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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant reincorporates the jurisdictional statement from her opening brief.

STATEMENT OF FACTS

Appellant reincorporates the statement of facts from her opening brief.

POINTS RELIED ON[1]

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 rights to due process and 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 the 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)**;

[1] Appellant replies to Point I and relies upon her opening brief as to Point II.

***United States v. Downing*, 665 F.2d 404 (1st Cir. 1981);**

***Worden v. McLemore*, 200 F.Supp. 746 (E.D. Mich. 2002)**

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

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

ARGUMENT[2]

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 rights to due process and 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 the 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.

[2] Appellant replies to Point I and relies upon her opening brief as to Point II.

Appellant replies briefly to point out the absence from Respondent's brief of any discussion of ***Michigan v. Tucker,* 417 U.S. 433 (1974)** upon which ***Oregon v. Elstad,* 470 U.S. 298 (1985)**.

In ***Miranda v. Arizona***, the Supreme Court left for another day the question of whether the fruit of the poisonous tree doctrine applies to ***Miranda*** violations. ***Id.*, 384 U.S. 436, 545 (1966) (White, J. dissenting)**. That day has yet to come in the United States Supreme Court. ***See Patterson v. United States*, 485 U.S. 922, 922-923 (1988)** ("In ***Michigan v. Tucker,* 417 U.S. 433, 447 (1974)**, this Court expressly left open the question of the admissibility of evidence obtained as a result of an interrogation conducted contrary to ***Miranda***.") (White, J., dissenting from the denial of cert.). Indeed, one of the cases upon which Respondent relies, ***United States v. Orso*, 266 F.3d 1030 (9th Cir. 2001)(en banc)[3],** is currently pending certiorari review in the United States Supreme Court. In the meantime, Ms. Seibert's case presents to this Court an opportunity to provide its interpretation of the "fruits analysis" as applied to ***Miranda***.

[3] Even the ***Orso*** Court acknowledged that the language in ***Elstad*** is "admittedly imprecise" and "creates some ambiguity regarding the proper formulation of the rule the Supreme Court wanted us to apply: If the Supreme Court wished to trigger the "tainted fruit" analysis only upon unconstitutionally coerced unwarned statements, then there would have been no reason for the Court to use a disjunctive sentence to include an additional trigger based on a category of behavior called "improper tactics." ***Id.* at 1036**.

In order to do so, this Court must begin with ***Michigan v. Tucker, supra***, which is precisely why the absence of such a discussion from Respondent's brief is troubling. The ***Tucker*** Court noted that a " 'prime purpose' " for the exclusion of evidence--" is 'to deter future unlawful police conduct and thereby effectuate the guarantee[s]' " of the Constitution. **417 U.S. at 446** (citation omitted). The Court emphasized that "[i]n a proper case this rationale would seem applicable to the Fifth Amendment context as well." ***Id.*, at 447**. This is the proper 5th Amendment case contemplated in ***Tucker***.

Perhaps anticipating a "good faith exception," the Court asserted that the "deterrent purpose" was applicable only where "the police have engaged in willful, or at the very least negligent, conduct...." **417 U.S. at 447**. Because the questioning in ***Tucker*** occurred *before* ***Miranda*** was announced and was otherwise conducted in an objectively reasonable manner, the exclusion of the derivative evidence solely for failure to comply with the then-nonexistent ***Miranda*** requirement would not significantly deter future ***Miranda*** violations. As the Court noted, the "deterrence rationale loses much of its force" when there is nothing to deter. ***Id***.

Far from rejecting the derivative-evidence rule, ***Tucker*** expressly invited its application in "a proper case" when the authorities have acted unreasonably. ***Id.*** ***Tucker's*** logic and its reliance on the Fourth Amendment "good faith" analysis compel the exclusion of derivative evidence where, as here, the police have deliberately, recklessly, or negligently violated the Fifth Amendment requirement of warnings and an effective waiver. ***See, e.g., United States v. Downing*, 665 F.2d 404, 407 (1981)** ("[I]f the rationale of the majority in ***Tucker*** is followed, it becomes important to determine in

each such case of derivative evidence whether, in the circumstances, enforcement of the exclusionary rule has some tendency to deter the police from engaging in conduct violating the fifth and sixth amendment rights of the accused").

A recent federal habeas corpus case, ***Worden v. McLemore,* 200 F.Supp. 746 (E.D. Mich. 2002)**, illuminates the insidious nature of police conduct in this area, and confirms that the United States Supreme Court has yet to definitively address the issue. The petitioner sought relief, in part, because the trial court refused to suppress evidence obtained due to a ***Miranda*** violation. The District Court was constrained to find that there was no clearly established federal law addressing the issue of whether the fruit of the poisonous tree doctrine applied to require exclusion of evidence obtained as a result of a ***Miranda*** violation, and therefore, habeas relief could not be granted on the grounds that the state court's decision was "contrary to or unreasonable application of Supreme Court precedent." ***Id.* at 752-754**.

Nonetheless, while constrained to deny habeas relief, the Court was troubled by its conclusion and its potential ramifications in police investigatory practices. ***Id.* at 753**. The deputies in ***McLemore*** ignored the clear mandates of ***Miranda***, and the Court was concerned that the decision not to exclude fruits obtained as a result of that violation would invite law enforcement officers to ignore ***Miranda*** "where they have undertaken a cost-benefit analysis and determined that the risk of having a confession excluded because of a ***Miranda*** violation is outweighed by the benefit of the admission of inculpatory evidence borne of that poisonous tree." ***Id.* at 753-754**. It also queried "if an when the Supreme Court will address the uncertainty regarding the admissibility of

evidence derived from a ***Miranda*** violation that remains after, and was perhaps magnified by, ***Dickerson v. United States,* 530 U.S. 428 (2000)**.

The concern of the ***McLemore*** court should be of concern to every court in this nation. It was the concern of nine of the 9th Circuit judges who dissented in the last ***Orso*** opinion:

> The unintended but clear message to police trainers may be welcomed in some quarters with open arms. Don't advise, interrogate the suspect, violate the Constitution, use subtle and deceptive pressure, take advantage of the inherently coercive setting, and then, after the damage has been done, after the beachhead has been gained, gently advise the suspect of her rights. Heavy-handed coercion is not necessary; all you need to defeat ***Miranda*** is trickery and deception. If the suspect confesses, the confession will most probably be admissible notwithstanding the flagrant abuse of the Constitution on which it depends. Don't worry if the suspect clams up when ***Miranda*** is finally administered, that person, if given her rights at the proper time, would not have talked anyway, so nothing gained, but nothing lost.

Orso*, 275 F.3d 1190, 1197 (9th Cir. 2001) (en banc)** (Judge Trott, dissenting). Justice Brennan and Justice Marshall foreshadowed this exact police abuse of ***Miranda when they dissented in ***Oregon v. Elstad, supra***. They feared that the majority's opinion would permit police to question a suspect twice -- once inadmissibly, and once admissibly. ***Id*., 470 U.S. 298, 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). They queried how the Court could 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 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?"

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

The Elstad majority called Justice Brennan's dissent "apocalyptic" and said that it distorted their reasoning and holding. ***Id.* at 318 fn.5**. But did it? Is that not what has come to pass when one of our Missouri courts has determined that an intentional violation of the ***Miranda*** warnings is no more reprehensible than an inadvertent one? ***State v. Seibert*, No. 23729, slip op. 13-14 (Mo. App., S.D. January 30, 2002)**. In so holding, the Southern District eviscerates ***Miranda*** and renders the Constitution a useless piece of paper. Its error must be corrected, lest law enforcement officers continue the flagrant abuse of the constitutional dictates of ***Miranda*** that they are bound to uphold.

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law;

> it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting)**. If the Southern District's decision is permitted to stand, police will do as a matter of routine what they did to Ms. Seibert. They will question suspects twice: once to make them confess, and once to make them confess admissibly. That is not a world in which a suspect's ***Miranda rights are "'scrupulously honored.'" ***Michigan v. Mosley*, 423 U.S. 96, 103 (1975), (*quoting Miranda*, 384 U.S. at 479)**. It is not a world in which ***Miranda*** rights are honored at all.

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 2,286 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 June 2002. According to that program, these disks are virus-free.

On the 1st day of July, 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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