IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC84315**
	)	
PATRICE SEIBERT,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE DOUGLAS E. LONG, JR., JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A Pulaski County jury found Appellant, Patrice Seibert, guilty of second-degree murder, Section 565.021, RSMo. The Honorable Douglas E. Long, Jr., sentenced Ms. Seibert to life imprisonment. After the Southern District Court of Appeals affirmed Ms. Seibert's conviction, this Court granted Ms. Seibert's transfer application pursuant to Rule 83.04, and it has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Patrice Seibert is the mother of five boys: Darian, Michael, Jonathan, Patrick and Shawn (Tr. 834-835, 838, 844-845). They all lived in a trailer in Rolla, Missouri (Tr. 855). A friend of Darian's, Donald Rector, also lived with them (Tr. 855). Jonathan, 12, was seriously handicapped with cerebral palsy, a seizure disorder, and he was also blind (Tr. 754, 836, 854). He could not walk, talk, or feed himself (Tr. 836, 854). He demanded considerable care, and Ms. Seibert took care of him (Tr. 836, 846, 854). She fed him and played with him, greeted him off the school bus, and did everything that a mother would do for her child (Tr. 846).

On the morning of February 12, 1997, Ms. Seibert discovered that Jonathan had died in his sleep (Tr. 836). She became hysterical and was crying (Tr. 845). Another son, Michael, who was home at the time, went to find his older brother, Darian, to tell him what had happened (Tr. 882). Darian, 17, had spent the night at Derrick Roper and Jeremy Batcher's house (Tr. 852, 876). The three of them had been drinking and taking drugs most of the night and then again that morning (Tr. 853, 879-882).

Michael found Darian and told him that Jonathan had passed away (Tr. 835, 856). Darian returned to the trailer, where his mother was crying and very upset (Tr. 835-836, 856). Darian went to look at Jonathan, and he became sick (Tr. 856). He angrily told his mother that he did not know what she should do, but that she should call the police (Tr. 882). Darian then left his mother and returned to Derrick and Jeremy's trailer to resume playing cards (Tr. 858).

A short time later, Michael returned to Derrick's house to tell Darian that their mother needed him to come home (Tr. 858). Michael, Darian, Derrick and Jeremy all went to Ms. Seibert's trailer (Tr. 858). She was still sitting on the couch, very upset (Tr. 858). She was thinking about reporting Jonathan's death, but she was afraid that the authorities would believe that she had been neglecting Jonathan because he had some bedsores (Tr. 837, 858, Ex. 43, p. 5). She had been "doctoring" the bedsores on her own (Ex. 43, p. 5).

Jeremy testified that either Derrick or Darian brought up the idea of setting the trailer on fire to cover up Jonathan's death (Tr. 838). Darian testified that Ms. Seibert first mentioned an electrical fire, and then Derrick said that an electrical fire was too slow and they would need something to speed it up (Tr. 859). They decided that somebody else had to be present in the fire - a babysitter - so that it would not look like Jonathan had been left alone in the trailer (Tr. 839, 840). Derrick suggested that Donald Rector could die in the fire (Tr. 840). Darian said that Derrick would have to "take him out," referring to Donald (Tr. 842).

These conversations occurred in Ms. Seibert's presence, although she did not participate in them (Tr. 839, 842). She did not disagree or discourage them (Tr. 843). Ms. Seibert knew that Donald could die in the fire (Ex. 43, p. 11-12).[1] She knew that Donald was taking Prozac, which made him sleepy (Ex. 43, p. 9).

[1] At one point during her later interrogation, she agreed that Donald was supposed to die in his sleep (Ex. 43, p. 9).

When Darian asked where his littlest brothers, Patrick and Shawn, would be during the fire, Ms. Seibert suggested that she could send them to church (Tr. 860).

After this discussion, Derrick, Darian and Jeremy walked back to Jeremy's trailer (Tr. 841). Derrick and Darian asked Jeremy if he wanted to help them with their alibis (Tr. 841). Jeremy told them no, and he did not really believe that they were going to go through with it anyway (Tr. 841, 847).

That afternoon, Darian and Derrick went to buy a gas can and some gasoline (Tr. 864). Darian said that Ms. Seibert had given Derrick a twenty-dollar bill to buy the gas can (Tr. 862-863). Ms. Seibert acknowledged that she had given them money to buy her some cigarettes and that she did not get change back, but she denied giving them money for a gas can or gasoline (Ex. 43, p. 6-7).

After buying and filling the gas can, Derrick and Darian called a cab to take them home (Tr. 864). The cab dropped them off at a gravel road between two trailer parks (Tr. 864). Derrick was afraid that someone would see him with the gas can, so he left it in the creek (Tr. 865). He later moved it because school was letting out, and he was afraid that someone might find the gas can (Tr. 865).

Later, when Patrick and Shawn came home from school, they did their homework and then went outside to play (Ex. 43, p. 8). When Darian and Derrick arrived at the house, Derrick played basketball with the kids in the road (Ex. 43, p. 9). Donald was at the trailer that afternoon, and he took his Prozac at 3:00 p.m. (Tr. 866, Ex. 43, p. 8).

At approximately 6:00 p.m., the church van came, and Ms. Seibert put Patrick and Shawn on it (Tr. 866, Ex. 43, p. 9). Ms. Seibert then called a cab for herself (Tr. 866, Ex.

43, p. 9-10). She did not want to be there when the trailer burned down (Ex. 43, p. 10). She took some clothes in a duffel bag, a picture and some coin money (Tr. 866-867, Ex. 43, p. 11). When Ms. Seibert left the trailer, Donald was asleep in the back bedroom (Tr. 867-868).

After Ms. Seibert left, Derrick went to retrieve the gas can (Tr. 868). According to Darian, Derrick began pouring gas throughout the trailer (Tr. 868-869). Derrick splashed Darian with gas and Darian went outside to wipe it off (Tr. 868-869). When Darian came back inside, he saw Derrick hitting Donald (Tr. 869). Donald was having a seizure and convulsing on the floor (Tr. 869). When Darian tried to help Donald, Derrick started to run out of the trailer (Tr. 869). Darian ran after him because he was afraid that Derrick was going to set the place on fire (Tr. 869-870). All of a sudden, he heard a screeching sound and the trailer went up in flames (Tr. 870). Darian caught on fire as he fled the trailer, suffering serious burns to his face (Tr. 850, 872).

A neighbor, Wes Reagan, saw the flames and called the fire department (Tr. 633). Reagan first saw Darian and then Derrick near the trailer (Tr. 633-634, 637). Darian was "smoldering," and Reagan patted the fire out with his hands (Tr. 633-634). When Darian re-ignited, Reagan sprayed him with a water hose (Tr. 633-634). While they waited for the fire department to arrive, Reagan overheard a conversation between Darian and Derrick (Tr. 634). Derrick told Darian that "there was an odd odor in the house and when he flipped the light switch on, everything went up." (Tr. 635). When Darian saw Reagan, he turned around and said, "yeah, right, right, everything went up." (Tr. 635). The two were talking about getting their stories straight (Tr. 637).

Darian and Derrick told the fire chief that two other people were still inside the trailer (Tr. 653). When the fire was extinguished, the firemen found two bodies on opposite sides of the trailer (Tr. 657-658). The body of Donald Rector was found kneeling in front of and partially lying on a sofa in the west bedroom (Tr. 658, 663). His clothes were partially burned off his body and there was a penetrating wound on the back of his skull (Tr. 662). In addition to the head wound, the medical examiner found that Donald had sustained several significant bruises over the left eyebrow and forehead, but the skull was not fractured (Tr. 744, 747-748). The frothy fluid and carbon found in his lungs meant that Donald had been alive and breathing sooty material during the fire (Tr. 750-752). The cause of death was asphyxiation secondary to exposure to fire (Tr. 757).

The body of Jonathan Seibert was found lying in a bed at the opposite end of the trailer (Tr. 663). There was no sooty material in Jonathan's lungs, which indicates that he was not alive during the fire (Tr. 755-756). The cause of death was not determined (Tr. 758).

There was a strong odor of gasoline in the trailer (Tr. 664). The Fire Marshall determined that either the refrigerator cycled or the furnace "kicked on" and ignited the vapors from the gasoline that Derrick had been pouring throughout the house (Tr. 696). A melted gasoline container was found in Jonathan's bedroom (Tr. 773-774).

Rolla Officer, Richard Hanrahan, was called to investigate (Tr. 764-765). He attempted to interview Darian and Derrick at the emergency room (Tr. 765). They told him that they flipped the switch and the trailer caught fire (Tr. 873-874). Hanrahan also

contacted Ms. Seibert at the hospital on the night of the fire (Tr. 775). He notified her of Jonathan's death (Tr. 776).

Two days later, Hanrahan interviewed Ms. Seibert at the burn unit of St. John's Hospital in St. Louis (Tr. 911). He did not place her under arrest at that time, but interviewed her in the security offices at the hospital (Tr. 912). Hanrahan asked Ms. Seibert some very direct questions about whether she knew anything about how the trailer burned (Tr. 912). She stated that she did not know (Tr. 912). She agreed with him that Derrick and Darian's statements had to be a lie (Tr. 916). She did not tell him that Jonathan had died prior to the fire (Tr. 914).

Then at 3:00 a.m. on February 17, 1997, the police awakened Ms. Seibert at the hospital (Tr. 911, 916-917, 925-927). Because St. Louis was not his jurisdiction, Officer Hanrahan made arrangements for St. Louis County Officer Kevin Clinton to arrest Ms. Seibert (Tr. 25-27, 926-927). He specifically told Officer Clinton not to advise Ms. Seibert of her *Miranda* rights (Tr. 27, 926). Clinton transported Ms. Seibert to the St. Louis County Police Department, and Hanrahan and Fire Marshall Windle followed in their car (Tr. 930). They spoke to Officer Clinton when they arrived at the police station (Tr. 931). Clinton told them that he had not asked Ms. Seibert any questions, but that she had asked him some questions (Tr. 931). Officer Clinton told Ms. Seibert that from what he knew, they had a very strong case against her, and it would be best for her to tell the truth (Tr. 931).

Hanrahan and Windle left Ms. Seibert in a small interview room for fifteen to twenty minutes (Tr. 932). This is part of their strategy to create stress in the suspect (Tr.

933). At 3:45 a.m., Hanrahan entered the room, sat very close to Ms. Seibert, and began his interrogation (Tr. 36, 933, 937). He interrogated her for 30 minutes before turning on a tape recorder (Tr. 31, 937).

Hanrahan purposefully did not advise Ms. Seibert of her rights before or during the first stage of his interrogation (Tr. 31, 937). He wanted to interrogate her without *Miranda* warnings in order to obtain a confession; then he would get her to confirm her confession on tape after the warnings were given (Tr. 31-32, 36, 38, 937). He describes his "technique" this way:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the Miranda rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read Miranda, and she repeated the items she had told us.

(Tr. 38).

During the first stage of the interrogation, Ms. Seibert told Hanrahan that she knew her trailer was to be burned (Tr. 937). Then Hanrahan said, "Donald was also to die in his sleep." (Tr. 937). Ms. Seibert did not answer him, but she began to cry (Tr. 937). Hanrahan squeezed her arm and repeated several times that "Donald was to die in his sleep." (Tr. 937-938). During the first unwarned interrogation, Ms. Seibert initially said that she had nothing to do with Donald's death (Tr. 40). When Hanrahan explained "the evidence" to her and explained "the situation," she changed her story (Tr. 40).

Ultimately, at the end of the first interrogation, Ms. Seibert agreed with Hanrahan that there was a plan for Donald Rector to die in the fire (Tr. 41).

When Ms. Seibert had said what the officers believed matched the evidence, they turned on the tape recorder and proceeded to the second stage of the interrogation (Tr. 28, 939). During this stage, Hanrahan asked leading questions of Ms. Seibert until she repeated the answers that she had already provided during the first stage of the interrogation (Tr. 35). His technique is to take the information that he obtains without the benefit of *Miranda* warnings, and then extract a taped statement of the same information after giving the *Miranda* warnings (Tr. 35). The information contained in the tape recording is largely a repeat of the information that Hanrahan and Windle obtained from Ms. Seibert before turning the tape recorder on (Tr. 30).

Ms. Seibert moved to suppress her statements (L.F. 44-45). Officer Hanrahan was the only witness called at the suppression hearing (Tr. 4-45). At the conclusion of the hearing, the trial court determined that if the State was only using the information discovered during the second stage of the interrogation, but not the first stage, then the statements were admissible:

> The Court: Okay. And they're not using the information that they found out in the second -- in the custodial -- in first level interrogation or prior interrogation -- first level of the interrogation, but rather using the second interrogation...
>
> The State: Yes, sir -- the post-Miranda.
>
> The Court: …after she was advised of her Miranda rights. I'm sure

we're -- there are lots of cases on that. The motion is denied. So we'll see what happens.

(Tr. 44-45).

The tape recording of Ms. Seibert's statements was introduced into evidence over objection, accompanied by her waiver of *Miranda* rights and a transcript of the "second stage" interrogation (Tr. 920, 924, Exhibits 37, 42 & 43). The jury heard and read the following incriminating statements:

When Jonathan died, Ms. Seibert was afraid of being investigated for child abuse and neglect (Ex. 43, p. 4). Jonathan had bedsores, which she had been trying to treat by herself, and she was afraid that they were going to give her a hard time about that (Ex. 43, p. 4-5). She needed to find a way to keep people from questioning her about Jonathan (Ex. 43, p. 5). She knew that the trailer was going to be burned down because that would be the easiest way to dispose of Jonathan's body (Ex. 43, p. 5).

Derrick Roper, Jeremy Batcher, Darian Seibert, Michael Vance, and Ms. Seibert were present during the discussion of burning the trailer (Ex. 43, p. 5-6). Derrick first brought up the idea of burning the trailer, and then they all discussed it (Ex. 43, p. 6). There had been a discussion about Donald (Ex. 43, p. 9). If they could get him out of the trailer, they should get him out (Ex. 43, p. 9). But, Ms. Seibert also knew that Donald could die there in his sleep because he was on a new medicine, Prozac, and it made him sleepy (Ex. 43, p. 11-12). At one point, Ms. Seibert agreed with Hanrahan that Donald was supposed to die in his sleep (Ex. 43, p. 9).

Ms. Seibert gave Derrick and Darian some money to buy her some cigarettes, but she said that she did not know they were going to buy gasoline with it (Ex. 43, p. 7). When they returned, Derrick handed her the cigarettes and a receipt from O'Reilly (Ex. 43, p. 7). Ms. Seibert then left with her friend and returned to the trailer at around 3:00 p.m. (Ex. 43, p. 7). At 6:00 p.m., Derrick and Darian arrived at the trailer (Ex. 43, p. 8). Ms. Seibert put her two youngest sons on the church van, and then called a taxi for herself (Ex. 43, p. 9). She did not want to be there when the trailer burned down (Ex. 43, p. 10). Later that night, a friend found her and told her about the fire, and she had to act surprised (Ex. 43, p. 10).

Defense counsel objected when these statements were admitted at trial (Tr. 831, 920, 924), and again in the motion for new trial (L.F. 89-91). The State emphasized Ms. Seibert's incriminating statements during its opening statement and closing arguments (Tr. 625, 967-968, 971, 986).

The State charged Ms. Seibert with first-degree murder in the death of Donald Rector and sought the death penalty (L.F. 32, 48). The trial court submitted verdict directors on first-degree murder, conventional second-degree murder, felony murder with arson as the underlying felony, and first degree arson with death (L.F. 72-77). The jury found Ms. Seibert guilty of conventional second-degree murder (L.F. 84). The jury recommended and the trial court imposed a sentence of life imprisonment (L.F. 88). This appeal follows.

POINTS RELIED ON

I.

The trial court clearly erred in overruling Ms. Seibert's motion to suppress and in admitting at trial, over objection, her statements to police that she knew that her trailer was going to be set on fire and that Donald Rector was to die in the fire, because these rulings violated her right to due process and privilege against self-incrimination guaranteed by the 5th and 14th Amendments to the U.S. Constitution and Article I, §§ 10 & 19 of the Missouri Constitution, in that the police elicited these statements using an unconstitutional "two-stage" interrogation technique: First, Officer Hanrahan instructed the arresting officer not to advise Ms. Seibert of her Miranda warnings, and believing that Ms. Seibert would incriminate herself, Hanrahan purposefully withheld the warnings during his lengthy initial custodial interrogation knowing that any statements she made would be inadmissible; Second, within minutes of obtaining a confession, Hanrahan advised Ms. Seibert of her rights and had her confirm her incriminating statements on tape. This purposeful "end-run" of *Miranda* is unconstitutional and admitting this evidence was not harmless, in that the State emphasized the illegally obtained statements, and the other evidence of Ms. Seibert's "knowledge" was tentative and contradictory.

***Oregon v. Elstad*, 470 U.S. 298 (1985)**;

***Michigan v. Tucker*, 417 U.S. 433 (1974)**;

***State v. Fakes*, 51 S.W.3d 24 (Mo. App., W.D. 2001)**;

***United States v. Carter*, 884 F.2d 368 (8th Cir. 1989)**;

U.S. Const., Amends 5 & 14;

Mo. Const., Art. I, Sections 10 & 19;

II.

The trial court erred in accepting the verdict and sentencing Ms. Seibert for 2nd degree murder, and plainly erred in instructing the jury on this offense in violation of Ms. Seibert's rights to due process and a fair trial guaranteed by the 5th, 6th & 14th Amendments to the U.S. Constitution and Art. I, §§ 10 & 18(a) of the Missouri Constitution, in that the State did not present evidence from which a rational juror could have found beyond a reasonable doubt that Ms. Seibert knowingly caused the death of Donald Rector in the absence of premeditation or deliberation, because, on the State's evidence -- that Ms. Seibert discussed plans to burn the trailer and leave Donald inside, provided money for gasoline, arranged for her younger sons to depart, and then called a cab so that she would not be there when the fire started -- Ms. Seibert was guilty of 1st degree murder, but not conventional 2nd degree murder, since she deliberated on Donald's death. However, if the jury believed that Ms. Seibert was unaware of plans to kill Donald, then she was still guilty of felony murder if she intended an arson and death resulted, but not conventional second degree murder. Defense counsel did not request a 2nd degree murder instruction, but did not object to it, and the trial court's misdirection of the jury resulted in an unsupported verdict, which is plain error and manifestly unjust.

***State v. Leisure*, 838 S.W.2d 49 (Mo. App., E.D. 1992)**;

***State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992)**;

***State v. Stepter*, 794 S.W.2d 649 (Mo. banc 1990)**;

***State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001)**;

U.S. Const., Amends 5, 6 & 14; and

Mo. Const., Art. I, §§ 10 & 18(a).

ARGUMENT

I.

The trial court clearly erred in overruling Ms. Seibert's motion to suppress and in admitting at trial, over objection, her statements to police that she knew that her trailer was going to be set on fire and that Donald Rector was to die in the fire, because these rulings violated her right to due process and privilege against self-incrimination guaranteed by the 5th and 14th Amendments to the U.S. Constitution and Article I, §§ 10 & 19 of the Missouri Constitution, in that the police elicited these statements using an unconstitutional "two-stage" interrogation technique: First, Officer Hanrahan instructed the arresting officer not to advise Ms. Seibert of her Miranda warnings, and believing that Ms. Seibert would incriminate herself, Hanrahan purposefully withheld the warnings during his lengthy initial custodial interrogation knowing that any statements she made would be inadmissible; Second, within minutes of obtaining a confession, Hanrahan advised Ms. Seibert of her rights and had her confirm her incriminating statements on tape. This purposeful "end-run" of *Miranda* is unconstitutional and admitting this evidence was not harmless, in that the State emphasized the illegally obtained statements, and the other evidence of Ms. Seibert's "knowledge" was tentative and contradictory.

As a society, we share "the deep-rooted feeling that the police must obey the law while enforcing the law." ***Spano v. New York***, 360 U.S. 315, 320-21 (1959); ***Miranda v. Arizona***, 384 U.S. 436, 480 (1966) ("The quality of a nation's civilization can be largely

measured by the methods it uses in the enforcement of its criminal law." (quoting Walter V. Schaefer, "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 26 (1956)).

In this case, Officer Hanrahan deliberately violated the law in order to procure incriminating statements from Ms. Seibert. He purposefully withheld ***Miranda*** warnings, prior to his initial interrogation, in order to obtain a confession. When his plan succeeded, he immediately read Ms. Seibert her rights and re-elicited her illegally-obtained statement on tape. The police cannot launder an illegally obtained confession through ***Miranda***, in what amounts to an end-run of a constitutional rule. The taint of these improper tactics infected Ms. Seibert's confession. Her statements, both before and after she was advised of her ***Miranda*** rights, should have been suppressed in order to deter this flagrant police misconduct.

I. The Facts

At 3:00 a.m. on February 17, 1997, the police roused Ms. Seibert from her sleep in the waiting room of the burn unit at St. John's hospital in St. Louis (Tr. 911, 916-917, 925-927). After losing one son, Ms. Seibert was keeping a vigil with her oldest son who was fighting for his life after being severely burned in the fire and (Tr. 927).

Because St. Louis was not his jurisdiction, Rolla officer Rick Hanrahan made arrangements for St. Louis County Officer Kevin Clinton to arrest Ms. Seibert (Tr. 25-27, 926-927). He specifically told Clinton **not** to advise Ms. Seibert of her ***Miranda*** rights (Tr. 27, 926). Clinton transported Ms. Seibert to the St. Louis County Police Department, and Hanrahan and Fire Marshall Windle followed in their car (Tr. 930). They spoke to Officer Clinton when they arrived at the police station (Tr. 931). Clinton told them that

he had not asked Ms. Seibert any questions, but that she had asked him a few (Tr. 931). Clinton told Ms. Seibert that from what he knew, they had a very strong case against her and it would be best for her to tell the truth (Tr. 931).

Hanrahan and Windle left Ms. Seibert in a small interview room for fifteen to twenty minutes (Tr. 932). This is part of their strategy to create stress in the suspect (Tr. 933). At 3:45 a.m., Hanrahan entered the room, sat very close to Ms. Seibert, and began the interrogation (Tr. 36, 933, 937). He interrogated her for half an hour before turning on a tape recorder (Tr. 31, 937). Hanrahan never advised Ms. Seibert of her constitutional rights before or during the first stage of the interrogation (Tr. 31, 937).

This is how Officer Hanrahan described his decision not to advise Ms. Seibert of her ***Miranda*** warnings:

> Q: You interviewed her -- what -- some twenty minutes perhaps -- twenty to thirty minutes?
>
> A: I'd say that's probably accurate.
>
> Q: All right. And in that, you do not read her her Miranda rights, do you -- her rights to remain silent?
>
> A: No, ma'am, we didn't.
>
> Q: And that was a conscious decision on your part.
>
> A: Yes, ma'am.
>
> Q: Because you wanted to see what she was going to say.
>
> A: It's part of a tactic I've been trained in and used before, and yes, ma'am, that's the main reason you're doing it.

Q: But you know that you are up there now. You have arrested someone -- correct -- or you have this person under arrest?

A: Yes, ma'am.

Q: And this person's not free to leave.

A: No, ma'am, she's not.

Q: And this person is in an interrogation room.

A: That's correct.

Q: And it is your full intent to go and interrogate this person.

A: Yes, ma'am.

Q: All right. And gain some sort of confession or admission of guilt -- correct?

A: That's our hope -- yes, ma'am.

Q: And that's your intent.

A: Absolutely.

Q: All right. And it is also your conscious decision not to inform her of her rights under the law of Miranda -- the case law.

A: Not at that point.

Q: You say this is something you were trained in.

A: Yes, ma'am.

(Tr. 31-32). There is no doubt that it was Officer Hanrahan's calculated and deliberate decision to withhold the ***Miranda*** warnings during the first stage of his interrogation (Tr. 31, 36, 38, 937).

During the first stage of the interrogation, Ms. Seibert told Hanrahan that she knew her trailer was to be burned (Tr. 937). Then Hanrahan said, "Donald was also to die in his sleep." (Tr. 937). Ms. Seibert did not answer him, but began to cry (Tr. 937). Hanrahan squeezed her arm and repeated several times that "Donald was to die in his sleep." (Tr. 937-938). During the first stage of the interrogation, Ms. Seibert initially denied having anything to do with Donald's death (Tr. 40). When Hanrahan explained "the evidence" to her and explained "the situation," she changed her story (Tr. 40). Ultimately, at the end of the first stage, Ms. Seibert agreed with Hanrahan that there was a plan for Donald Rector to die in the fire (Tr. 41).

When Ms. Seibert had said what Hanrahan and Windle believed matched the evidence, they turned on the tape recorder and set out to have her repeat the first statement (Tr. 939). This was the second stage of the interrogation (Tr. 28, 939). During this stage, Hanrahan asked leading questions of Ms. Seibert until she repeated the answers that she had already provided during the first stage (Tr. 35). His technique is to take the information that he initially obtains without the benefit of ***Miranda*** warnings, and then to make a taped statement of the same information after giving the ***Miranda*** warnings (Tr. 35). The information contained in the tape recording is largely a repeat of the information that Hanrahan and Windle obtained from Ms. Seibert before turning on the tape recorder (Tr. 30).

Ms. Seibert moved to suppress her statements (L.F. 44-45). Officer Hanrahan was the only witness called at the suppression hearing (Tr. 4-45). At the conclusion of the hearing, the trial court determined that if the State was only using the information

discovered in the second interrogation, but not the first interrogation, then the statements were admissible:

> The Court: Okay. And they're not using the information that they found out in the second -- in the custodial -- in first level interrogation or prior interrogation -- first level of the interrogation, but rather using the second interrogation...
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> The State: Yes, sir -- the post Miranda.
>
> The Court: …after she was advised of her Miranda rights. I'm sure we're -- there are lots of cases on that. The motion is denied. So we'll see what happens.

(Tr. 44-45).

The tape recording of Ms. Seibert's statements was introduced into evidence over objection, accompanied by her waiver of ***Miranda*** rights and a transcript of the "second stage" interrogation (Tr. 920, 924, Exhibits 37, 42 & 43).

II. The Standard of Review

On a motion to suppress, the state bears the burden of showing by a preponderance of the evidence that the motion should be denied. ***State v. Mitchell*, 2 S.W.2d 123 (Mo. App., S.D. 1999)**. This Court must view the facts in the light most favorable to the trial court's ruling, disregarding contrary evidence and inferences, to determine if it is supported by substantial evidence. ***Id.***

The question of waiver is one of fact, and the trial court's findings of fact concerning waiver will not be overturned unless clearly erroneous. ***Id.*** However, "[o]n

review, 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." ***Id.***, (***citing State v. Bucklew***, **973 S.W.2d 83, 90 (Mo. banc 1998)** (***quoting Johnson v. Zerbst,*** **304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed 1461, 1466 (1938))**. On appeal from the denial of a motion to suppress evidence, all evidence bearing on the question presented, both at the motion hearing and at trial, may be considered. ***Id.***

III. Substantive Law and Argument

This case involves the interplay between four major United States Supreme Court cases: ***Miranda v. Arizona, infra***; ***Michigan v. Tucker, infra***; ***Oregon v. Elstad, infra***; and ***Dickerson v. United States, infra***.

Miranda

In ***Miranda v. Arizona*****, 384 U.S. 436, 478-79 (1966)**, the Supreme Court held that, in order to protect an individual's privilege against self-incrimination, certain warnings must be given before her statement made during custodial interrogation could be admitted in evidence. Under ***Miranda***, any confession made by an accused in connection with an in-custody interrogation will be presumed to be involuntary in violation of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) unless the accused is first informed that she has a right to remain silent, that anything said can and will be used against her, that she has the right to consult a lawyer, and that if she is indigent a lawyer will be appointed to represent her. ***State v. Fakes*****, 51 S.W.3d 24, 27 (Mo. App., W.D. 2001**).

Miranda sought to prevent government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. ***Arizona v. Mauro*, 481 U.S. 520, 529-530 (1987)**. In ***Dickerson v. United States*, 530 U.S. 428, 438-440 (2000)**, the Court confirmed the continued vitality of ***Miranda***, holding that the protections announced therein are of constitutional origin. The Court noted that ever since ***Miranda***, it has been clear that the privilege against self-incrimination extends beyond the doors of the courtroom. ***Dickerson*, 530 U.S. 439-441**. Indeed, the ***Miranda*** Court granted certiorari in part "*to give concrete constitutional guidelines for law enforcement agencies and courts to follow.*" ***Miranda*, 384 U.S. at 441-442; *Dickerson*, 530 U.S. at 439** (emphasis added).

Moreover, the ***Miranda*** decision was prompted in large measure by judicial dissatisfaction with the difficulties and uncertainties inherent in case-by-case voluntariness determinations. ***United States v. Carter*, 884 F.2d 368, 374 (8th Cir. 1989) (*citing W.R. LaFave & J.H. Israel*, 1 Criminal Procedure § 6.3, at 451 (Supp. 1989)**. One of the principal advantages of ***Miranda*** is the ease and clarity of its application. ***Arizona v. Roberson*, 486 U.S. 675 (1988)**. The specificity of the ***Miranda*** rules "benefits the accused and the State alike…" as well as the courts. ***Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (*quoting Fare v. Michael C.*, 442 U.S. 707, 718 (1979))**. If the police are permitted to ignore ***Miranda*** until after they obtain a confession, the courts will once again be embroiled in the endless case-by-case voluntariness inquiries ***Miranda*** sought to prevent, and the ease-of-application rationale enunciated by the Supreme Court will be largely nullified. ***Carter*, 884 F.2d at 374**.

Exclusion of Evidence Derived from Miranda Violations – Michigan v. Tucker

In ***Michigan v. Tucker*, 417 U.S. 433 (1974)**, the Supreme Court identified twin rationales[2] for the exclusion of evidence derived from ***Miranda*** violations. The issue before the Court in ***Tucker*** was whether evidence derived from a non-coercive ***Miranda*** violation should nonetheless be suppressed in order to deter police misconduct:

> Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in ***Miranda***. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be.

***Id.*, 417 U.S. 445**. The Court concluded that, while suppression is not automatically required, it may be required if the police have acted in bad faith:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize

[2] "Twin rationales" is the description later used by the Court in ***Oregon v. Elstad***, when it relied on ***Tucker's*** discussion of "trustworthiness" and "deterrence." **470 U.S. 298, 308 (1985)**.

> police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

***Id.*, 417 U.S. at 446** (emphasis added).

The Court reiterated that, in a search-and-seizure context, the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." ***Id.* (*quoting United States v. Calandra*, 414 U.S. 338, 347 (1974))**. It continued:

> The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.

Id.*, (*quoting Elkins v. United States*, 364 U.S. 206, 217 (1960))**. Then, the ***Tucker Court made a very important statement -- one that is critical to the issue presented in Ms. Seibert's case. Regarding the exclusionary rule, the Court stated that, "[i]n a proper case this rationale would seem applicable to the Fifth Amendment context as well." ***Id.*, 417 U.S. at 447** (emphasis added). The Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

Id. (emphasis added).

In ***Tucker***, the police interrogated the defendant without first administering the ***Miranda*** warnings.[3] During the course of the interrogation, Tucker named a witness. When the witness implicated Tucker in the crime, Tucker sought to suppress the witness' testimony. ***Tucker*, 417 U.S. at 435-437**.

The defense argued that the evidence derived solely from statements made without full ***Miranda*** warnings should be excluded at a subsequent criminal trial. ***Id.* at 438-439**. The Court examined the question presented in two separate parts. First, it considered whether the police conduct complained of directly infringed upon Tucker's right against compulsory self-incrimination or whether it instead violated only what was then described as the "prophylactic rules" developed to protect that right. ***Id.* at 439**.[4] Second, it considered whether the evidence derived from the interrogation must be excluded. ***Id.***

Tucker advanced two bases for presumptive exclusion of the derivative evidence: a Fifth Amendment coercion analysis, and a Fourth Amendment fruits analysis under ***Wong Sun v. United States*, 371 U.S. 471 (1963)**. ***Tucker*, 417 U.S. at 438-439, 445-446**. The Court concluded that, under the coercion analysis, Tucker's Fifth Amendment rights had not been infringed; his statements had not been compelled. ***Id.*, 417 U.S. at 444-445**. When a defendant's Fifth Amendment rights themselves have been infringed,

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[3] While the questioning took place before the Court's decision in ***Miranda***, Tucker's trial took place afterwards. **94 S.Ct. at 2359**. Under the holding of ***Johnson v. New Jersey*, 384 U.S. 719 (1966)**, therefore, ***Miranda*** was applicable to the case.

[4] ***Dickerson*** made clear that ***Miranda*** is not simply a prophylactic rule.

Miranda imposes a remedy of automatic, presumptive exclusion of the resulting statements. Here, however, Tucker's Fifth Amendment rights had not been infringed, and a presumptive exclusion of the resulting evidence was therefore unwarranted.

The Court next considered what "valid and useful purpose" could be served by excluding the evidence under a "fruits" analysis. ***Id.*, 417 U.S. at 446**. The first rationale that the Court examined was that of "deter[ring] future unlawful police conduct." ***Id.*** It noted that discouraging the use of improper police tactics is "the exclusionary rule's prime purpose." ***Id.*** Again, it stated that "in a proper case this rationale would seem applicable to the Fifth Amendment context as well." ***Id.*, 417 U.S. at 446-447**. The Court described the qualities that "a proper case" would have to possess for the deterrence rationale to apply. It would have to be a case in which "the police have engaged in willful, or at the very least negligent, conduct…" ***Id.* at 447**. This is because the rationale "loses much of its force" in cases "[w]here he official action was pursued in complete good faith." ***Id.***

Applying this analysis to the facts of ***Tucker***, the Court concluded that the police had acted in good faith: They had followed the requirements of ***Escobedo v. Illinois*, 378 U.S. 478 (1964)**, the governing case law at the time. ***Tucker*, 417 U.S. at 447**. Therefore, bad-faith police conduct would not be significantly deterred if the derivative evidence were excluded. ***Id.* at 447-448**.

After considering a "deterrence" rationale for the exclusion of derivative evidence, the Court next considered a second, entirely separate "valid and useful purpose" that might be served by excluding the derivative evidence: ensuring that all of the evidence

admitted against a defendant is trustworthy. ***Id.* at 448**. The Court acknowledged that coerced evidence is untrustworthy, but it found no coercion in the case before it. ***Id.* at 448-449**.

To summarize, the ***Tucker*** Court stated that each rationale -- deterrence and trustworthiness -- plays a role in the Fifth Amendment context. But neither acts as a presumptive bar that automatically excludes evidence derived from a ***Miranda*** violation. Instead, a trial court must look to see what actually happened. If the facts show that exclusion is justified to deter misconduct or promote the trustworthiness of confessions, the evidence may be excluded.

***Oregon v. Elstad* Reaffirms *Tucker*'s Twin Rationales**

In ***Oregon v. Elstad*, 470 U.S. 298 (1985)**, as in ***Tucker***, the Supreme Court addressed the question of whether evidence derived from a ***Miranda*** violation should be excluded. ***Id.* at 300**. The question in ***Elstad*** was whether ***Miranda*** requires the suppression of statements obtained after the suspect initially makes an incriminating statement, then receives the ***Miranda*** warnings, and subsequently makes a further incriminating statement. ***Id.*** The evidence sought to be suppressed in ***Elstad*** was more directly linked to the ***Miranda*** violation than the evidence sought to be suppressed in ***Tucker***. In ***Elstad***, the defendant directly confessed in his unwarned statement and sought to suppress his later warned admission. Whereas, in ***Tucker***, the defendant did not confess in his incompletely warned statement, but rather named a witness who he believed would exculpate him; the witness instead inculpated him, and he sought to suppress the witness' testimony.

The facts of ***Elstad*** are important: Officers had information linking 18-year-old Michael Elstad to a recent burglary. ***Id.* at 300**. They went to Elstad's home with a warrant for his arrest. ***Id.*** Elstad's mother answered the door and took the officers to Elstad. ***Id.*** One of the officers stepped into the kitchen with Elstad's mother to explain the arrest. ***Id.* at 300-301**. Meanwhile, another officer remained with Elstad. ***Id.* at 301.** That officer testified:

> I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."

Id. The officers transported Elstad to headquarters, and approximately one hour later they advised Elstad for the first time of his ***Miranda*** rights. ***Id.*** Elstad said that he understood his rights and that he wished to make a statement. ***Id.*** He then gave a full statement, admitting involvement in the burglary and incidentally admitting possession of marijuana. ***Id.* at 301-302.**

Elstad sought to suppress both his initial oral remark and his subsequent confession. ***Id.* at 302**. The State conceded that Elstad had been in custody when he made his statement, "I was there," and accordingly agreed that this statement was inadmissible as having been given without the prescribed ***Miranda*** warnings. ***Id.*** But the

State maintained that any conceivable "taint" had been dissipated prior to Elstad's written confession by the officer's careful administration of the requisite warnings. ***Id.***

The question presented in ***Elstad*** differed somewhat from that presented in ***Tucker***. The ***Miranda*** violation in ***Elstad*** led much more directly to incriminating evidence. Nevertheless, the Court applied the same presumption analysis to this more closely connected derivative evidence that it had applied to the more attenuated evidence in ***Tucker***. The ***Elstad*** Court held that the further statement, obtained after the warning has been given, need only be suppressed when the first statement was given in response to "deliberately coercive or improper tactics." ***Id.*, 470 U.S. at 308-309, 314** (emphasis added).

The Court began its analysis by rejecting, as it had in ***Tucker***, the notion that the defendant's warned confession should be presumptively excluded. ***Id.* at 308**. It explicitly repudiated automatic exclusion on both a Fourth Amendment ***Wong Sun*** fruits analysis and a Fifth Amendment coercion analysis. **470 U.S. at 303-304** (terming both the Fourth Amendment "fruit of the poisonous tree" metaphor and the Fifth Amendment "cat out of the bag" metaphor "misleading" in the context of ***Miranda***). It concluded instead that an unwarned statement was presumptively inadmissible for some purposes, but not for all purposes. **470 U.S. at 307-308**. Thus, as the Court pointed out, the government may not use in its case-in-chief a statement taken in violation of ***Miranda*** because an irrebuttable presumption of coercion bars its use. But, under ***Harris v. New York*, 401 U.S. 222 (1971)**, no presumption of coercion exists if the governments uses the statement peripherally, to impeach. ***Elstad*, 470 U.S. at 307-309**. Under this analysis,

instead of applying a presumptive bar when the government seeks to use a statement peripherally, a court must evaluate the admissibility of the statement by looking to the circumstances under which it was actually made. Under ***Harris***, for example, if the statement was voluntarily made, it may be admitted. **470 U.S. at 307-308**.

After establishing that the peripheral use of an unwarned statement is not automatically forbidden, the ***Elstad*** Court discussed the presumptions that it had set out in ***Tucker***. ***Id.* at 308-309**. It noted that, in ***Tucker***, the defendant's constitutional rights had suffered no "actual infringement." ***Id.* at 308**. For this reason, exclusion would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." ***Id.*** Thus, the ***Elstad*** Court reaffirmed ***Tucker's*** holding that, faced with evidence that falls outside the limits of ***Miranda***, a court may not presume that police used improper tactics to obtain it -- a presumption that would warrant exclusion on a deterrence theory. Nor may a court presume that police coerced the unwarned statement -- a presumption that would justify exclusion on a trustworthiness theory. Instead, the court must look to whether a suspect's rights have suffered an actual infringement.

The ***Elstad*** Court then stated, "We believe that this reasoning applies with equal force" to the derivative evidence at issue in ***Elstad*** -- evidence that was much more closely related to the ***Miranda*** violation than that in ***Tucker***. ***Id.* at 308-309.** Just as in ***Tucker*** and ***Harris***, no presumptions could be applied. Instead, a court must look to what actually happened: **"[T]he absence of any coercion or improper tactics undercuts the twin rationales – trustworthiness and deterrence – for a broader rule." *Id*. at 308.**

(emphasis added). This sentence is at the heart of the opinion, because it reaffirms that the Court intended its decision to embrace *both* of the ***Tucker*** rationales: deterrence and trustworthiness. The sentence structurally links the wrong of coercion with the exclusionary rationale of trustworthiness, and the wrong of "improper tactics" with the exclusionary rationale of deterrence. Trustworthiness is undercut by police coercion; deterrence is supported through the use of exclusion to remedy improper police tactics. Thus, if police actually used coercion, the statement must be excluded because it may be untrustworthy; if police actually used improper tactics, the statement must be excluded because such tactics cannot be condoned.

In this way, the Court emphasized that, under ***Tucker***, there is no *presumption* of exclusion on a theory of improper tactics or on a theory of coercion. Rather, a court must look to the facts of the case. Did the police really use improper tactics? Or did the police really coerce the defendant's statement? This is what the Court meant when it stated that an unwarned statement may not be presumed to be compelled "without deliberately coercive or improper tactics." **470 U.S. at 314**.

The Court then analyzed the facts of ***Elstad*** -- on a non-presumptive basis -- to discover what had actually happened. The ***Elstad*** court regarded the officer's initial breach of ***Miranda*** as relatively innocent. "The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect, but to notify his mother of the reason for his arrest." ***Id.*** **at 315**. "This breach may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or it may simply have reflected [the officer's]

reluctance to initiate an alarming police procedure before [they] had spoken with respondent's mother." ***Id.* at 315-316.** "Whatever the reason for [the officer's] oversight, the incident had none of the earmarks of coercion." ***Id.* at 316.** "Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent." ***Id.***

The Court found no coercion; the young Elstad had been questioned in his own living room at midday, with his mother nearby in the kitchen. ***Id.* at 315**. It also found no improper tactics; the police had honestly been confused about whether Elstad was really in a custodial setting in his living room. ***Id.* at 315-316**. In the absence of either coercion or improper tactics, the unwarned confession could not be shown to have tainted the warned confession, and the warned confession was admissible.

In the present case, there was no such "innocence" on the part of Officer Hanrahan. He knew that Ms. Seibert was under arrest and that he was going to interrogate her. He refused to advise Ms. Seibert of her constitutional rights as a calculated ploy to obtain a confession. He described his "technique" this way:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the Miranda rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read Miranda, and she repeated the items she had told us.

(Tr. 38). This officer knew the law. He simply chose to ignore it. He knew that a ***Miranda*** violation would result in the exclusion of her initial statement, but he thought he

had discovered an end-run around the constitutional requirements of ***Miranda***. His actions were both coercive and improper, and they were certainly calculated to undermine Ms. Seibert's ability to exercise her free will. ***Elstad,* 470 U.S. at 309**.

Officer Hanrahan knew that his "technique" was "reasonably likely to evoke an incriminating response from [Ms. Seibert]." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980). *And it did*. His conduct is precisely what the Supreme Court had in mind in ***Elstad***, when it exempted "deliberately coercive or improper tactics in obtaining the initial statement" from the ordinary rule that subsequent statements are not to be measured by a "tainted fruit" standard, but by whether they are voluntary. ***Elstad,* 470 U.S. at 314.** The police in ***Elstad*** did not use deliberately improper tactics during the interrogation that produced the first incriminating statement; Officer Hanrahan did. Ms. Seibert's statements were the direct and unmistakable product of improper police tactics and an unconstitutional interrogation.

Besides its express language, there is yet another way to be certain that the ***Elstad*** majority did not intend for a deliberate violation of ***Miranda*** to be found acceptable under the standards of ***Elstad***. It becomes very clear that a deliberate end-run of ***Miranda*** would never pass constitutional muster by simply reviewing Justice Brennan's dissent and the majority's response thereto.

Justice Brennan's Dissent in Elstad

Justice Brennan's dissent is significant for two reasons: 1) He firmly believed that the majority's opinion would permit exactly what Officer Hanrahan did to Ms. Seibert; and 2) the majority said that he was wrong.

Joined in his dissent by Justice Marshall, Justice Brennan emphasized ***Tucker's*** endorsement of the deterrence rational for exclusion. ***Id.* at 354-356** (Brennan, J., dissenting). He feared that the majority's opinion would permit police to question a suspect twice -- once inadmissibly, and once admissibly. ***Id.* at 358** (Brennan, J., dissenting). Rather than deterring the infringement of constitutional rights, this would encourage police deliberately and improperly to elicit unwarned incriminating statements. ***Id.* at 356** (Brennan, J., dissenting).

Justice Brennan was concerned because he believed that the police in ***Elstad*** acted in bad faith -- they "clearly broke the law." ***Id.* at 359** (Brennan, J., dissenting). Among other reasons, he believed that the officers could not possibly have been confused about whether their conference with Elstad had constituted custodial interrogation. ***Id.* at 359, 360** (Brennan, J., dissenting). In essence, they had used "improper tactics" to elicit incriminating statements:[5]

He rebuked the majority, stating:

> How can the Court possibly expect the authorities to obey ***Miranda*** when they have every incentive now to interrogate suspects without warnings or an effective waiver, knowing that the fruits of such interrogations "ordinarily" will be admitted, that an admissible subsequent

[5] Justice Brennan also believed that the conduct of the police in ***Elstad*** had been inherently coercive and that the defendant's warned confession should have been excluded on that basis as well. **470 U.S. at 360-362** (Brennan, J. dissenting).

> confession "ordinarily" can be obtained simply by reciting the ***Miranda*** warning shortly after the first has been procured and asking the accused to repeat himself, and that unless the accused can demonstrate otherwise his confession will be viewed as an "act of free will" in response to "legitimate law enforcement activity?" By condoning such a result, the Court today encourages practices that threaten to reduce ***Miranda*** to a mere "form of words," and it is shocking that the Court nevertheless disingenuously purports that it "in no way retreats" from the ***Miranda*** safeguards.

***Id.* at 358-359** (Brennan, J., dissenting) (citations omitted).

In response, the majority called Justice Brennan's dissent "apocalyptic" and said that it distorted their reasoning and holding. ***Id.* at 318 fn.5**. The majority specifically rejected the accusation that it had ignored the deterrence theory advanced in ***Tucker***. Justice Brennan had accused the majority of abandoning the remedy for violations of constitutional rights by precluding the use of "the well-established [exclusionary] rules respecting derivative evidence. ***Id.* at 320** (Brennan, J., dissenting). But the majority had *affirmed* both of ***Tucker's*** rationales for exclusion. It affirmed both that evidence derived from ***Miranda*** violations may be excluded if the police coerce it, *and* if the police use improper tactics to procure it. Rejecting the dissent, the majority implicitly stated that its decision did not permit what happened to defendants like Ms. Seibert. The majority's own dismissal of Justice Brennan's concerns clearly shows that ***Elstad*** bars a bad-faith violation of ***Miranda***.

The Western District - Elstad Does Not Permit "Circumvention of Miranda"

The Western District has confronted this exact issue and has resolved it in Ms. Seibert's favor. In ***State v. Fakes*, 51 S.W.3d 24 (Mo. App., W.D. 2001)**, the police arrested and interrogated Ms. Fakes without advising her of her ***Miranda*** rights. ***Id.* at 27**. When Ms. Fakes became "very emotional," she was placed in a cell to allow her time to compose herself. ***Id.*** After "a period of time," Fakes was brought back into the office and was advised of her ***Miranda*** rights, which Fakes said she understood. ***Id.*** Fakes declined to give a written statement but "again verbally gave [the police] all of the [same information] *after* waiving her rights" (emphasis in original). ***Id.***

Prior to trial, Ms. Fakes filed a motion to suppress the statements she made during the time she was in custody following her arrest. ***Id.*** The motion sought to suppress both the statements made before and after the administration of the ***Miranda*** warnings. ***Id.*** The trial court held that the pre-warning statements were not admissible, except for rebuttal or impeachment purposes; however, it denied the motion as to the statements made after Fakes was given her ***Miranda*** warning. ***Id.* at 28.**

On appeal, Fakes argued, in part, that the trial court erred in allowing testimony at trial as to the statements she made on the day of her arrest because of the lack of timely ***Miranda*** warnings. ***Id.* at 29**. Fakes argued that none of the statements that she made on the night of her arrest were admissible because the post-warning statements were so dependent upon and so intertwined with the pre-warning statements that the two cannot be separated. ***Id.* at 30**. The warning of her rights came only after all the details of the

matter had been thoroughly discussed. ***Id.*** After the warnings were given, all that remained was for the officers to confirm the details of her earlier comments. ***Id.***

The Western District agreed that the two statements -- the warned and the unwarned -- cannot be separated. ***Id.* at 33**. This is especially true because the warned statements were merely a confirmation of the unwarned statements. ***Id.*** The post-warning statements were obviously very closely linked to the extensive unwarned interrogation, and the administration of the warnings was a belated attempt, at the conclusion of the real interrogation, to breathe legal validity back into an improper interrogation. ***Id.* at 35**; *see also* ***State v. Williams***, **486 S.W.2d 469, 473 (Mo. 1972)** (accused confessed to crime after defective warning; confessed again several hours later after proper warning; neither confession held admissible).

In ***Fakes***, the warnings were an afterthought, and were given only after a temporary recess in the interrogation. ***Id.* at 35**. Apparently, after the break in the questioning, the officers realized they had not properly warned Fakes. ***Id.*** No reason was shown for the failure to advise Fakes of her rights before she was systematically interrogated at the police station. ***Id.***

> [T]hese circumstances of this case illustrate that when there has been an extensive interrogation without warnings, then the warnings are provided as an afterthought, and the post-warning interview is merely a confirmation of the unwarned interrogation, there is, of necessity, substantial doubt as to whether there has been compliance with ***Miranda***.
>
> ……

> We think that, in a case where the pre-warning interrogation is the only interrogation documented in detail and remembered in detail by the police, and the warnings have been provided as an afterthought, to allow any testimony of the interrogation is to allow a circumvention of ***Miranda***.

***Id.* at 34**.

Ultimately, the failure to do police work in proper fashion, and the improper way the interrogation was conducted resulted in the violation of Fakes' constitutional rights. ***Id.* at 35.** Although the evidence of her guilt was otherwise strong, the Court could not say beyond a reasonable doubt that the error caused by the injection into the case of the illegal interrogation was harmless. ***Id.* at 35-36**. It reversed and remanded the case for a new trial. ***Id.***

The police conduct in Ms. Seibert's case is much, much worse. The police work here was not merely ambiguously improper, it was a calculated and deliberate violation of ***Miranda***. The police in ***Fakes*** administered the warnings as an afterthought, but there was no reason shown for the failure to timely advise her of her rights. ***Id.* at 32**. If exclusion is required under those circumstances, then it is certainly required when the police not only purposefully violate ***Miranda*** in obtaining the first set of incriminating statements, but deliberately use improper tactics while doing so.

This case differs significantly from ***Elstad***, and reversal is compelled by ***Fakes***, because, just as in ***Fakes***, Ms. Seibert was subjected to a lengthy interrogation prior to being informed of her rights. The absence of ***Miranda*** warnings prior to this interrogation was deliberate. The officers knew that the warnings were required, but

withheld them in the hopes of obtaining a confession. The second taped statement was taken immediately after the initial confession, and was merely a repeat of the initial, unwarned confession.

Ever since ***Miranda***, it has been clear that the privilege against self-incrimination extends beyond the doors of the courtroom. ***Fakes*, 51 S.W.3d at 33**; ***see Dickerson v. United States*, 530 U.S. at 439-440**. Ms. Seibert had a right not to be a witness against herself at the police station. ***Fakes*, 51 S.W.3d at 33**. She could waive that right and make a voluntary statement. ***Id.*** However, in view of the fact that she was so extensively interrogated before she was advised of her rights and that the police deliberately withheld her rights in an effort to obtain that confession, it is not as clear that she later voluntarily waived those rights when, after finally having been advised of her rights, she merely confirmed her earlier statements. ***Id.*** To permit the introduction of a statement which is merely the repeat of -- and taken on the heels of -- an otherwise excludable unwarned statement, would sound the death knell for ***Miranda***. For all practical purposes, ***Miranda*** would be meaningless. While scholars can still debate the extent to which ***Miranda*** is compelled by the Fifth Amendment, ***Miranda*** remains the law. ***Id.* at 34**; ***Dickerson*, 530 U.S. 428 (2000)**. The police purposefully violated Ms. Seibert's constitutional rights, no intervening factors dissipated the taint of this violation, and her tape-recorded statement is rendered involuntary.

As it did below, Respondent may attempt to distinguish ***Fakes*** in three ways: (1) Fakes' unwarned interview was lengthy and extensive; (2) the ***Miranda*** warnings were given as an "afterthought;" and (3) Fakes' pre *and* post-***Miranda*** responses were admitted

into evidence at trial (Respondent's SD brief at 18-19). These are not just distinctions without a difference, they are not distinctions at all. If anything, they demonstrate that the facts of Ms. Seibert's case are much worse than ***Fakes***.

First, there is no evidence that Ms. Fakes' unwarned interview was any longer or more extensive than Ms. Seibert's. But more importantly, Ms. Fakes was also given a break to "allow her time to compose herself." ***Fakes***, 51 S.W.3d at 27. This defeats Respondent's claim that a 15-20 minute break dissipated the taint of the ***Miranda*** violation in Ms. Seibert's case.

Secondly, it is true that the police in ***Fakes*** administered the ***Miranda*** warnings as an afterthought. Here, there was no such "negligence." Rather, Officer Hanrahan *purposefully* set out to disobey the constitutional mandate of ***Miranda*** in order to obtain a confession. Clearly, the improper police tactics used here were much more egregious than in ***Fakes***.

Finally, the ***Fakes*** court specifically found that "even if some of these incidents were again discussed also, after she was advised of her rights…the two statements -- the warned and the unwarned -- cannot be separated." **51 S.W.3d at 33**. The trial court in ***Fakes*** made the same pretrial ruling as the trial court here -- i.e., that the unwarned statements were inadmissible. However, evidence of the unwarned statements came in. Regardless, the ***Fakes*** court held that when "the post-warning interview is merely a confirmation of the unwarned interrogation, there is, of necessity, substantial doubt as to whether there has been compliance with ***Miranda***." ***Id.* at 34**. "The post-warning statements were obviously very closely linked to the extensive unwarned interrogation,

and the administration of the warnings was a belated attempt, at the conclusion of the real interrogation, to breathe legal validity back into an improper interrogation." ***Id.* at 35**. Neither confession is admissible. ***Id.*** The error did not depend upon the independent introduction of the unwarned statements, but regardless, it is clear that the statements introduced against Ms. Seibert *were* the unwarned statements, merely laundered through a warning that came too late. The warned statements were only a confirmation of the unwarned statements. As the ***Fakes*** court noted, the two cannot be separated. ***Id.* at 33**. Reversal is also required here.

The 8th Circuit - Elstad does not permit an "end run around Miranda."

The 8th Circuit has also addressed this exact issue. In ***United States v. Carter*, 884 F.2d 368, 369 (8th Cir. 1989)**, postal inspectors suspected Terry Carter, a bank employee, of stealing bearer checks. Carter was summoned to the bank president's office where he was interrogated for an hour and a half. ***Id.*** After obtaining incriminating statements from Carter and discovering a bearer check in his wallet, the inspectors warned Carter of his ***Miranda*** rights. ***Id.*** Carter said that he understood those rights and signed a waiver form; he then wrote out a handwritten statement admitting his guilt. ***Id.***

Carter moved to suppress all of his statements, and the District Court granted the motion. ***Id.*** The United States appealed, arguing that, even if the unwarned statement must be suppressed, Carter's written confession, which he executed after receiving ***Miranda*** warnings, should be admitted under ***Oregon v. Elstad, supra***. ***Id.* at 369-370, 372**. The 8th Circuit analyzed ***Elstad*** in the following way:

> The Court distinguished *presumptive* coercion resulting from the absence of ***Miranda*** warnings from *actual* coercion through the use of coercive or improper methods by the police. ***Id.* 470 U.S. at 307-308**. Thus, statements obtained in violation of ***Miranda***, although they must be suppressed as presumptively coercive, may yet be deemed voluntary in fact. ***Id.* at 307**. If the unwarned statement is voluntary, then a subsequent warned confession may be admissible if the prior statement is not the result of "deliberately coercive or improper tactics." ***Id.* at 314**.

Carter, 884 F.2d at 372. The Court proceeded to note, as did the ***Fakes*** court, the important differences in the facts of ***Carter*** and those in ***Elstad***. In ***Carter***, there was no real passage of time between the unwarned confession and the subsequent warnings and confession; it all occurred as part and parcel of a continuous process. ***Id.* at 373**. Thus, the second confession came almost directly on the heels of the first. ***Id.***

> Although ***Elstad*** precludes the formulation of a "rigid rule" in determining the admissibility of the second confession, ***id.* at 318**, our review of "the surrounding circumstances and the entire course of police conduct with respect to the suspect," ***id.***, convinces us that the second confession cannot be allowed into evidence.

***Carter*, 884 F.2d at 373**.

The ***Carter*** Court emphasized the Supreme Court's concern in ***Elstad*** that technical violations of ***Miranda*** may arise from errors by the police in determining when

a suspect is in custody or has had his freedom of movement significantly restrained. ***Id.*** (***citing Elstad*, 470 U.S. at 309)**. But, in ***Carter***, the custodial nature of the suspect's interrogation was not unclear to the officers; indeed, the investigation had focused on Carter and they told Carter not to leave. ***Id.* at 373**. They persistently interrogated him for nearly an hour. ***Id.*** The ***Miranda*** warnings were in order, and, although that alone did not determine the admissibility of Carter's statement, it did demonstrate that an underlying concern of the ***Elstad*** opinion was largely absent in ***Carter***.

Furthermore, the 8th Circuit noted that the ***Elstad*** Court "gave no indication that it intended to give a green light to law enforcement officers to ignore the requirements of ***Miranda*** until after such time as they are able to secure a confession." ***Id.* at 373**. "***Elstad*** did not go so far as to fashion a rule permitting this sort of end run around ***Miranda***." ***Id.*** "In fact, the majority expressly rejected Justice Brennan's 'apocalyptic' dissenting remonstration that the Court's holding dealt a 'crippling blow' to ***Miranda*** by permitting the police to withhold warnings until the end of interrogation, and abjured what it viewed as Justice Brennan's invitation to trial courts and prosecutors to distort the reasoning and holding of the Court's opinion." ***Id.* (*citing Elstad*, 470 U.S. at 318 fn.5; and 319, 330 (Brennan, J., dissenting))**.

Again, it is important to note that the 8th Circuit in ***Carter***, and the Western District in ***Fakes***, found ***Elstad*** distinguishable, on facts much less egregious than those presented in this appeal. Officer Hanrahan was neither negligent nor in "technical violation" of ***Miranda***. Rather, he employed a calculated and deliberate tactic to undermine Ms. Seibert's free will and obtain a confession. This cannot be described in

any other way than an "improper tactic" that divested Ms. Seibert of the right to know and to rely upon her rights. This is the "proper case" for exclusion of derivative evidence in the Fifth Amendment context, as contemplated by ***Michigan v. Tucker, supra***. These tactics are irreconcilable with ***Miranda*** and due process of law, and the exclusionary rule must reach this situation. Otherwise, the repeated statement by the Supreme Court that the ***Miranda*** warnings must be "scrupulously honored" is meaningless. ***See Michigan v. Mosley,* 423 U.S. 96, 103 (1975)**. Indeed, while the ***Miranda*** record did "not evince overt physical coercion or patent psychological ploys, the fact remain[ed] that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." **384 U.S. at 457**. It defies reason to think that the ***Miranda*** Court would have approved of laundering an unwarned statement through a subsequent, warned reiteration thereof. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, ***no statement obtained*** from the defendant can truly be the product of his free choice." ***Id.*** (emphasis added).

The Southern District's Opinion and the Federal Cases it Relies On Are Flawed

The Southern District "fail[ed] to see why an intentional violation of the ***Miranda*** warnings is any more reprehensible than an inadvertent one." (Slip op.13-14). Thus, said the Southern District, since the officer did not engage in promises, threats, or inducements of any kind, Ms. Seibert's second statement could not have been coerced. In so holding, the Southern District noted that, according to ***Elstad***, "a violation of ***Miranda*** is not, standing alone, a violation of the Fifth Amendment," and that the "improper

tactics" prohibited in ***Elstad*** are only one issue to be considered on the issue of voluntariness (Slip op. 10-12).

The Southern District's opinion also dismissed the 8th Circuit in ***United States v. Carter***, discussed *supra*, in favor of decisions of the 1st, 9th and D.C. Circuit Courts of Appeals (Slip op. 11-13). It noted that the 1st Circuit had characterized ***Carter*** as "facially inconsistent with…***Elstad***." ***United States v. Esquillin*, 208 F.3d 315, 319 (1st Cir. 2000)** (Slip op. 13). However, unlike the Southern District, at least two of the federal circuit cases it relied on took a "dim view of deliberate, in contrast to inadvertent or 'technical,' failures to advise an accused of his Constitutional rights." ***Orso v. United States***, **266 F.3d 1030, 1042 (9th Cir. 2001);** ***see also Davis v. United States,*** **724 A.2d 1163 (D.C. App. 1998)**. These cases simply did not acknowledge that ***Tucker*** and ***Elstad*** allow for the exclusion of derivative evidence to deter such flagrant police misconduct.

The problem with the Southern District's opinion and the cases it relies on is that they hinge upon a premise that voluntariness is ***Elstad's*** "overriding theme." ***Orso,*** **266 F.3d at 1036**. It is true that ***Elstad*** focuses to a great extent on voluntariness. But it does not do so to reject a deterrence analysis. Rather, the ***Elstad*** Court recognized and adopted deterrence as one of the twin rationales of exclusion. The Court's focus on voluntariness addressed the underlying state court decision, which discussed *only* voluntariness, and also responded to Justice Brennan's concerns about coercion and torture. Thus, although much of ***Elstad*** involves a coercion analysis, ***Elstad*** is not simply a coercion case.

Elstad begins by recounting the basis of the state court's decision excluding the disputed evidence, which was based solely on a coercion analysis. ***See State v. Elstad*, 658 P.2d 552 (1983*); see also* 470 U.S. at 303** (quoting the Oregon court's holding that "the coercive impact of the unconstitutionally obtained statement remains…"). Thus, the question presented to the Court reflected the state court's analysis. ***Id.*** (question presented on certiorari is whether a warned statement must be suppressed "solely because the police had tainted an earlier voluntary but unwarned admission from the defendant"_ ***see also id.* at 309-310** (rejecting the belief of the Oregon court "that the unwarned remark compromised the voluntariness of Elstad's later confession").

Much of the Court's later discussion also addressed the Oregon court's focus on a coercion analysis. The Oregon court had employed a cat-out-of-the-bag metaphor to describe the psychological effect of a defendant's voluntary disclosure of incriminating information, but the Supreme Court rejected it. ***Id.* at 311-312**. In its summary of its ruling, the Court returned to the Oregon court's decision, rejecting its "rigid rule" that presumes coercion when a statement is voluntary. ***Id.* at 317-318**.

Another impetus for the majority's voluntariness analysis was Justice Brennan's view that Elstad's statement should be presumptively barred on a coercion theory even though no physical or gross psychological methods had been used to coerce him. ***See id.* at 333-340** (Brennan, J., dissenting). Justice Brennan had written that a defendant who has divulged his guilty secret in an unwarned statement will believe that he has no reason to conceal it in a later warned statement and that the warned statement must therefore be considered to be compelled. ***Id.*** (Brennan, J., dissenting). The majority rejected this

view, drawing a sharp distinction between a statement extracted by actual torture and one volunteered through the uncertain processes of a defendant's state of mind. **470 U.S. at 312-313**. Nothing in ***Elstad's*** discussion of voluntariness, nor anything else in the opinion, rejects ***Tucker's*** clear statement that bad-faith police tactics could justify the suppression of a later, warned confession.

The Southern District's opinion and the federal cases upon which it relied read ***Elstad*** to exclude warned confessions only where those confessions are tainted by involuntary, unwarned statements. That is too narrow a reading. ***Elstad*** is not simply a case about voluntariness. It does not permit the use of a warned confession as long as the confession is preceded by a voluntary unwarned statement. Instead, it adopted the two rationales for the exclusion of derivative evidence identified in ***Tucker, supra***. Under ***Tucker***, a warned confession may be excludable for two reasons: because the earlier unwarned statement was involuntary, or because the earlier unwarned statement was elicited in bad faith. These alternative rationales serve the twin goals of preventing the use of untrustworthy confessions and deterring police misconduct. Both goals are appropriate in the Fifth Amendment context, and both are permissible under ***Elstad***.

The Effect of Dickerson v. United States

At the time that ***Elstad*** was decided, it was unclear whether ***Miranda*** was constitutionally-based. The Court has since declared ***Miranda*** to be "a constitutional decision." ***Dickerson v. United States*****, 530 U.S. at 438**. It reaffirmed that "***Miranda*** requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." **530 U.S. at**

442 (*citing Miranda,* 384 U.S. at 467). ***Dickerson*** makes clear that, under our Constitution, a law enforcement officer must tell a suspect in custody that she has the right to remain silent. The officer may not deliberately leave the suspect unwarned in the hope that he may be induced to confess. ***Dickerson*, 530 U.S. at 434-35** (reaffirming ***Miranda's*** rejection of "trickery" and other deceptive tactics in questioning suspects) **(*citing Miranda*, 384 U.S. at 455-58)**.

Even the 9th Circuit's acknowledged that, "when ***Elstad*** was decided, ***Miranda*** was not understood to be a constitutional rule" and that "the Court's recent decision in ***Dickerson***…calls [ ] into question" the rejection of a fruits analysis in the absence of a constitutional violation. ***United States v. Orso*, 275 F.3d 1190, 1191 (9th Cir. 2001)**.[6]

[6] The 9th Circuit originally reversed Orso's conviction because of the officer's deliberate violation of ***Miranda***. ***United States v. Orso*, 234 F.3d 436 (9th Cir. 2000)(vacated)**. A limited en banc 9th Cir. Panel later affirmed the conviction. ***United States v. Orso*, 266 F.3d 1030 (9th Cir. 2001) (en banc)**. A member of the court called *sua sponte* for full-court review, but it failed to receive a majority of the votes of the active, non-recused judges. ***United States v. Orso*, 275 F.3d 1190 (9th Cir. 2001)** (O'Scannlain, C.J., specially concurring). Eight judges dissented from the denial of full court review, **275 F.3d at 1192**, finding that ***Elstad*** would exclude evidence derived from a ***Miranda*** violation based on deliberately improper and unconscionable police tactics. **275 F.3d at 1194-1195** (Trott, C.J., dissenting).

The 9th Circuit realized that ***Dickerson's*** analysis of ***Elstad*** "(all one sentence of it) is less than fully satisfying." ***Id.* at 1192**.

Indeed, ***Dickerson's*** discussion of ***Elstad*** is brief. It states that ***Elstad*** "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment." ***Dickerson*, 530 U.S. at 441**. But, with this statement, the Court merely reaffirms the non-presumptive ***Tucker*** analysis that ***Elstad*** adopted. An unwarned interrogation under the Fifth Amendment differs from an unreasonable search under the Fourth Amendment because it does not presumptively lead to the exclusion of derivative evidence. However, it may still require evidence to be excluded on a deterrence theory if the circumstances dictate such a result. If the facts show that police, like Officer Hanrahan here, really did use deliberately improper tactics to violate ***Miranda***, then the derivative evidence must be suppressed.

The admissibility of a confession turns as much on whether the technique for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. ***Miller v. Fenton*, 474 U.S. 104 (1985)**. "For victims caught in the snare of officials who deliberately choose to ignore the law and the Constitution in favor of their own methods...the Constitution becomes a useless piece of paper." ***Cooper v. Dupnik*, 963 F.2d 1220, 1252 (9th Cir. 1992) (en banc)**.

While police deception may have a place after the advisement of the suspect's rights, Officer Hanrahan's pre-advice deception cannot be an acceptable substitute for the

affirmative constitutional commands of ***Miranda***. To allow such police abuse of the law does not "scrupulously honor" ***Miranda***, it eviscerates it. It allows the officers deliberately and flagrantly to violate the protections to which the suspect is entitled under the Constitution. ***Elstad*** specifically excludes such "improper tactics" from its mandate, and ***Tucker*** acknowledges that the exclusion of derivative evidence is proper in a case such as this. This Court must not permit police officers to circumvent ***Miranda*** with impunity and to flagrantly abuse the Constitution upon which it depends, and which they take their oath to uphold.

Prejudice

Because there was error introduced in this case, this Court must reverse for a new trial unless it is convinced beyond a reasonable doubt that the error was harmless. ***State v. Miller,* 650 S.W.2d 619, 621 (Mo. banc 1983)**. The burden to overcome the presumption of prejudice lies with the State. ***Id.*** This it cannot do. Although Ms. Seibert was acquitted of capital murder, she was convicted of second degree murder as an accessory for knowingly killing Donald Rector.[7]

The impact of Ms. Seibert's unlawfully obtained statement was devastating. The jury was allowed to hear and read the following incriminating statements:

When Jonathan died, Ms. Seibert was afraid of being investigated for child abuse and neglect (Ex. 43, p. 4). Jonathan had bedsores, which she had been trying to treat by

[7] Ms. Seibert challenges the sufficiency of the evidence to support her conviction of second degree murder in Point II.

herself, and she was afraid that they were going to give her a hard time about that (Ex. 43, p. 4-5). She needed to find a way to keep people from questioning her about Jonathan (Ex. 43, p. 5). She knew that the trailer was going to be burned down because that would be the easiest way to dispose of Jonathan's body (Ex. 43, p. 5).

Derrick Roper, Jeremy Batcher, Darian Seibert, Michael Vance, and Ms. Seibert were present during the discussion of burning the trailer (Ex. 43, p. 5-6). Derrick first brought up the idea of burning the trailer, and then they all discussed it (Ex. 43, p. 6). There had been a discussion about Donald (Ex. 43, p. 9). If they could get him out of the trailer, they should get him out (Ex. 43, p. 9). But, Ms. Seibert also knew that Donald could die there in his sleep because he was on a new medicine, Prozac, and it made him sleepy (Ex. 43, p. 11-12). At one point, Ms. Seibert agreed with Hanrahan that Donald was supposed to die in his sleep (Ex. 43, p. 9).

Ms. Seibert gave Derrick and Darian some money to buy her some cigarettes, but she said that she did not know they were going to buy gasoline with it (Ex. 43, p. 7). When they returned, Derrick handed her the cigarettes and a receipt from O'Reilly (Ex. 43, p. 7). Ms. Seibert then left with her friend and returned to the trailer at around 3:00 p.m. (Ex. 43, p. 7). At 6:00 p.m., Derrick and Darian showed up (Ex. 43, p. 8). Ms. Seibert put her two youngest sons on the church van, and then called a taxi for herself (Ex. 43, p. 9). She did not want to be there when the trailer burned down (Ex. 43, p. 10). Later that night, a friend found her and told her about the fire, and she had to act surprised (Ex. 43, p. 10).

Defense counsel objected when these statements were admitted at trial (Tr. 831, 920, 924), and again in the motion for new trial (L.F. 89-91). The State emphasized Ms. Seibert's incriminating statements during its opening statement and closing arguments (Tr. 625, 967-968, 971, 986).

Besides her statement, the State presented two witnesses implicating Ms. Seibert in the death of Donald Rector. However, their testimony was significantly contradictory and challenged on cross-examination:

Ms. Seibert's son, Darian, pled guilty to avoid the death penalty for his role in Donald Rector's death (Tr. 877). Darian testified at trial that his mother was present during the discussion of setting the trailer on fire with Donald Rector sleeping inside (Tr. 908-909). He stated that his mother knew that the trailer was to be burned, she knew Donald Rector was to be asleep in the trailer when it burned, she went along with the plan and she provided money for the gasoline (Tr. 863, 874). However, this testimony contradicted Darian's previous testimony that there were no plans for Donald to die in the fire - only that Donald had to be there when the fire started (Tr. 907). Darian previously testified that up until the time Derrick Roper started pouring gasoline, he did not actually believe that this was really going to happen (Tr. 890).

Jeremy Batcher testified that either Derrick or Darian brought up the idea of setting the trailer on fire to cover up Jonathan's death (Tr. 838). Jeremy said that Ms. Seibert was present during the conversation about the fire, but that she was not really participating in the discussion (Tr. 839). It was either Derrick or Darian who suggested that someone had to be there with Jonathan in the fire (Tr. 839-840). Jeremy heard

Derrick bring up Donald's name (Tr. 840). Jeremy was also "pretty certain" that Darian told Derrick that Derrick was going to "have to take [Donald] out or something." (Tr. 840-841). Jeremy did not think that Ms. Seibert wanted anybody to be in the trailer (Tr. 843). Ms. Seibert never asked anything of Jeremy, but Derrick and Darian asked him if he wanted to help them with their alibis (Tr. 841). Jeremy did not believe that they were going to go through with it (Tr. 841).

Given the conflicting nature of Darian and Jeremy's testimony, Ms. Seibert's "confession" certainly went a long way to aiding the State's case against her as an accomplice to murder. There is no doubt that Darian and Derrick were present in the trailer, that Derrick beat Donald in the head before starting the fire, that Derrick poured the gasoline, and that Darian did nothing to stop him. While Ms. Seibert may have known about the plans for the fire, there is a significant question about whether she was aware of Derrick and Darian's plans for Donald.

"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him…'" ***Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (*quoting Bruton v. United States*, 391 U.S. 123, 139-140 (1968)** (White, J. , dissenting)). This Court cannot say beyond a reasonable doubt that the error caused by the injection of Ms. Seibert's statements into the case was harmless. Therefore, this Court must reverse Ms. Seibert's conviction and remand the case for a new trial.

II.

The trial court erred in accepting the verdict and sentencing Ms. Seibert for 2nd degree murder, and plainly erred in instructing the jury on this offense in violation of Ms. Seibert's rights to due process and a fair trial guaranteed by the 5th, 6th & 14th Amendments to the U.S. Constitution and Art. I, §§ 10 & 18(a) of the Missouri Constitution, in that the State did not present evidence from which a rational juror could have found beyond a reasonable doubt that Ms. Seibert knowingly caused the death of Donald Rector in the absence of premeditation or deliberation, because, on the State's evidence -- that Ms. Seibert discussed plans to burn the trailer and leave Donald inside, provided money for gasoline, arranged for her younger sons to depart, and then called a cab so that she would not be there when the fire started -- Ms. Seibert was guilty of 1st degree murder, but not conventional 2nd degree murder, since she deliberated on Donald's death. However, if the jury believed that Ms. Seibert was unaware of plans to kill Donald, then she was still guilty of felony murder if she intended an arson and death resulted, but not conventional second degree murder. Defense counsel did not request a 2nd degree murder instruction, but did not object to it, and the trial court's misdirection of the jury resulted in an unsupported verdict, which is plain error and manifestly unjust.

Ms. Seibert was convicted of conventional second degree murder, but she could not have been guilty of this offense. Either she deliberated on Donald's death, and was

guilty of first degree murder, or she did not know of the plans to kill Donald, and was guilty only of felony murder. The facts and inferences do not support an instruction on, or a verdict of, second degree murder.

Before depriving Ms. Seibert of her liberty, the State had to prove beyond a reasonable doubt that she committed each element of the offense of which she was convicted. ***In re Winship*, 397 U.S. 358, 363-364 (1970)**. The State failed to present sufficient evidence to support both a jury instruction and a conviction for second degree murder. If the jury believed that Ms. Seibert knew that Donald Rector was to die in the fire -- that she participated in a plan, not only to burn down her trailer to cover up the death of Jonathan, but also agreed to let Donald Rector die in the fire -- then it had no evidence from which it could acquit Ms. Seibert of premeditated first degree murder.

A defendant may be convicted of an offense included in an offense charged in the indictment or information. **§556.046**; ***State v. Stepter*, 794 S.W.2d 649, 652 (Mo. banc 1990)**. An offense is so included when it is specifically denominated by statute as a lesser degree of the offense charged. ***Id.*** **Section 565.025.2** sets forth the lesser degree offenses of the homicide offenses. As a result of the legislature's adoption of **§565.025.2**, it is clear which homicide offenses are lesser included in other homicide offenses. ***Id.*** Murder in the second degree is a lesser degree offense of murder in the first degree. ***Id.***

Section 556.046.2 provides: "The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offenses charged and convicting him of the included offense." It becomes necessary then to determine the standard for evaluating whether there is a basis

for both the acquittal of the charged offense of first degree murder and for conviction of the included offense of second degree murder. ***Stepter*, 794 S.W.2d at 652**. Only where there is a basis for a verdict of acquittal of the offense charged and a conviction of the lesser offense is an instruction on the lesser offense required. ***Id.*** Deliberation is the element which distinguishes capital murder from second degree murder. ***State v. Leisure*, 838 S.W.2d 49, 58 (Mo. App., E.D. 1992)**.

In ***Leisure***, the defendant requested a second degree murder instruction. ***Id.* at 57**. The defendant planted a bomb on the victim's automobile. ***Id.* at 52-53**. The Court held that "the use of a bomb on an automobile involves planning and preparation which necessarily requires deliberation. ***Id.* at 58**. Since Leisure denied any involvement in the killing, the Court held that Leisure was either guilty of deliberate, premeditated murder or nothing at all. "There is no basis for instructing down from capital murder." ***Id.***

Here, the trial court presented the jury with four possibilities: first degree murder, conventional second degree murder, felony murder and first degree arson with death (L.F. 72-77). For the jury to have convicted Ms. Seibert of conventional second degree murder, it necessarily had to believe that Darian Seibert or Derek Roper knowingly killed Donald Rector, and that Ms. Seibert, with the purpose of promoting or furthering the murder, aided or encouraged them. This instruction indirectly ascribes a knowing mental state to Ms. Seibert, because "one cannot have the purpose to promote murder by aiding another person unless one knows the other person intends to kill; thus, the purpose to aid will include the mental state needed for murder." **MAI-CR 3d. 304.04, Notes on Use 7(b)**. Having determined that Ms. Seibert was a knowing accessory to Donald's death, it

was necessary also for the jury to determine her mental state. On the facts of this case, it was not possible for the jury to find a lack of deliberation.

If the jury, in fact, believed that Ms. Seibert was a knowing accessory in the plan to kill Donald, then it would have had to believe the following:

On the morning of February 12, 1997, Ms. Seibert discovered that her son, Jonathan had died (Tr. 855- 856). Ms. Seibert was afraid of being investigated for child abuse and neglect because Jonathan had bedsores which she had been trying to treat by herself, and she was afraid that the authorities would give her a hard time about that (Tr. 858, Ex. 43, p. 4-5). She needed to find a way to keep people from questioning her about Jonathan (Ex. 43, p. 5).

That same morning, she sent her second oldest son to find her oldest son (Tr. 855). Sometime that morning, Derrick Roper, Jeremy Batcher, Darian Seibert, Michael Vance, and Ms. Seibert gathered at her trailer and discussed burning it down (Tr. 858, Ex. 43, p. 5-6). Darian heard his mother suggest an electrical fire (Tr. 859). Then Derrick said that an electrical fire was too slow, and that they needed something to "speed it up." (Tr. 859-860). Ms. Seibert said that Derrick first brought up the idea of burning the trailer, and then they all discussed it (Ex. 43, p. 6). Either way, Ms. Seibert knew that the trailer was going to be burned down because that would be the easiest way to cover up what happened to Jonathan (Tr. 860, Ex. 43, p. 5).

When Darian asked about what would be done with his littlest brothers, Patrick and Shawn, Ms. Seibert responded that she could send them to church (Tr. 860). There was also a discussion about Donald (Tr. 860-861, Ex. 43, p. 9). When Darian asked,

"What about Donald?" Ms. Seibert answered, "He'll be asleep." (Tr. 861). Derrick asked why Donald had to die, and Derrick said that somebody needed to be there to make it look like someone had been watching Jonathan (Tr. 861). Ms. Seibert knew that Donald could die there in his sleep because he was on a new medicine, Prozac, and it made him sleepy (Ex. 43, p. 11-12). Darian testified that Ms. Seibert knew Donald Rector was to be asleep in the trailer when it burned, she went along with the plan and she provided money for the gasoline (Tr. 863, 874, Ex. 43, p.7-9).

During the course of the afternoon, Derrick and Darian purchased a gas can and some gasoline (Tr. 863-864). When they returned, Derrick handed Ms. Seibert the cigarettes and a receipt from O'Reilly (Ex. 43, p. 7). Ms. Seibert then left with her friend and returned to the trailer at around 3:00 p.m. (Ex. 43, p. 7). At 6:00 p.m., Derrick and Darian showed up (Ex. 43, p. 8). Ms. Seibert put her two youngest sons on the church van, and then called a taxi for herself (Tr. 866, Ex. 43, p. 9). She did not want to be there when the trailer burned down (Ex. 43, p. 10). She took a duffel bag of clothes and some money (Tr. 866). Donald was sleeping in the back room of the trailer when she left (Tr. 867-868). Later that night, a friend found her and told her about the fire, and she had to act surprised (Ex. 43, p. 10).

There was a basis for instructing down - but not to conventional second degree murder. If the jury believed that Ms. Seibert was involved in the plan to leave Donald in the fire, then they would have to find her guilty of first degree murder. Like the bombing of a car in ***Leisure***, ***supra***, an elaborate plan to set fire to a trailer in order to cover up one death, which involved leaving a "babysitter" to die in the fire, involves planning and

preparation which necessarily requires deliberation. The plan was devised in the morning, and it was not carried out until that evening. If the jurors believed that Ms. Seibert knew that Donald would die in the fire, then no rational juror could find that this murder was not deliberated upon.

However, if the jury believed that Ms. Seibert was only involved in the planning of the fire, but did not know about or intend for Donald to die in the fire, then she is either guilty of felony murder or first degree arson with death - both of which were submitted - but not conventional second degree murder. Indeed, Jeremy Batcher's testimony implicates Ms. Seibert *only* in the plan to start the fire, *not* to kill Donald (Tr. 843). But the jury could never get to the two instructions that were supported by Jeremy's testimony, because the second degree murder instruction stood in the way and confused the issues.

Ms. Seibert recognizes that in most homicide cases, a defendant is entitled to a second degree instruction. ***State v. Mease*, 842 S.W.2d 98, 112 (Mo. banc 1992)**. However, a second degree murder instruction is not required in every case in which first degree murder is charged. ***State v. Santillian*, 948 S.W.2d 574, 576 (Mo. banc 1997)**. For example, in ***Mease*, 842 S.W.2d 98**, the evidence showed that the defendant planned the murder of one of his victims for three months in advance of the killing. He acquired a variety of weapons and ammunition and told his girlfriend that he was going to kill one of the victims. Defendant's girlfriend dropped him off in the woods near the victims' cabin, where defendant, dressed in camouflage, scouted the area for a full day. Defendant constructed a blind and lay waiting for several hours for the victims to emerge from the

cabin. Defendant shot each of the three victims from afar, then shot each of them once more in the head at close range. The Court held that no second degree instruction was required because "no rational fact finder could conclude that the [defendant] acted without deliberation." ***Id.* at 112**.

If these jurors believed that Ms. Seibert *knew* that Donald was supposed to die in the fire, then just as in ***Mease, supra***, and ***Leisure, supra***, no rational fact finder could conclude that she acted without deliberation. Conventional second degree murder was unsupported by the evidence, and the trial court should not have so instructed the jury. This erroneous instruction also served to confuse the real issues in the case. It is probable that the jury believed that Ms. Seibert *only* intended the fire, but *not* Donald's death. In that case, either felony murder based on the arson, or first-degree arson with death would have been appropriate verdicts. Both of these lesser-included offenses were submitted, but the jury never got to them because of the erroneous conventional second-degree murder instruction.

The fact that there was no objection to the second-degree murder instruction does not preclude review. Claims of error not preserved under **Rule 28.03** may still be reviewed for plain error if manifest injustice would otherwise occur. ***State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo. banc 2001)**; **Rule 30.20**. Plain error occurs when it is clear that the trial court so misdirected the jury so that it is apparent the error affected the verdict. ***State v. Beeler*, 12 S.W.2d 294, 300 (Mo. banc 2000)**. Obviously, an instruction unsupported by the evidence affects the verdict and constitutes plain error. The real issue here is that the evidence is insufficient to support the conviction.

Because there was no evidence to support second-degree murder, the trial court plainly erred in submitting such instruction to the jury, and erred in accepting the jury's verdict of guilt and in sentencing Ms. Seibert for that crime. Therefore, this court must reverse Ms. Seibert's conviction and order her discharged.

CONCLUSION

Because the police purposefully violated Ms. Seibert's right not to incriminate herself, and the State relied upon an illegally obtained confession, this Court must reverse Ms. Seibert's conviction and remand for a new trial (Point I). Because the evidence was insufficient to convict Ms. Seibert of conventional second-degree murder, this Court must reverse her conviction and order her discharged (Point II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amy M. Bartholow, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word 2000, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 16,842 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.0, updated in May 2002. According to that program, these disks are virus-free.

On the 31st day of May, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were hand-delivered, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Amy M. Bartholow