

KENNEDY, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 02–1371

MISSOURI, PETITIONER *v.* PATRICE SEIBERT

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF MISSOURI

[June 28, 2004]

JUSTICE KENNEDY, concurring in the judgment.

The interrogation technique used in this case is designed to circumvent *Miranda v. Arizona*, 384 U. S. 436 (1966). It undermines the *Miranda* warning and obscures its meaning. The plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible. Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement.

The *Miranda* rule has become an important and accepted element of the criminal justice system. See *Dickerson v. United States*, 530 U. S. 428 (2000). At the same time, not every violation of the rule requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction. Thus, we have held that statements obtained in violation of the rule can be used for impeachment, so that the truth finding function of the trial is not distorted by the defense, see *Harris v. New York*, 401 U. S. 222 (1971); that there is an exception to protect countervailing concerns of public safety, see *New York v. Quarles*, 467 U. S. 649 (1984); and that physical evidence obtained in reliance on statements taken in violation of the rule is admissible, see *United States v.*

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Patane, post, p. _____. These cases, in my view, are correct. They recognize that admission of evidence is proper when it would further important objectives without compromising *Miranda's* central concerns. Under these precedents, the scope of the *Miranda* suppression remedy depends on a consideration of those legitimate interests and on whether admission of the evidence under the circumstances would frustrate *Miranda's* central concerns and objectives.

Oregon v. Elstad, 470 U. S. 298 (1985), reflects this approach. In *Elstad*, a suspect made an initial incriminating statement at his home. The suspect had not received a *Miranda* warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time. The suspect was taken to the station house, where he received a proper warning, waived his *Miranda* rights, and made a second statement. He later argued that the postwarning statement should be suppressed because it was related to the unwarned first statement, and likely induced or caused by it. The Court held that, although a *Miranda* violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because “neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression” given the facts of that case. *Elstad, supra*, at 308 (citing *Michigan v. Tucker*, 417 U. S. 433, 445 (1974)).

In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements

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to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. See *Elstad*, 470 U. S., at 309 (“It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period”). That approach would serve “neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the . . . testimony.” *Id.*, at 308.

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As JUSTICE SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Further, the interrogating officer here relied on the defendant’s prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. See App. 70 (“Trice, didn’t you tell me that he was supposed

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to die in his sleep?”). This shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of “knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.” *Moran v. Burbine*, 475 U. S. 412, 423–424 (1986). When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.

The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on “whether the *Miranda* warnings delivered midstream could have been effective enough to accomplish their object” given the specific facts of the case. *Ante*, at 13. This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. *Ante*, at 13–15. In my view, this test cuts too broadly. *Miranda*’s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. Cf. *Berkemer v. McCarty*, 468 U. S. 420, 430 (1984). I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the

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Miranda warning.

The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Cf. *Westover v. United States*, decided with *Miranda v. Arizona*, 384 U. S. 436 (1966). Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

For these reasons, I concur in the judgment of the Court.