derived from a *Miranda* violation.[10]

---

1. 345 F.3d 1007 (8th Cir. 2003).
2. 384 U.S. 436 (1966).
3. *See* Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).
4. 530 U.S. 428 (2000).
5. *Id.* at 444.
6. 371 U.S. 471 (1963).
7. *See* United States v. Villalba-Alvarado, 345 F.3d 1007 (8th Cir. 2003); United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002); United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *rev'd*, 124 S. Ct. 2620 (2004); United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176 (3d Cir. 2001).
8. United States v. Patane, 124 S. Ct. 2620 (2004).
9. 345 F.3d 1007 (8th Cir. 2003).
10. *Id.* at 1019.

II. FACTS AND HOLDING

Police obtained a search warrant for Villalba-Alvarado's car, home, and person subsequent to a controlled drug buy with pre-recorded currency.[11] When the officers executing the warrant spotted Villalba-Alvarado in his car, they immediately handcuffed him and brought him back to his house.[12] Villalba-Alvarado was not advised of his *Miranda* rights at this time.[13] At his house, Villalba-Alvarado voluntarily disclosed to the officers the location of a hidden panel containing cocaine and a scale.[14] He also disclosed that he had a coat in the closet containing $3,360, a portion of which was the pre-recorded currency.[15] The search of Villalba-Alvarado's home lasted another forty-five minutes but revealed no other evidence.[16] After the search, the officers took Villalba-Alvarado to the police station where they advised him of his rights for the first time.[17] Villalba-Alvarado waived his *Miranda* rights and gave another statement detailing where the drugs were found.[18]

At trial, Villalba-Alvarado asserted that since *Dickerson v. United States*[19] declared *Miranda v. Arizona*[20] a constitutional rule, the police's failure to administer the *Miranda* warnings was a constitutional violation and the poisonous fruits doctrine applied.[21] However, the United States argued that the fruit-of-the-poisonous-tree doctrine did not apply, that the physical evidence would have inevitably been discovered in the course of executing the warrant, and that the second statement from Villalba-Alvarado dissipated the taint of the prior unwarned statement.[22] Villalba-Alvarado argued that because *Dickerson*[23] undermined the holdings of *Oregon v. Elstad*[24] and *Michigan v. Tucker*,[25] both his second statement and the physical evidence should be suppressed.[26]

---

11. *Id.* at 1008.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1009.
18. *Id.*
19. 530 U.S. 428 (2000).
20. 384 U.S. 436 (1966).
21. *Villalba-Alvarado*, 345 F.3d at 1011-12.
22. *Id.* at 1009.
23. 530 U.S. at 438-39 (holding that *Miranda* is a constitutional rather than merely prophylactic rule).
24. 470 U.S. 298, 309 (1985) (admitting evidence of a voluntary, warned confession after an earlier *Miranda* violation).
25. 417 U.S. 433, 450-52 (1974) (admitting testimony of a witness identified by an unwarned statement).
26. *Villalba-Alvarado*, 345 F.3d at 1009-12.

Following a suppression hearing, the magistrate recommended: 1) the drugs be suppressed under the *Wong Sun v. United States*[27] poisonous fruits doctrine, 2) the money be admitted under the inevitable discovery rule, and 3) the post-*Mirandized* statements also be suppressed under the poisonous fruits doctrine.[28] The United States District Court for the District of Minnesota concurred with most of the magistrate's recommendations, but amended them to admit part of the second statement that did not relate to the physical evidence.[29]

A three judge panel for the United States Court of Appeals for the Eighth Circuit reversed.[30] The appellate court relied on the language in *Dickerson* reaffirming a difference between an unreasonable search under the Fourth Amendment and an unwarned statement under the Fifth Amendment to conclude that the Supreme Court had reaffirmed *Elstad*.[31] This meant that the post-waiver statement in the instant case did not need to be suppressed under the poisonous fruits doctrine.[32] The Eighth Circuit analyzed similar cases from the First, Third, Fourth, and Tenth Circuits and decided to join the Third and Fourth Circuits' holdings that there need not be a distinction between types of derivative evidence.[33] Rather any type of evidence derived from a *Miranda* violation is subject to a voluntariness standard.[34] Finally, the court concluded that the inevitable discovery doctrine could not apply to the drugs, but it could apply to the currency.[35]

---

27. 371 U.S. 471 (1963).

28. *Villalba-Alvarado*, 345 F.3d at 1009.

29. *Id.* at 1009-10.

30. *Id.* at 1008.

31. *Id.* at 1012. *Elstad* held a voluntary, warned confession admissible even though it followed an initial unwarned statement. Oregon v. Elstad, 470 U.S. 298, 309 (1985). Elstad was given a full set of *Miranda* warnings after the initial statement and before the second confession. *Id.* at 301. The Eighth Circuit in the instant case believes that a full set of *Miranda* warnings will also dissipate the taint of physical evidence derived from the initial unwarned statement. *Villalba-Alvarado*, 345 F.3d at 1013.

32. *Villalba-Alvarado*, 345 F.3d at 1013. The court also cited *United States v. Feller*, a post-*Dickerson* case in which the court found a post-warning, post-waiver statement following an earlier *Miranda* violation admissible because the latter statement was voluntary. *Id.* (citing United States v. Fellers, 285 F.3d 721, 724 (8th Cir. 2002), *rev'd*, 540 U.S. 519 (2004)). Relying on the distinction in *Dickerson* between the application of the exclusionary rule to Fourth and Fifth Amendment violations and its earlier holding in *Fellers*, the court found the post-waiver statement to be admissible. *Id.* This portion of the holding will not be discussed further in this Note.

33. *Id.* at 1019.

34. *Id.*

35. *Id.* at 1020. *Nix v. Williams* laid out a two part test for inevitable discovery. Nix v. Williams, 467 U.S. 431 (1984). First, the officers must be participating in an ongoing investigation separate from the unlawful conduct. *Villalba-Alvarado*, 345 F.3d at 1019 (citing *Nix*, 467 U.S. at 144). In the instant case it is uncontested that this

III. LEGAL BACKGROUND

The *Miranda v. Arizona*[36] decision created an exclusionary rule to protect the Fifth Amendment privilege against self-incrimination during custodial interrogations.[37] This rule excluded evidence obtained prior to advising the suspect of his constitutional rights unless he knowingly and voluntarily waived those rights.[38] Since *Miranda*, the United States Supreme Court has carved out three exceptions to this rule.[39]

In *New York v. Quarles*,[40] the Court created an exception to admit an unwarned statement and its fruits where the evidence was obtained in an effort to protect public safety.[41] The other two exceptions involve the admissibility of derivative evidence even though the initial unwarned statement is inadmissible.[42]

The exclusionary rule holds that "evidence seized by the police in violation of the Fourth Amendment may not be introduced by the prosecution in a criminal trial of the victim of the unreasonable search or seizure."[43] The Fourth Amendment exclusionary rule applies to both direct and indirect products of government illegality.[44] The initial illegal police conduct is referred to as the "poisonous tree," and evidence obtained from the illegal conduct is known as "fruit of the poisonous tree."[45] The poisonous fruits doctrine applies to derivative evidence unless the connection between the initial illegality and the fruit is too attenuated.[46] Although the doctrine was initially developed

---

first element is satisfied by the search pursuant to a valid warrant. *Id.* The second requirement is a showing of reasonable probability that the lawful part of the investigation would have independently led the officers to the same evidence. *Id.* (citing *Nix*, 467 U.S. at 444). This evidentiary issue must be proven by a preponderance of the evidence. *Id.* (citing *Nix*, 467 U.S. at 444). The court found that the government failed to prove by a preponderance of the evidence that the officers would have independently discovered the secret panel, but there was a reasonable probability the money in the coat pocket would have been discovered. *Id.* at 1020. This portion of the holding will not be discussed further in this Note.

36. 384 U.S. 436 (1966).

37. *Id.* at 478-79.

38. *Id.* at 479.

39. *See* Oregon v. Elstad, 470 U.S. 298, 314 (1985); New York v. Quarles, 467 U.S. 649, 655-56 (1984); Michigan v. Tucker, 417 U.S. 433, 447-48 (1974).

40. 467 U.S. 649 (1984).

41. *Id.* at 657-58.

42. *See Elstad*, 470 U.S. at 318; *Tucker*, 417 U.S. at 448.

43. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 5.04, at 73 (2d ed. 1997).

44. *Id.* § 21.08, at 352.

45. *Id.*

46. Nardone v. United States, 308 U.S. 338, 341 (1939). Passage of time and a break in the chain of events were two ways in which evidence could become too attenuated to be considered a fruit of the poisonous tree. *Id.*

under the Fourth Amendment, the Supreme Court has also applied it to Fifth and Sixth Amendment violations.[47] Nevertheless, neither the *Miranda* decision nor any subsequent Supreme Court decisions have expressly clarified when physical evidence derived directly from an unwarned statement is admissible.

A. The Miranda Decision

The issue before the *Miranda* Court was the admissibility of statements made during custodial interrogations where the defendant was not made aware of his Fifth Amendment right against self-incrimination.[48] The Court directed its opinion at deciding whether procedural safeguards were necessary to ensure that an individual is informed of his Fifth Amendment rights prior to custodial interrogation.[49] The Court consolidated four cases with similar facts from different jurisdictions in addressing this issue.[50] In every case, police questioned the defendants in isolation, the defendants were not effectively warned of their rights prior to interrogation, and the interrogation resulted in incriminating statements.[51]

Prior to *Miranda*, the admissibility of confessions was based on a voluntariness standard.[52] This standard involved a determination of whether the defendant's will had been overborne.[53] The *Miranda* Court recognized that coercion can be psychological as well as physical.[54] In light of past problems of physical coercion and current concerns about psychological coercion, the Court worried that defendants' confessions may not be a product of their free will.[55] The Court examined law enforcement interrogation manuals and realized that the line between voluntary and involuntary confessions was unclear.[56] The manuals emphasized the importance of many tactics clearly

47. *See* United States v. Wade, 388 U.S. 218, 240 (1967); Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964).

48. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

49. *Id.*

50. *Id.* at 445. The four cases were: California v. Stewart, Miranda v. Arizona, Vignera v. New York, and Westover v. United States. *Id.* at 456-57.

51. *Id.* at 445.

52. The voluntariness standard derives from both the Fifth and Fourteenth Amendments. Dickerson v. United States, 530 U.S. 428, 433 (2000).

53. *Id.* at 434. Voluntariness inquiries require the court to determine whether the defendant's confession was a product of his free choice. Culombe v. Connecticut, 367 U.S. 568, 602 (1961). "[I]f he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the . . . confession [is inadmissible]." *Id.*

54. *Miranda*, 384 U.S. at 448.

55. *Id.* at 447-48.

56. *Miranda*, 384 U.S. at 448-49; *see also Dickerson*, 530 U.S. at 435.

aimed at psychologically coercing suspects.[57] The Court also noted that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals"[58] even without the use of coercive interrogation.

The Court pointed out that "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."[59] The whole purpose behind these incommunicado interrogation practices was to put the suspect in such an impaired emotional state as to render him almost incapable of making a rational decision.[60] When these techniques were used, the suspect was not voluntarily surrendering his constitutional right against self-incrimination by speaking to the police.[61] Rather, the coercive techniques and the failure to warn the suspect of his right to remain silent led him to speak.[62] Such statements were not a product of the individual's free will.[63] The *Miranda* Court determined the best way to restore voluntariness was to require that the individual be informed of his constitutional rights against self-incrimination prior to custodial interrogation.[64]

Before the police may question a suspect in custody, the suspect must be made aware of four rights: 1) the right to remain silent, 2) that anything said can be used against him in court, 3) the right to an attorney at any time prior to or during questioning, and 4) that an attorney will be appointed if he cannot afford one.[65] Once the warnings have been administered, the individual may knowingly and voluntarily waive these rights.[66] The *Miranda* Court underscored the importance of their decision by declaring "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[67]

---

57. *Miranda*, 384 U.S. at 449-50. Examples of such tactics include: getting the suspect alone and away from home, stripping him of any possible psychological advantage, and acting as though guilt is a certainty of which they are just confirming the details. *Id.*

58. *Id.* at 455.

59. *Id.* at 457-58.

60. *Id.* at 465.

61. *Id.*

62. *Id.*

63. *Id.* at 458.

64. *Id.* at 467.

65. *Id.* at 479.

66. *Id.* Additionally, because the privilege against self-incrimination was so fundamental to our legal system and the warnings were so easily administered, the Court rejected the idea of a case by case approach to determine if each individual was already aware of his constitutional rights before making statements. *Id.* at 468.

67. *Id.* at 476. The Court noted that the warnings were not intended to create a "constitutional straitjacket" impairing efforts of reform. *Id.* at 467. Rather, the Court

B. Exceptions to Miranda's Exclusionary Rule

The United States Supreme Court stated the first exception to *Miranda*'s exclusionary rule in *New York v. Quarles*.[68] In *Quarles*, a woman reported to Officer Kraft that a man with a gun had raped her.[69] She directed the officers to the grocery store the suspect had just entered.[70] After a brief chase, Kraft detained Quarles and found him wearing an empty shoulder holster.[71] Kraft asked where the gun was, at which point Quarles pointed and said "the gun is over there."[72] Immediately after retrieving the gun, Kraft formally arrested and read him the *Miranda* warnings.[73] Quarles then made additional incriminating statements.[74]

The Court held that Kraft was allowed to ask about the location of the gun before giving *Miranda* warnings under a "public safety" exception.[75] "[T]he availability of [this] exception does not depend upon the motivation of the individual officers involved."[76] The Court reasoned that *Miranda* was willing to accept fewer convictions as the price for protecting an individual's Fifth Amendment right.[77] But here there was a graver risk to public safety.[78] As a result, the Court concluded "public safety outweigh[ed] the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[79] The Court ended its opinion by noting that this exception would not be difficult to apply.[80] Police officers could easily differentiate between questions used to protect the public and questions used to secure evidence.[81]

---

encouraged Congress and the states to develop other ways to more effectively protect the individual's Fifth Amendment rights while also encouraging efficient law enforcement. *Id.* But until this alternative is developed, these warnings are the constitutional minimum to be followed. *Id.*

68. 467 U.S. 649 (1984).
69. *Id.* at 651-52.
70. *Id.*
71. *Id.* at 652.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 655.
76. *Id.* at 656.
77. *Id.* at 655-56.
78. *Id.* at 657.
79. *Id.*
80. *Id.* at 658-59.
81. *Id.*

The second exception to *Miranda*'s exclusionary rule was announced in *Michigan v. Tucker*.[82] Tucker was arrested for rape and received all the *Miranda* warnings except that an attorney would be appointed to him if he could not afford one.[83] Tucker stated that he understood these rights and did not want an attorney.[84] Tucker told the police that he was with a man named Henderson on the night of the crime.[85] Henderson told the police a very different story.[86] The Court had to decide whether the police violated Tucker's right against self-incrimination and whether Henderson's testimony had to be excluded.[87]

The *Tucker* Court first recognized that the *Miranda* rule was implicated.[88] The police did not violate Tucker's right against compulsory self-incrimination, but they did deprive him of the complete set of *Miranda*'s procedural safeguards established to protect that right.[89] Although the police had not violated the Constitution, the Court acknowledged that there had been a violation of the procedural safeguards of *Miranda*.[90] The real question, then, was how sweeping the judicial remedy for a nonconstitutional *Miranda* violation should be.[91]

The Court then compared the admissibility of Henderson's testimony to the exclusionary rule of the Fourth Amendment.[92] Under *Wong Sun v. United States*,[93] evidence obtained as a result of a Fourth Amendment violation is not admissible as a fruit of the poisonous tree.[94] The Court found that the *Wong Sun* rule did not control here because the police had not violated Tucker's Fifth Amendment constitutional right but merely the prophylactic standards announced in *Miranda*.[95] However, the Court agreed that under certain circumstances the fruit-of-the-poisonous-tree doctrine could apply to Fifth Amendment violations.[96]

---

82. 417 U.S. 433 (1974). Tucker's arrest and questioning took place before the *Miranda* decision was handed down, but his trial occurred after the decision. *Id.* at 435.

83. *Id.* at 436.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 439.

88. *Id.* at 435.

89. *Id.* at 444.

90. *Id.* at 445.

91. *Id.*

92. *Id.*

93. 371 U.S. 471 (1963). In this case, the police discovered evidence as a result of an arrest made without probable cause, and the court held that the derivative evidence was inadmissible against defendant at trial. *Id.*

94. *Tucker*, 417 U.S. at 445.

95. *Id.* at 445-46.

96. *Id.* at 446-47.

The final derivative evidence exception to *Miranda* came from *Oregon v. Elstad*.[97] Elstad was implicated in a robbery, and the police went to his house to arrest him.[98] When the officers told Elstad they were there to talk about the robbery, Elstad made incriminating statements in response to the officers' questions.[99] One hour later, at the police station, Elstad received *Miranda* warnings.[100] He waived those warnings and offered the police a full confession.[101] The issue before the Court was whether the initial unwarned statement tainted the later warned confession.[102]

The Court rejected Elstad's poisonous fruit argument.[103] If a violation of an individual's Fourth Amendment rights results in a confession, that confession must be suppressed unless the confession is sufficiently attenuated from the initial illegality.[104] However, the Court found that in the Fifth Amendment context, no such attenuation is needed to admit the second statement.[105] The Court noted that *Miranda*'s exclusionary rule was broader than the Fourth Amendment's exclusionary rule.[106] After all, *Miranda*'s exclusionary rule can be triggered even without a Fifth Amendment violation.[107]

The Court relied on its language from *Quarles* and *Tucker* to reiterate that failure to give the Miranda warnings was not a constitutional violation.[108] Where there was no deliberately coercive police conduct, giving an individual a full set of *Miranda* warnings cured the presumed compulsion of an earlier unwarned statement.[109] The Court held that an individual who provides a voluntary but unwarned statement is not precluded from subsequently waiving his rights and giving another statement once he received the *Miranda* warnings.[110]

---

97. 470 U.S. 298 (1985).
98. *Id.*
99. *Id.* at 301.
100. *Id.*
101. *Id.*
102. *Id.* at 300.
103. *Id.* at 305-07.
104. *Id.* at 306. In a situation where a Fourth Amendment violation tainted the confession, the prosecution must show both voluntariness and a sufficient attenuation in events in order to admit the confession. *Id.*
105. *Id.* at 318.
106. *Id.* at 306.
107. *Id.*
108. *Id.*
109. *Id.* at 314.
110. *Id.* at 318.

C. Dickerson: Miranda *as a Constitutional Rule*

In *Dickerson v. United States*[111] the Supreme Court considered whether the Constitution itself required that an individual receive *Miranda* warnings.[112] The issue arose as a result of a federal statute purporting to require that the admissibility of confessions be governed only by a voluntariness test.[113] *Miranda* warnings were to be no more than a factor of the test.[114] The Court held that the federal statute was unconstitutional.[115]

The Supreme Court began its analysis by noting that it had supervisory authority over federal courts.[116] Congress could control judicially enacted rules and procedures not mandated by the Constitution, but Congress did not have authority to overrule a Supreme Court decision based on the Constitution.[117]

Next, the language itself in *Miranda* indicated that the Court intended to set forth a constitutional rule.[118] The *Miranda* opinion stated that its purpose was "'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.'"[119] *Miranda* further noted that the confessions in each of the four cases "'were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.'"[120] The *Miranda* Court invited Congress to protect the Fifth Amendment privilege against self-incrimination, but warned that anything proposed must be "'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'"[121]

Finally, the Court rejected the argument that *Miranda*'s exceptions prove that *Miranda* is not a constitutional rule.[122] The Court insisted that these exceptions simply illuminate the fact that constitutional rules are not

111. 530 U.S. 428 (2000).

112. *Id.* at 432.

113. *Id.* at 435-36 (citing 18 U.S.C. § 3501 (2000)).

114. *Id. See also* 28 U.S.C. § 3501. Because of the direct conflict between this statute and the *Miranda* holding, it was clear that Congress intended to overrule *Miranda*. *Dickerson*, 530 U.S. at 436. Congress would only have the power to overrule *Miranda* if it was not a constitutional decision. *Id.* at 436-37.

115. *Dickerson*, 530 U.S. at 442-43.

116. *Id.* at 437.

117. *Id.*

118. *Id.* at 439.

119. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 441-42 (1966)).

120. *Id.* at 439-40 (quoting *Miranda*, 384 U.S. at 491).

121. *Id.* at 440 (quoting *Miranda*, 384 U.S. at 467).

122. *Id.* at 441; *see also* Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

immutable.[123] The majority concluded that *Miranda* produced a constitutional rule that Congress is not able to supercede by statute.[124]

*D. The Post-*Dickerson *Circuit Split*

The circuit courts have split in their interpretation of *Dickerson*. In *United States v. DeSumma*,[125] for example, an officer asked DeSumma if he had any weapons before giving him his *Miranda* warnings.[126] DeSumma directed the officers to a gun in his vehicle.[127] The Third Circuit analyzed its pre-*Dickerson* decisions and decided that they were in line with *Dickerson*'s holding.[128] The court interpreted *Dickerson* to draw a distinction between the Fourth and Fifth Amendment with respect to derivative evidence.[129] The fruit-of-the-poisonous-tree doctrine only applied to Fourth Amendment violations.[130]

Citing *Elstad*, the Third Circuit found that "the purpose of the Fourth Amendment's exclusionary rule is 'to deter unreasonable searches, no matter how probative their fruits'"[131] and that "'the *Miranda* presumption . . . does not require that the statements and their fruits be discarded as inherently tainted.'"[132] The court reasoned that applying the poisonous fruits doctrine to evidence derived from *Miranda* violations would be inconsistent with the doctrine's goals of deterring police misconduct and assuring trustworthy evidence.[133]

The court rejected DeSumma's argument that these pre-*Dickerson* cases were inapplicable because they read *Miranda* as a prophylactic rule.[134] Rather, the court pointed to the language in *Dickerson* which stated that there was a difference between an unreasonable search under the Fourth Amendment and a statement obtained without *Miranda* warnings under the Fifth

123. *Dickerson*, 530 U.S. at 441. In particular, the Court pointed out that its refusal in *Elstad* to apply the fruits doctrine was a product of the inherent difference in an unreasonable search and a confession obtained without *Miranda* warnings, not that *Miranda* is not a constitutional rule. *Id.*

124. *Id.* at 444.

125. 272 F.3d 176 (3d Cir. 2001).

126. *Id.* at 178.

127. *Id.*

128. *Id.* at 179-80.

129. *Id.* at 180.

130. *Id.*

131. *Id.* at 179 (quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

132. *Id.* (quoting *Elstad*, 470 U.S. at 307) (alteration in original).

133. *Id.* at 180.

134. *Id.*

Amendment.[135] The Third Circuit interpreted this language to mean that the Supreme Court anticipated and rejected DeSumma's argument.[136]

In *United States. v. Sterling*,[137] on facts similar to *DeSumma*, the Fourth Circuit held that the fruit-of-the-poisonous-tree doctrine did not apply to physical evidence derived from a *Miranda* violation.[138] The court looked to its pre-*Dickerson* cases for guidance,[139] noting that the Supreme Court held witness testimony admissible in *Tucker*[140] and a subsequent, warned statement admissible in *Elstad*.[141] Consequently, as long as the unwarned statement that led to the physical evidence was voluntary, the physical evidence is admissible.[142]

The *Sterling* court pointed to the wording of *Miranda*'s holding, that certain warnings must be given before custodial interrogation for the individual's *statements* to be admissible.[143] The court interpreted the *Dickerson* holding to indicate that the exceptions to *Miranda* were not overruled by *Dickerson*.[144] As a result, there was still a distinction between the admissibility of statements and derivative evidence.[145]

Unlike the Third and Fourth Circuits, the First Circuit did not believe that the poisonous fruits doctrine never applied to evidence derived from *Miranda* violations.[146] In *United States v. Faulkingham*,[147] the First Circuit considered whether the fruits doctrine applied to physical evidence obtained as a result of an unwarned statement.[148] In that case, Faulkingham made incriminating statements after his arrest but prior to receiving *Miranda* warnings that led the officers to physical evidence.[149] The court determined that the admissibility of physical evidence should be analyzed under the "'twin rationales' for *Miranda*: trustworthiness and deterrence."[150]

---

135. *Id.* (citing Dickerson v. United States, 530 U.S. 428, 441 (2000)).

136. *Id.*

137. 283 F.3d 216 (4th Cir. 2002).

138. *Id.* at 218-19.

139. *Id.* In *United States v. Elie*, the court relied on the Supreme Court's rulings in *Tucker* and *Elstad* to find the fruits doctrine inapplicable to derivative physical evidence. *Id.* (citing United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997), *abrogated by* United States v. Sterling, 283 F.3d 216 (4th Cir. 2002)).

140. *Sterling*, 283 F.3d at 218. *See supra* notes 82-96 and accompanying text.

141. *Sterling*, 283 F.3d at 218. *See supra* notes 97-110 and accompanying text.

142. *Sterling*, 283 F.3d at 219 (citing *Elie*, 111 F.3d at 1142).

143. *Id.*

144. *Id.*

145. *Id.*

146. United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002).

147. 295 F.3d 85 (1st Cir. 2002).

148. *Id.* at 90.

149. *Id.* at 86.

150. *Id.* (citing Oregon v. Elstad, 470 U.S. 298, 308 (1985)).

The First Circuit recognized that *Elstad* permitted the admissibility of the second confession on the basis of voluntariness.[151] But the court found that *Elstad* did not completely prohibit admissibility of evidence derived from a *Miranda* violation.[152] Where there was more than a merely technical *Miranda* violation and where a "substantial nexus" exists between the violation and the derivative evidence, the evidence could plausibly be suppressed.[153]

The court held that in some situations the fruits doctrine should apply to *Miranda* violations but in others it should not.[154] To determine when the fruits doctrine applies, a court must balance the reliability of the derivative evidence against the need to deter police misconduct.[155] In this case, the derivative evidence was reliable, Faulkingham's statements were voluntary, and the failure to give *Miranda* warnings was negligent but not willful.[156] Therefore, the evidence in *Faulkingham* was admissible.[157] But, the First Circuit left open the possibility of applying the fruits doctrine in a situation where deterrence concerns were greater and the *Miranda* violation deliberate.[158]

In *United States v. Patane*[159] the Tenth Circuit held that the poisonous fruits doctrine applied to physical evidence derived from a *Miranda* violation.[160] Patane responded to police questioning but did not receive a complete *Miranda* warning.[161] As a result of Patane's statements, the police discovered a gun.[162] The court analyzed both Supreme Court precedent and the decisions of the First, Third, and Fourth Circuits[163] in formulating its decision.[164]

The court rejected the Government's reliance on *Tucker* and *Elstad* for the proposition that the poisonous fruits doctrine never applied in Fifth Amendment contexts.[165] Both *Elstad*[166] and *Tucker*[167] rested their holdings on

---

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 93.
156. *Id.*
157. *Id.* at 93-94.
158. *Id.* at 94.
159. 304 F.3d 1013 (10th Cir. 2002), *rev'd*, 124 S. Ct. 2620 (2004).
160. *Id.* at 1029.
161. *Id.* at 1015.
162. *Id.*
163. *See* United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002); United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. DeSumma, 272 F.2d 176 (3d Cir. 2001).
164. *See Patane*, 304 F.3d at 1018-29.
165. *Id.* at 1019.
166. "'The prophylactic *Miranda* warnings therefore are "not themselves rights protected by the Constitution . . . ."' Oregon v. Elstad, 470 U.S. 298, 305 (1985) (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)) (citations omitted).

the premise that *Miranda* was a prophylactic rather than constitutional rule.[168] This premise was completely undermined in *Dickerson* when the Supreme Court said *Miranda* was a constitutional rule.[169]

The court rejected the holdings of the Third and Fourth Circuits that physical evidence derived from a *Miranda* violation could never be suppressed under the fruits doctrine.[170] Rather, the Tenth Circuit agreed with the two major premises of the First Circuit's *Faulkingham* decision: that *Dickerson* changed the analysis of applying the fruits doctrine to *Miranda* violations, and that those fruits must be suppressed to adhere to the goal of deterrence.[171] However, the court declined to adopt the First Circuit's position that suppression is only necessary where there is deliberate police misconduct.[172] Instead, the Tenth Circuit held that the fruits doctrine applied regardless of whether the *Miranda* violations were willful or negligent.[173]

IV. INSTANT DECISION

In *United States v. Villalba-Alvarado*,[174] the Court of Appeals for the Eighth Circuit determined physical evidence derived from a *Miranda* violation should be admitted even in light of the Supreme Court's decision in *Dickerson*.[175] Ultimately the court held that all evidence derived from a *Miranda* violation must be scrutinized under a voluntariness standard to determine its admissibility.[176]

The court first looked to its pre-*Dickerson* cases to see if any distinction had previously been made regarding derivative physical evidence.[177] In *United States v. Carter*,[178] the Eighth Circuit held physical evidence derived from an unwarned statement inadmissible.[179] But that holding was based on the fact that the defendant's subsequent consent was not voluntary.[180] In

167. "Since there was *no* actual *infringement* of the suspect's *constitutional rights*, [*Tucker*] was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." *Id.* at 308 (citing Michigan v. Tucker, 417 U.S. 433, 445-46 (1974)).
168. *Patane*, 304 F.3d at 1019.
169. *Id.*
170. *Id.* at 1023.
171. *Id.* at 1027.
172. *Id.* at 1027-29.
173. *Id.*
174. 345 F.3d 1007 (8th Cir. 2003).
175. *Id.* at 1019.
176. *Id.*
177. *Id.* at 1014.
178. 884 F.2d 368 (8th Cir. 1989).
179. *Id.* at 374-75.
180. *Id.*

United States v. Wiley,[181] the Eighth Circuit relied on *Elstad* to determine that physical evidence obtained from an unwarned but voluntary statement was admissible because consent was voluntarily granted after the *Miranda* violation.[182] The court conceded that *Wiley* does not control the present case because it dealt with physical fruits flowing indirectly, not directly, from a *Miranda* violation, but the court did find *Wiley* instructive.[183] Thus the court found that, before *Dickerson*, the Eighth Circuit did not interpret *Elstad* to apply only to subsequent warned statements, but to other forms of derivative evidence as well.[184]

The court then turned to the purpose underlying the *Miranda* rule to determine whether the fruits doctrine should apply differently to different types of derivative evidence.[185] After acknowledging that the two main purposes underlying *Miranda* are deterrence of police misconduct and trustworthiness of evidence, the court rejected the idea that deterrence serves a different role for physical evidence than it does for testimonial evidence.[186] Additionally, it concluded that the trustworthiness rationale did not exist at all for derivative physical evidence because the reliability of physical evidence is not diminished by an unwarned statement.[187]

The court then turned to the decisions of other circuits on this issue.[188] In factually similar cases, the Third and Fourth Circuits[189] held that even after *Dickerson*, *Elstad* continued to govern the admissibility of subsequent statements and physical evidence.[190] The Eighth Circuit found this to coincide with its pre-*Dickerson* belief that *Elstad* applied to all forms of derivative evidence.[191] The First Circuit[192] resolved this issue by balancing the deterrence and trustworthiness factors on a case-by-case basis.[193] Under this test, the deterrence factor required deliberate action by an officer to suppress the derivate evidence; mere negligent conduct is insufficient.[194] The Eighth Circuit rejected that test because it could not find precedent supporting a test that relied on an officer's subjective intent.[195]

---

181. 997 F.2d 378 (8th Cir. 1993), *abrogated by* United States v. Bieri, 21 F.3d 819 (8th Cir. 1994).
182. *Id.* at 383.
183. United States v. Villalba-Alvarado, 345 F.3d 1007, 1014 (8th Cir. 2003).
184. *Id.* at 1014-15.
185. *Id.* at 1015.
186. *Id.* at 1015-16.
187. *Id.* at 1016.
188. *Id.* at 1016-19.
189. *See supra* notes 125-45 and accompanying text.
190. *Villalba-Alvarado*, 345 F.3d at 1016-17.
191. *Id.* at 1016.
192. *See supra* notes 146-58 and accompanying text.
193. *Villalba-Alvarado*, 345 F.3d at 1017.
194. *Id.*
195. *Id.* at 1018.

Finally, the Eighth Circuit noted the Tenth Circuit's conclusion[196] that *Elstad* and *Tucker* were undermined, if not overruled, by *Dickerson*'s holding that *Miranda* was a constitutional rule.[197] As a result, the Tenth Circuit chose to extend the fruits doctrine to derivative physical evidence whether it flowed from deliberate or negligent police misconduct.[198] The Eighth Circuit rejected the *Patane* court's holding for two reasons.[199] First, the Eighth Circuit did not believe that *Elstad*'s holding relied on the volitional character of subsequent statements.[200] Therefore, *Elstad* should apply to other types of derivative evidence as well.[201] Additionally, this court parted with the Tenth Circuit by refusing to interpret *Dickerson* as intending "to narrowly limit the established exceptions."[202]

The Eighth Circuit Court of Appeals combined Supreme Court precedent, its own precedent, and the decisions of other circuits in deciding that derivative physical evidence should be treated the same as derivative testimonial evidence.[203] The Eighth Circuit joined the Third and Fourth Circuits, concluding that a voluntariness standard should be applied to determine the admissibility of all types of evidence derived from a *Miranda* violation.[204]

V. COMMENT

Despite *Dickerson*, the Eighth Circuit examined its reasoning in pre-*Dickerson* cases and found that reasoning still valid.[205] However, in reaching this decision the Eighth Circuit misinterpreted *Dickerson*'s effect on *Elstad*. The court erred in holding that all types of derivative evidence should be governed by a voluntariness standard.[206]

The Eighth Circuit's starting point for analysis of the issue of admissibility of physical fruits focused on the potential admissibility of subsequent warned statements and witness testimony.[207] The court noted that in its pre-

196. *See supra* notes 159-73 and accompanying text.

197. *Villalba-Alvarado*, 345 F.3d at 1017-18 (citing United States v. Patane, 304 F.3d 1013, 1024-25 (2002), *rev'd*, 124 S. Ct. 2620 (2004)).

198. *Patane*, 304 F.3d at 1027-29.

199. *Villalba-Alvarado*, 345 F.3d at 1018.

200. *Id.*

201. *Id.*

202. *Id.* at 1019.

203. *Id.*

204. *Id.*

205. *See id.* at 1014-15 (discussing United States v. Wiley, 997 F.2d 378 (8th Cir. 1993), *abrogated by* United States v. Bieri, 21 F.3d 819 (8th Cir. 1994); United States v. Carter, 884 F.2d 368 (8th Cir. 1989)).

206. *See id.* at 1019.

207. *Id.* at 1014.

Dickerson cases it interpreted *Elstad* as a broad exception applying to several forms of derivative evidence.[208]

The court found "it necessary to accord greater deference to *Dickerson*'s preservation of the ongoing distinction in application of the exclusionary rule under the Fourth and Fifth Amendments than did the Tenth Circuit in *Patane*."[209] The *Dickerson* Court opined that its refusal in *Elstad* to apply the "traditional" fruits doctrine to *Miranda* violations did not convey the message that *Miranda* is not a constitutional rule.[210] The Court noted a difference between unreasonable searches under the Fourth Amendment and unwarned statements under the Fifth Amendment.[211] *Dickerson*'s analysis about the difference stops there. No other court has clarified the difference between a Fourth and Fifth Amendment violation.

In reality, the difference between the Fourth and Fifth Amendments is a difference in limitations on when to apply the fruits doctrine, not the application itself.[212] The Fourth Amendment is adamantly protected because society holds privacy in the home as very important.[213] Once the police have violated a person's Fourth Amendment rights, the person's privacy cannot be given back.[214] Therefore, evidence derived from a Fourth Amendment violation is only admissible if there is a break in time and events such that the taint of the initial violation has dissipated.[215] However, when a person's Fifth Amendment rights are violated, less is required to cure the taint.[216] As the *Elstad* Court noted, "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible."[217]

Fifth Amendment violations are easier to cure than Fourth Amendment violations. But the fruits doctrine holds that a constitutional violation requires suppression of evidence derived from the violation until the violation is suffi-

208. *Id.*

209. *Id.* at 1018-19.

210. Dickerson v. United States, 530 U.S. 428, 441 (2000).

211. *Id.*

212. Kirsten Lela Ambach, Comment, Miranda*'s Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757, 785 (2003).

213. *See* Payton v. New York, 445 U.S. 573, 589-90 (1980) ("'The right of the people to be secure in their . . . houses . . . shall not be violated.'" The strength of this language shows "'[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'") (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

214. Ambach, *supra* note 212, at 784.

215. *Id.*

216. *Id.* at 784-85.

217. Oregon v. Elstad, 470 U.S. 298, 310-11 (1985).

ciently dissipated.[218] The Eighth Circuit's reliance on *Elstad*'s refusal to apply the "traditional" fruits doctrine does not prohibit some application of the fruits doctrine in the *Miranda* context.[219] The "traditional" fruits doctrine explained in *Wong Sun* centers around the concept of attenuation.[220] When the derivative fruit is physical evidence gained immediately from an unwarned statement, no opportunity exists to cure the *Miranda* violation or dissipate the taint of the physical evidence.[221] Thus, the real "difference" between an unreasonable search under the Fourth Amendment and an unwarned statement under the Fifth Amendment is the "limits of the fruits doctrine, not its application."[222] Consequently, the Eighth Circuit erred in refusing to apply the fruits doctrine to derivative physical evidence.

The Eighth Circuit also looked to the "twin rationales" of *Miranda* in reaching its decision.[223] It noted that suppressing the original unwarned statement deters overzealous law enforcement.[224] The threat of suppression removes the incentive for police officers to obtain coerced statements.[225] However, the court failed to address any detrimental effects caused by admitting the derivative physical evidence. Instead, the court said it could not "discern that the deterrence rationale serves a role that is greater or lesser than the role it serves in the context of derivative statements."[226] It relied on *Elstad*'s finding that excluding a subsequent voluntary statement made after the warning was given would not further *Miranda*'s deterrence rationale.[227] But, neither *Elstad* nor *Tucker* involved physical evidence. Therefore, the rationale for admitting derivative testimonial evidence cannot simply be transposed to physical evidence. The physical evidence in the instant case was derived from a constitutional violation. The taint had not been sufficiently dissipated, so the Eighth Circuit erred in not applying the fruits doctrine.[228]

The Eighth Circuit also rested its decision on the belief that *Elstad*'s holding did not rely on the fact that the subsequent warned statements were voluntarily given.[229] Regardless of whether the turning point in *Elstad* decision was the volitional nature of the statements, the court still missed a fundamental point. The post-*Dickerson* cases holding that the fruits doctrine does

218. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939).
219. Ambach, *supra* note 212, at 785.
220. *Id.*
221. *Id.* at 785-86.
222. *Id.* at 785.
223. United States v. Villalba-Alvarado, 345 F.3d 1007, 1015 (8th Cir. 2003).
224. *Id.*
225. *Id.*
226. *Id.* at 1016.
227. *Id.*
228. *See id.*
229. *Id.* at 1018.

not apply to derivative physical evidence all rely on *Elstad* and *Tucker*.[230] Both *Elstad* and *Tucker* are clearly based on the belief that *Miranda* was prophylactic, not constitutional.[231] Since the Supreme Court decided *Dickerson*, many courts have grasped at dicta in *Elstad*, *Tucker*, and *Dickerson* in efforts to determine whether the fruits doctrine applies to physical evidence.

Shortly after the Eighth Circuit issued its ruling in *Villalba-Alvarado v. United States*, the United States Supreme Court granted certiorari on the Tenth Circuit's decision in *United States v. Patane*.[232] On June 28, 2004 the Court issued a plurality opinion that failed to resolve the circuit split and left us with no clearer an understanding of whether the poisonous fruit doctrine should apply to physical fruits derived from a *Miranda* violation.[233]

The plurality concluded that the goal of *Miranda* was to protect suspects against self-incrimination.[234] Because the introduction of physical evidence does not implicate the Self-Incrimination Clause, the Court reasoned, the physical fruits derived from a *Miranda* violation need not be suppressed.[235] Further, the plurality said the police violate neither the Constitution nor the *Miranda* rule when they fail to administer the *Miranda* warnings.[236]

Concurring in the decision, Justices Kennedy and O'Connor found "it unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is '[any]thing to deter' so long as the unwarned statements are not later introduced at trial."[237] Writing for the dissent, Justice Souter argued that the plurality and concurring opinions would give law en-

---

230. *See generally id.*; United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176 (3d Cir. 2001).

231. "'The prophylactic *Miranda* warnings therefore are "not themselves rights protected by the Constitution . . . ."'" Oregon v. Elstad, 470 U.S. 298, 305 (1985) (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)) (citations omitted). "Since there was *no* actual *infringement* of the suspect's *constitutional rights*, [*Tucker*] was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." *Id.* at 308 (emphasis added). The *Tucker* Court distinguished *Wong Sun* because "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." Michigan v. Tucker, 417 U.S. 433, 446 (1974).

232. 124 S. Ct. 2620 (2004).

233. *See id.*

234. *Id.* at 2624.

235. *Id.* The Court reasoned that the protection offered by the Self-Incrimination Clause acts to prohibit a criminal defendant from being compelled to testify against himself. *Id.* at 2626. Because the primary protection of the Clause is testimonial, it "cannot be violated by the introduction of nontestimonial evidence." *Id.*

236. *Id.*

237. *Id.* at 2631 (Kennedy, J., concurring).

forcement an incentive to disregard the *Miranda* warnings.[238] Justice Breyer filed a separate dissent in which he opined that physical fruits derived from an unwarned statement would be suppressed "unless the failure to [give the] *Miranda* warnings was in good faith."[239]

The Tenth Circuit correctly articulated the current state of the law in holding, "*Wong Sun* requires suppression only of the fruits of *unconstitutional* conduct, [therefore] the violation of a prophylactic rule did not require the same remedy."[240] Therefore, *Dickerson*'s declaration of *Miranda* as a constitutional rule also requires some application of the fruits doctrine to derivative physical evidence.

VI. CONCLUSION

The circuit courts are split on the issue of whether physical evidence derived from a *Miranda* violation is subject to the fruit of the poisonous tree doctrine. In *Villalba-Alvarado v. United States*,[241] the Eighth Circuit Court of Appeals decided that the fruits doctrine did not apply to derivative physical evidence. It relied on language in *Dickerson* that there is a difference between the application of the fruits doctrine in the Fourth Amendment context and application in the Fifth Amendment context.[242] However, the Supreme Court has not fully fleshed out what exactly it meant when it made these statements in *Dickerson*. What we do know is that the exclusionary rule requires that evidence derived from a constitutional violation be excluded.[243] The *Dickerson* Court announced that *Miranda* was a constitutional rule. Therefore, the Eighth Circuit clearly erred in concluding that the exclusionary rule did not apply to the violation of Villalba-Alvarado's constitutional rights.

KERRY F. SCHONWALD

238. *Id.* at 2631 (Souter, J., dissenting). Justice Souter stated "[t]hat inducement to forestall involuntary statements and troublesome issues of fact can only atrophy if we turn around and recognize an evidentiary benefit when an unwarned statement leads investigators to tangible evidence." *Id.* (Souter, J., dissenting).

239. *Id.* at 2632 (Breyer, J., dissenting).

240. United States v. Patane, 304 F.3d 1013, 1019 (10th Cir. 2002), *rev'd*, 124 S. Ct. 2620 (2004).

241. 345 F.3d 1007 (8th Cir. 2003).

242. Dickerson v. United States, 530 U.S. 428, 441 (2000).

243. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939).