



# NOTES

## *Miranda* Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine

### INTRODUCTION

There is a jurisdictional split on the relatively narrow issue of whether the fruit of the poisonous tree doctrine applies to *Miranda* violations of the invocation of the right to counsel.<sup>1</sup> These are known as *Edwards*<sup>2</sup>-tainted violations. Much of the confusion in this area of criminal procedure can be traced to the two-level nature of the *Miranda* warnings themselves.<sup>3</sup> There is the specific procedural warning itself—in this case, the notification of the right to counsel—and there is the actual invocation of the right by the suspect.<sup>4</sup> This Note will not address directly the issue of the use or exclusion of evidence derived from the failure by the police to give the required *Miranda* warnings.<sup>5</sup> Rather, this Note only addresses the question of whether the fruit of the poisonous tree doctrine<sup>6</sup> should apply to violations of a suspect's invocation of his right to counsel. In fact, as this Note will demonstrate, the poisonous fruits doctrine definitionally applies to all first generation derivative evidence after *Miranda* violations.<sup>7</sup> The narrower question is whether

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1. Compare *United States v. Downing*, 665 F.2d 404 (1st Cir. 1981) (applying the fruit of the poisonous tree doctrine) with *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092 (1982) (declining to apply the poisonous tree doctrine).

2. *Edwards v. Arizona*, 451 U.S. 477 (1980).

3. *Miranda v. Arizona*, 384 U.S. 436 (1966). The first-level warnings are well-known. A person in custodial interrogation must be given four warnings: (1) you have the right to remain silent; (2) anything you say can be used against you in court; (3) you have the right to the presence of an attorney; and (4) if you cannot afford a lawyer, one will be appointed prior to any questioning if you so desire. The second level of the *Miranda* warnings is their actual invocation. This Note addresses the application of the fruit of the poisonous tree doctrine to violations of the invocation of the right to counsel at its second level.

4. This seems to be a critical distinction. The United States Supreme Court has been very protective of persons who have invoked their right to counsel. See *infra* notes 172-282 and accompanying text.

5. See *Oregon v. Elstad*, 470 U.S. 298 (1985) (rejecting application of the fruits doctrine to a suspect's subsequent confession despite an earlier unwarned confession); *Michigan v. Tucker*, 417 U.S. 433 (1974) (refusing to exclude the testimony of a witness discovered after a failure by police to warn the suspect he had a right to appointed counsel when the other warnings were given).

6. The fullest explication of the fruit of the poisonous tree doctrine can be found in *Wong Sun v. United States*, 371 U.S. 471 (1963). Illegally obtained evidence (the poison tree) is sometimes used to generate derivative evidence (the poison fruit). Since the poison tree's first generation evidence must be suppressed, the fruit of the poisonous tree doctrine argues that derivative generation evidence should also be suppressed.

7. For example, the unwarned confession in *Elstad* was automatically suppressed. Justice O'Connor stated, "*Miranda* requires that the unwarned admission must be suppressed . . ." *Elstad*, 470 U.S. at 309. This is a classic example of the application of fruit of the poisonous

the fruits doctrine applies to second, and remoter, generation derivative evidence once there has been an *Edwards*-tainted violation.

This is still an open issue. The United States Supreme Court, in both *Michigan v. Tucker*<sup>8</sup> and *Oregon v. Elstad*,<sup>9</sup> refused to apply the poisonous fruits doctrine after procedural *Miranda* violations.<sup>10</sup> *Elstad* may even stand for the larger proposition that the fruit of the poisonous tree doctrine never applies to procedural violations of *Miranda*.<sup>11</sup> There is a distinction, however, between the failure to read a suspect his right(s) and a violation of that right once the suspect has tried to invoke it. This issue will remain open until the Supreme Court grants certiorari in the appropriate case. *Elstad* did not conclusively dispose of this issue.

This Note will highlight the problem by first focusing on the different approaches used by the split jurisdictions. The Note will then turn to a short history of the fruit of the poisonous tree doctrine and a review of the purposes underlying the exclusionary rule. This Note will then examine the notion of prophylactic or procedural safeguards in contradistinction to constitutional rights in part three. The analysis will touch on *Tucker* and *Elstad* and *Miranda* itself. The real question is whether the right to counsel, once invoked by a suspect in custodial interrogation, is itself a constitutional right. Part four examines the relationship between the fifth and sixth amendment rights to counsel. The Supreme Court, both in the fifth and sixth amendment contexts, has shown itself to be especially protective of the right to counsel. Part five will propose a solution to the jurisdictional split.<sup>12</sup>

## I. THE JURISDICTIONAL SPLIT

### A. Downing

In *United States v. Downing*,<sup>13</sup> the First Circuit identified three issues which should be addressed in determining whether the exclusionary rule should be applied to the fruits of an *Edwards*-tainted violation. The threshold inquiry is whether there has been a violation of a suspect's invocation of his right to counsel in a custodial interrogation setting.<sup>14</sup> The second—and

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tree doctrine to first generation derivative evidence. The poisonous tree here is the failure by the police to give any *Miranda* warnings at all. The excluded fruit is the unwarned confession.

8. 417 U.S. 433.

9. 470 U.S. 298.

10. Justice O'Connor's long discussion of the inapplicability of the fruits doctrine in the context of *Elstad*'s facts focuses primarily on the voluntary nature of both the pre-warned and post-warned confessions and the procedural nature of the *Miranda* violation. See *id.* at 1290-96. A procedural violation is one in which the required manner of reading the *Miranda* warnings is not complied with.

11. See *infra* notes 109-71 and accompanying text.

12. Justice O'Connor noted in *Elstad* that this whole area of criminal procedure lends itself to colorful metaphor. *Elstad*, 470 U.S. at 303.

13. 665 F.2d 404 (1st Cir. 1981).

14. *Id.* at 406.

the major focus of this Note—is whether the fruits of such a violation should be admitted.<sup>15</sup> Finally, the court should inquire whether the challenged evidence is admissible under the inevitable discovery doctrine.<sup>16</sup>

The defendant, John Downing, was arrested in 1980 by Maine State Police for narcotics violations. He was advised of his *Miranda* rights at that time. He initially waived those rights and answered police questioning. Downing then stated he wished to see his lawyer before answering further questions.<sup>17</sup>

The police transferred Downing to another building for booking procedures. A federal customs officer took over the processing and questioning of the suspect. The state police officers failed to tell the customs officer that Downing had requested assistance of counsel. The federal agent also did not inquire whether Downing had asserted any of his rights. The customs officer told Downing he did not have to answer any questions, but did not give the full set of *Miranda* warnings. Downing's lawyer was never called.<sup>18</sup>

The customs agent took down some biographical information. He then asked Downing to empty his pockets. Downing did so, and surrendered various objects, including a set of keys. The customs agent asked what the keys were used for. Downing said he used them for his airplane and, responding to further questioning, he told the customs agent the location of his plane. This was the first knowledge the police had that the defendant owned an airplane. Eventually the police secured a search warrant, searched the plane and found evidence later introduced against defendant at his trial, and also secured statements from employees at the airport which implicated the defendant in the charged drug conspiracy.<sup>19</sup>

The district court held there had been an *Edwards* violation, and that both the intangible and third-party testimonial evidence discovered as a result of that violation had to be suppressed as fruits of the poisonous tree.<sup>20</sup>

In affirming, the First Circuit methodically set forth a series of reasons for applying the exclusionary sanction to fruits of *Edwards*-tainted violations.<sup>21</sup> The first inquiry, as in all *Miranda* cases, is whether there is custodial interrogation. The court applied the *Rhode Island v. Innis*<sup>22</sup> test,<sup>23</sup> and

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15. *Id.* at 407.

16. *Id.* at 409.

17. *Id.* at 405.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 406-09.

22. 446 U.S. 291 (1980).

23. *Miranda* kicks in when there is (1) police interrogation in (2) a custodial setting. The *Innis* test goes to the interrogation prong. Interrogation, under *Innis*, "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted).

determined that the federal customs agent was custodially interrogating Downing.

The second and crucial inquiry was whether there had been an *Edwards* violation. The First Circuit noted:

The [Supreme] Court has recently stated in clear terms that "an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." Moreover, once an accused requests the presence of counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police."<sup>24</sup>

The government conceded that Downing had not initiated conversation about the keys. Since the defendant's request for counsel had not been honored, the court found an *Edwards* violation. *Edwards* requires the suppression of first generation derivative evidence, that is, Downing's statements.<sup>25</sup> It is not clear whether *Edwards* also requires suppression of remoter generation derivative evidence, that is, evidence found in the airplane.<sup>26</sup> The First Circuit found that it did.<sup>27</sup>

The First Circuit rejected the argument that *Michigan v. Tucker* had answered this question.<sup>28</sup> The court distinguished *Tucker* on a number of grounds, most notably that the violation in that case had been procedural.<sup>29</sup> The court held that *Edwards* plus *Miranda* added up to a full-fledged fifth amendment right to counsel.<sup>30</sup> Once a constitutional right has been violated, the fruit of the poisonous tree doctrine applies.<sup>31</sup> The chief justification for the use of the exclusionary rule in any setting is the deterrence of unlawful behavior by the police.<sup>32</sup> The court cited the Massachusetts case of *Commonwealth v. White*,<sup>33</sup> and noted "[t]he possibility of obtaining admissible derivative evidence would seem to remove much of the incentive for police to follow the dictates of *Miranda*."<sup>34</sup> The court even suggested that its reading

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24. *Downing*, 665 F.2d at 406 (citations omitted) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482, 484-85 (1980)).

25. *Edwards*, 451 U.S. 477.

26. *Edwards* only addressed first generation derivative evidence when the invocation of *Miranda*'s right to counsel had been disregarded.

27. *Downing*, 665 F.2d 404.

28. *Id.* at 407.

29. *Id.* at 408.

30. *Id.* at 408-09.

31. *Id.*

32. *Id.* at 409.

33. 374 Mass. 132, 371 N.E.2d 777 (1977), *aff'd by an equally divided court*, 439 U.S. 280 (1978). *White* is the leading state case applying the fruits doctrine to *Edwards*-tainted violations.

34. *Downing*, 665 F.2d at 409 n.5. The Massachusetts Supreme Court in *White* also suppressed the fruits of *Edwards*-tainted violations. "To hold otherwise," the court noted, "would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks." *White*, 374 Mass. at 139, 371 N.E.2d at 781.

of *Tucker* indicated the *Tucker* Court was ready to apply the fruits doctrine if an actual fifth amendment violation had been found.<sup>35</sup>

The deterrence rationale as used by the *Downing* court seems appropriate given the facts of the police behavior in this case. The Maine State Police officers read Downing his rights, but refused to honor his attempt to invoke his *Edwards* right to counsel. Instead, the Maine officers turned Downing over to a federal customs inspector and failed to inform the customs officer that Downing had invoked his right to counsel. The police should not be allowed to pass along their mistakes to each other.<sup>36</sup> The customs officer himself failed to reacquaint Downing with his *Miranda* rights. The second round of custodial interrogation thus involved both a violation of the first-level procedural *Miranda* rights and a violation of the second-level *Edwards* right to counsel. The use of the exclusionary rule here would likely have the effect of deterring future similar misconduct like that at issue in *Downing*.

The real issue is whether the *Miranda*-based *Edwards* right to counsel is a constitutional right. If it is, there seems little doubt the *Downing* court correctly concluded the fruit of the poisonous tree doctrine should apply.<sup>37</sup> Other courts have simply sidestepped the issue.<sup>38</sup> The Georgia Supreme Court, on the other hand, has read *Edwards* as announcing another prophylactic rule, and has explicitly declined to apply the fruits doctrine's exclusionary sanction in the absence of a contrary holding by the United States Supreme Court.

### B. *Wilson v. Zant*<sup>39</sup>

Joseph Wilson, Jr., the defendant in the Georgia case, was arrested at home around 6:30 on the morning of February 27, 1979, in connection with a drug-related kidnapping and murder. The police immediately read Wilson his *Miranda* warnings and then took him to the Forsyth County Sheriff's Department. The interrogation of the defendant by Sergeant J.C. Adams began near 8:00 a.m. and continued until Wilson requested an attorney. The request was not honored. Sergeant Adams instead again read Wilson his

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35. *Downing*, 665 F.2d at 408 (citing *Michigan v. Tucker*, 417 U.S. 443, 445-46 (1974)).

36. "Law enforcement officers working in teams should be discouraged from violating the accused's constitutional rights by failing to ascertain or advise one another whether those rights had been previously asserted." *Downing*, 665 F.2d at 407. The Supreme Court has used this same rationale in a fourth amendment context involving a constitutionally defective warrant. See *Whiteley v. Warden*, 401 U.S. 560 (1971).

37. Justice O'Connor's opinion in *Elstad* casts considerable doubt on this conclusion, however. *Elstad* seems to hold that a *Miranda* violation is not a constitutional violation. But see the discussion of *Elstad*, *infra* at notes 146-171 and accompanying text.

38. See *United States v. Scalf*, 708 F.2d 1540 (10th Cir. 1983); *State v. King*, 140 Ariz. 602, 684 P.2d 174 (1984) (both courts choosing to leave the *Edwards*-tainted fruit of the poisonous tree issue open).

39. 249 Ga. 373, 290 S.E.2d 442, *cert. denied*, 459 U.S. 1092 (1982).

*Miranda* rights. Wilson then signed a waiver form and gave an incriminating statement to the police, from which three items of derivative evidence were obtained.<sup>40</sup>

Wilson was subsequently convicted of murder, kidnapping with bodily injury, and possession of a firearm during the commission of a felony. He was given the death sentence for the murder conviction.<sup>41</sup>

Wilson appealed through the Georgia court system on the grounds that both the intangible and third-party testimonial evidence used to convict him were suppressible fruits of an *Edwards*-tainted violation.<sup>42</sup>

The lower Georgia courts disagreed, and the Georgia Supreme Court affirmed, holding that the fruits of statements obtained in violation of prophylactic rules are not necessarily subject to the exclusionary sanction.<sup>43</sup>

The issues before the Georgia court were precisely the issues the First Circuit had addressed in *Downing*.<sup>44</sup> *Downing*, in fact, was cited by the Georgia court and rejected.<sup>45</sup> The Georgia court relied principally on statements in *Michigan v. Tucker*<sup>46</sup> in which, in the words of the Georgia court, "the [Supreme] Court held that the 'fruit' of a statement procured by police when the defendant had not been advised of his right to appointed counsel did not fall within the ambit of the exclusionary rule."<sup>47</sup> The Georgia court drew no distinction between first- and second-level *Miranda* rights to counsel violations. The entire right to counsel in the *Miranda* context was held to be a prophylactic safeguard, protecting a person's fifth amendment right not to incriminate oneself compulsorily.<sup>48</sup>

The Georgia court agreed with the general proposition from the United States Supreme Court that "[t]he 'fruit' of a statement which was obtained in violation of a constitutional right must be suppressed."<sup>49</sup> The Georgia court did not read *Edwards* as announcing such a right. "We understand *Edwards* to be an application of the prophylactic rules of *Miranda*."<sup>50</sup> No

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40. *Id.* at 375-76, 290 S.E.2d at 445-46 (the items included a photo, a toy gun, and live witness testimony).

41. *Id.* at 373, 290 S.E.2d at 444.

42. *Id.* at 376, 290 S.E.2d at 446.

43. *Id.* at 378, 290 S.E.2d at 447-48.

44. Nevertheless, the Georgia Supreme Court made one finding which may be significant in determining whether *Wong Sun* should apply to *Edwards* violations. The court found that Wilson's incriminating statement, despite the *Edwards* violation, was voluntary. "We therefore hold that the exclusionary rule does not apply to evidence derived from a *voluntary statement* obtained in violation of *Edwards v. Arizona*, and that it was not error to admit the 'fruits' of the defendant's statement in this case." *Id.* at 378-79, 290 S.E.2d at 448 (citation omitted) (emphasis added).

45. *Id.* at 378, 290 S.E.2d at 447.

46. 417 U.S. 433.

47. *Wilson*, 249 Ga. at 378, 290 S.E.2d at 447.

48. *Id.*

49. *Id.*

50. *Id.*

distinction was drawn between a violation of the mere reading of the rules themselves and the attempt to invoke one of the *Miranda* rights.

The Georgia court held that *Edwards* did dictate the exclusion of the defendant's incriminating statements, but that the fruits were admissible.<sup>51</sup> The Georgia court noted that in the face of an "unresolved constitutional question,"<sup>52</sup> it was free to extend or not extend the exclusionary rule, and it chose not to do so.<sup>53</sup>

The fundamental difference between the First Circuit and the Georgia Supreme Court is that the Georgia court refused to draw a distinction between the required reading of the *Miranda* warnings and the rights those rules represented. Both were prophylactic. A violation of a prophylactic right did not require the suppression of evidence under the poisonous fruits doctrine. Only the violation of a constitutional right brought the exclusionary sanction into play. Under the Georgia view *Miranda* actually involved three levels of "rights," and two of the levels were merely prophylactic. The right to be read the warnings, and the actual invocation of any of those rights, were mere procedural devices. The *Miranda*—and *Edwards*—Court had announced those "rights" only as protective safeguards. The only constitutional right was the third-level right to be free from compelled self-incrimination.

The split jurisdictions agree that the fruits doctrine applies whenever a constitutional right is violated.<sup>54</sup> The split, then, derives from contrary readings of *Edwards*, and *Miranda* and its progeny. In large part the split comes from different understandings of the complicated distinction drawn by the Supreme Court at various times between prophylactic and constitutional rights.<sup>55</sup>

## II. CHINESE PUZZLES: THE FRUIT OF THE POISONOUS TREE DOCTRINE

### A. Silverthorne

The earliest statement by the Supreme Court of the essential components of the fruit of the poisonous tree doctrine<sup>56</sup> can be found in *Silverthorne Lumber Co. v. United States*.<sup>57</sup> Justice Holmes delivered the opinion for the

51. *Id.* at 378-79, 290 S.E.2d at 447-48.

52. *Id.* at 378, 290 S.E.2d at 447.

53. *Id.* at 378-79, 290 S.E.2d at 448.

54. As noted before, the Supreme Court may not agree. See *infra* notes 109-171 and accompanying text.

55. See *Miranda v. Arizona*, 384 U.S. 436, 463, 490 (1966); *Tucker*, 417 U.S. at 439; *Oregon v. Elstad* 470 U.S. 298, 304 (1985).

56. For a sweeping overview of the doctrine in many contexts, see Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579 (1968).

57. 251 U.S. 385 (1920).



Court. Holmes wrote "[t]he facts are simple [sic],"<sup>58</sup> and went on to sketch an elegant outline of the future fruits doctrine in a very brief opinion.

Two Silverthornes were arrested at their homes in the early hours of February 25, 1919. They were held in custody for several hours. During their detentions members of the Justice Department and a United States Marshall "*without a shadow of authority* went to the office of their company and made a clean sweep of all the books, papers and documents found there."<sup>59</sup> The illegally seized documents were eventually returned, though photographs and copies of the most important papers were made.<sup>60</sup> Subpoenas based on information contained in the copied documents were prepared ordering the production of the originals. The Silverthornes refused to comply. The district court held them in contempt, and the case was brought to the Supreme Court on a writ of error.<sup>61</sup>

Holmes called the seizure an "outrage"<sup>62</sup> and wrote that the issue "could not be presented more nakedly."<sup>63</sup> The issue which Holmes peremptorily decided was whether derivative evidence could be used against a defendant despite its acquisition by the government through illegal means. "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."<sup>64</sup> Holmes wrote that this meant the government needed to take "two steps"<sup>65</sup> instead of one to use the evidence it otherwise could not use. Relying on *Weeks v. United States*,<sup>66</sup> Holmes then extended the scope of the exclusionary sanction to the derivative use of the illegally seized evidence:

In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. . . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*<sup>67</sup>

The combination of the egregious governmental behavior here with the logical extension of *Weeks*' exclusionary sanction were all Holmes needed to reverse the contempt judgments against the Silverthornes.

Holmes added that simply because facts had been illegally acquired did not mean they had "become sacred and inaccessible."<sup>68</sup> The same facts "[i]f

58. *Id.* at 390.

59. *Id.* (emphasis added).

60. *Id.* at 391.

61. *Id.* at 390-91. The amount of the fine assessed for the contempt was only \$250.

62. *Id.* at 391.

63. *Id.*

64. *Id.*

65. *Id.* at 392.

66. 232 U.S. 383 (1914).

67. *Silverthorne*, 251 U.S. at 392 (citation omitted) (emphasis added).

68. *Id.*

. . . gained from an *independent source* . . . may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."<sup>69</sup>

Though not yet named, the fruit of the poisonous tree doctrine had been established as law in the federal courts, or at least as fourth amendment law. The doctrine in its most naked form held three notions: (1) evidence illegally gained could not be used in any way;<sup>70</sup> (2) the government was not to profit in any manner from its own illegality;<sup>71</sup> and (3) the underlying facts were not immunized and other evidence of those facts would be admissible so long as they were developed by an independent source.<sup>72</sup>

### B. Nardone

As students of fourth amendment law well know, the simplest statement of a new rule inevitably leads to elaborations of that rule, and refinements, and complications. *Silverthorne* was followed nineteen years later by *Nardone v. United States*.<sup>73</sup> Justice Frankfurter applied Holmes' *Silverthorne* doctrine to evidence gained from information acquired through an illegal wiretap.<sup>74</sup> The doctrine was fleshed out, and it was also given its unforgettable name with Frankfurter's felicitous phrase. The accused was to be given a chance "to prove that a substantial portion of the case against him was a fruit of the poisonous tree."<sup>75</sup>

*Nardone* suggested a different approach to the exclusion of derivative evidence, however. It noted that a balancing of interests was involved. There was a heavy price to pay whenever "logically relevant [evidence] in criminal prosecutions"<sup>76</sup> was excluded. Frankfurter had identified the concern which would influence both Rehnquist and O'Connor later in their separate decisions not to apply the fruits doctrine to *Miranda* violations, at least in a procedural context. It was a hard thing to lose competent evidence. "[T]wo opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through

69. *Id.* (emphasis added).

70. This was the fruit of the poisonous tree exclusionary sanction rationale.

71. This was the deterrence rationale.

72. This was the tempering component of the doctrine. Eventually it would be elaborated to allow the admission of otherwise inadmissible evidence not only if developed through an independent source, but also if there had been attenuation, *Wong Sun v. United States*, 371 U.S. 471 (1963); or harmless error, *Chapman v. California*, 386 U.S. 18 (1967), at least as applied by the lower courts, see *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982); or an inevitable discovery, *Nix v. Williams*, 467 U.S. 431 (1984).

73. 308 U.S. 338 (1939).

74. *Id.* at 341.

75. *Id.*

76. *Id.* at 340.

zeal or design.”<sup>77</sup> “Zeal or design” apparently meant that both willful and negligent errors by the police, if illegal, would lead to the exclusion of otherwise competent derivative evidence.

*Nardone* is particularly interesting because the fruits doctrine was applied to a nonconstitutional violation. The poison tree here was the illegal wiretap in contravention of section 605 of the Communications Act of 1934.<sup>78</sup> The Court could have used the fourth amendment as the basis for its decision, but it explicitly did not.<sup>79</sup> The insistence that the fruits doctrine only applied to constitutional violations was a creation of later constituencies of the Supreme Court. Frankfurter thought otherwise. Application of the fruits doctrine for deterrent purposes was not the essential consideration. The balance had to be made. Application of the fruit of the poisonous tree doctrine “must be justified by an over-riding public policy expressed in the Constitution or the law of the land.”<sup>80</sup>

*Nardone* extended the scope of the exclusionary rule as applied through the fruits doctrine to evidence derived from violations of the Constitution or “the law of the land.” *Nardone*’s fruit of the poisonous tree doctrine was not mechanical at all. The question was not whether there had been a constitutional violation by the police. The question was whether there had been police illegality of any kind. That still did not answer the (in)-admissibility of the evidence. The trial court still had to be convinced there was a solid connection between the alleged police illegality and the proffered evidence.<sup>81</sup> Frankfurter explained that the rationale behind the fruits doctrine was that “[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty.’”<sup>82</sup>

*Nardone* adopted *Silverthorne*’s independent source doctrine,<sup>83</sup> and, in another felicitous turn of phrase by Frankfurter, added one of its own. “As a matter of good sense,” Frankfurter wrote, “such connection may have become *so attenuated as to dissipate the taint*.”<sup>84</sup>

The core of *Nardone* was Frankfurter’s *reasonable* approach to criminal procedure. The fruit of the poisonous tree doctrine was not a bright-line rule capable of ready application if only a threshold showing—such as a constitutional violation—was made. “The civilized conduct of criminal trials cannot be confined within mechanical rules. . . . Such a system as ours must,

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77. *Id.*

78. *Id.* at 339.

79. *Cf. Katz v. United States*, 389 U.S. 347 (1967).

80. *Nardone*, 308 U.S. at 340 (emphasis added).

81. *Id.* at 340.

82. *Id.* at 340 (citing *Nardone v. United States*, 302 U.S. 379, 383 (1937)).

83. *Nardone*, 308 U.S. at 341.

84. *Id.* (emphasis added).

within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges."<sup>85</sup>

The Warren and Burger Courts, in contrast, were often in search of bright-line rules. *Miranda* itself announced the brightest of the bright-line rules. The fruit of the poisonous tree doctrine, as announced in *Silverthorne* and especially *Nardone*, was decidedly not a bright-line doctrine. Bright-line rules call for bright-line responses. *Miranda* and the fruit of the poisonous tree doctrine were like oil and water, and came from different fundamental conceptions of the application of the law of criminal procedure.

### C. Wong Sun

*Wong Sun v. United States*<sup>86</sup> added a final element to the fruit of the poisonous tree doctrine. In order to object to the use of any evidence, even if illegally seized, a person had to have standing.<sup>87</sup> The test was whether a personal "right of privacy of person or premises" had been invaded.<sup>88</sup>

*Wong Sun's* fact pattern was more complicated than the fact patterns in *Silverthorne* and *Nardone*. After the initial standing inquiry had been answered, however, the essential application of the doctrine remained the same. *Wong Sun*, nevertheless, is the leading fruit of the poisonous tree decision. It is the case on which courts rely when deciding whether to apply the fruits doctrine to *Edwards* violations.

At 2 a.m. on June 4, 1959, Hom Way was arrested in San Francisco's Chinatown. Hom Way had an ounce of heroin in his possession. Hom Way said he had purchased the ounce from "Blackie Toy," and that "Blackie Toy" ran a laundry on Leavenworth Street.<sup>89</sup>

At six that same morning several federal agents went to 1733 Leavenworth Street and knocked on the door of a business named "Oye's Laundry." The laundry was run by defendant James Wah Toy (hereinafter Toy), but nothing in the trial record indicated this Toy and "Blackie Toy" were the same person. After a short conversation one of the agents stated, "I am a federal narcotics agent."<sup>90</sup> Toy took off running. The federal agents pursued Toy, broke down the door leading into his apartment, and followed him into his bedroom where they handcuffed him and placed him under arrest. Toy then incriminated himself and a person named Johnny Yee. Toy said both he and Johnny Yee had smoked some heroin the night before. The federal agents had no warrant.<sup>91</sup>

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85. *Id.* at 342.

86. 371 U.S. 471.

87. *Id.*

88. *Id.* at 492.

89. *Id.* at 473.

90. *Id.* at 473-74.

91. *Id.*

Johnny Yee was then arrested and just under an ounce of heroin was taken from a bureau drawer in his bedroom. Both Yee and Toy were taken to the Bureau of Narcotics. Yee said his heroin had been given to him four days earlier by Toy and someone named "Sea Dog." Toy identified "Sea Dog" as Wong Sun. Wong Sun was then arrested, also without a warrant. No additional drugs were found.<sup>92</sup>

Toy, Yee, and Wong Sun were arraigned and later interrogated.<sup>93</sup> Toy and Wong Sun both made further incriminating statements to police which they refused to sign.<sup>94</sup> Yee was the government's principal witness. Hom Way did not testify and was not charged.<sup>95</sup>

Four evidentiary items were challenged by Toy and Wong Sun as fruits of various poison trees, either of "unlawful arrests or of attendant searches."<sup>96</sup> The four items included: (1) Toy's statements in his bedroom at the time of his unlawful arrest; (2) the heroin taken from Johnny Yee; (3) Toy's unsigned statement; and (4) Wong Sun's unsigned statement.<sup>97</sup>

The Court held that the warrantless entry of Toy's apartment and bedroom had been illegal. Toy was held to have standing to challenge the initial illegal search and seizure. The Court then applied a straight-forward fruit of the poisonous tree analysis. Toy's bedroom statements were inadmissible fruits against Toy. The heroin taken from Johnny Yee was also an inadmissible fruit against Toy. So was Toy's unsigned confession. The Court quoted *Silverthorne's* proposition that illegally procured evidence "shall not be used at all."<sup>98</sup>

Wong Sun's case, however, was quite different. Two pieces of evidence were held to be admissible against Wong Sun. Wong Sun had no standing to object to the heroin taken from Yee.<sup>99</sup> Wong Sun had no poison tree from which to claim this fruit derived. Toy's poison tree was not also Wong Sun's poison tree. Wong Sun needed his own before the fruits doctrine came into play.

Wong Sun may, or may not, have had his own poisonous tree. The Court left aside the question whether Wong Sun was illegally arrested without probable cause. The attenuation prong of the fruits doctrine made such a determination unnecessary. Wong Sun had been released on his own recog-

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92. *Id.* at 475.

93. *Id.* at 475-76. *Wong Sun* is a pre-*Miranda* case. Nevertheless, the agent conducting the interrogation advised Yee, Toy and Wong Sun that each had the "right to withhold information which might be used against him," and that each "was entitled to the advice of counsel." *Id.* None of the three, apparently, tried to exercise their rights.

94. *Id.* at 476-77.

95. *Id.* at 477.

96. *Id.*

97. *Id.*

98. *Id.* at 485 (citing *Silverthorne*, 251 U.S. at 392).

99. *Id.* at 492.

nizance after his arraignment, and "returned *voluntarily* several days later to make the statement."<sup>100</sup> "[W]e hold," Justice Brennan wrote, "that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'"<sup>101</sup>

Three things can be extracted from *Wong Sun* which have a bearing on the application of the fruit of the poisonous tree doctrine to *Miranda* and *Edwards* violations. First, the *Wong Sun* majority apparently narrowed *Nardone's* fruits doctrine to constitutional violations alone. Nothing in the opinion mentions *Nardone's* alternative "or the law of the land."<sup>102</sup> The fruits doctrine was to be used to extend the exclusionary rule "in order to enforce the basic constitutional policies."<sup>103</sup> The second major consideration was whether the facts of the particular case suggested that a defendant's confession was enough of a voluntary product to break the causal chain between the fruit and the poison tree. The Court's test was whether the confession was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."<sup>104</sup> A sufficient act of free will meant there was no fruit, even though there had been a poison tree.<sup>105</sup> Finally, however, in making a judgment about attenuation, and the voluntariness of any statement, another test was to be kept in mind. Was the evidence "come at by exploitation of that illegality[?]"<sup>106</sup> If so, the evidence was fruit of the poison tree and "may not be used."<sup>107</sup>

*Wong Sun's* fruit of the poisonous tree doctrine, like *Nardone's*, announced no bright-line rules.<sup>108</sup>

### III. PROPHYLACTIC SAFEGUARDS

#### A. Tucker

*Michigan v. Tucker*<sup>109</sup> brought the issue of whether the fruit of the poisonous tree doctrine ever applies to *Miranda* violations of any kind before

100. *Id.* at 491 (emphasis added).

101. *Id.* (citing *Nardone*, 308 U.S. at 341).

102. *Nardone*, 308 U.S. at 340.

103. *Wong Sun*, 371 U.S. at 485.

104. *Id.* at 486 (emphasis added).

105. This is an interesting notion, and may be the basic rationale underlying both Justice Rehnquist's refusal to apply the fruits doctrine in *Tucker* and Justice O'Connor's refusal to apply it in *Elstad*.

106. *Wong Sun*, 371 U.S. at 488 (citing J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)). In many ways, this really seems to be the critical inquiry.

107. *Id.*

108. In fact, Justice Clark wrote in dissent that "[t]he Court has made a Chinese puzzle out of [this case]." *Id.* at 498.

109. 417 U.S. 433 (1974).

the Supreme Court for the first time in an unusual manner. The custodial interrogation at issue occurred before the *Miranda* decision was handed down, and *Tucker* reached the Supreme Court after *Miranda* was announced.<sup>110</sup>

The defendant Tucker was arrested in connection with the brutal rape and beating of a 43-year-old Michigan woman. Tucker was taken to a police station for questioning. The police asked Tucker, among other things, "whether he wanted an attorney, and whether he understood his constitutional rights."<sup>111</sup> Tucker said he did understand his rights, and that he did not want an attorney.<sup>112</sup> The police then advised Tucker that anything he said could be used against him in court.<sup>113</sup> The police failed, however, to advise Tucker that he had the right to appointed counsel.<sup>114</sup>

Tucker responded to police questioning by trying to establish an alibi. He claimed he had been with a friend named Robert Henderson the night of the rape. At the trial, Henderson contradicted this story in part, and Tucker was convicted of rape and sentenced to twenty to forty years' imprisonment.<sup>115</sup>

The issue before the Supreme Court was whether the testimony of a witness identified in questioning in technical violation of the four warnings required by *Miranda*—even though the interrogation pre-dated the *Miranda* opinion—had to be excluded as fruit of the poisonous tree.<sup>116</sup>

Justice Rehnquist called the failure to give the fourth warning "an inadvertent disregard . . . of the *procedural rules* later established in *Miranda*."<sup>117</sup> Technically, even though Tucker's facts occurred pre-*Miranda*, the failure to give all the warnings was a poison tree.<sup>118</sup> In keeping with the technical failure to warn Tucker of all his as yet unannounced *Miranda* rights, the court automatically excluded the technical fruit, his confession, of the technical poison tree. *Miranda*, at the very least, announced a per se rule that the first generation derivative evidence of a *Miranda* violation must be suppressed. The Supreme Court has never seriously questioned this. *Tucker*, in fact, presented the strongest case possible for allowing even the confession into evidence, and yet the confession was excluded. This is classic

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110. The events at issue in *Tucker* took place April 19, 1966. *Miranda* was decided June 13, 1966.

111. *Tucker*, 417 U.S. at 436.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 435.

117. *Id.* at 445 (emphasis added).

118. "This Court said in *Miranda* that statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial. That requirement was fully complied with by the state court here: respondent's statements . . . were not admitted against him at trial." *Id.*

fruit of the poisonous tree doctrine analysis. The Court, in the *Miranda* context, may not explicitly call its analysis fruit of the poison tree doctrine, but it is.

The real question, in the *Miranda* context, is whether more remote, second generation derivative evidence is also to be excluded. In the context of *Tucker's* narrow facts, Justice Rehnquist wrote, "[t]he question for decision is how sweeping the judicially imposed consequences of this disregard shall be."<sup>119</sup>

Rehnquist's analysis asked three questions. First, was there a constitutional violation?<sup>120</sup> Or, secondly, was the violation only one of "prophylactic rules developed to protect that [constitutional] right[?]"<sup>121</sup> The final issue was "whether the evidence derived from this interrogation must be excluded."<sup>122</sup>

The potential constitutional right at issue in *Tucker* was *not* the sixth amendment right to counsel.<sup>123</sup> The only constitutional right potentially at issue in *Tucker*, according to Rehnquist, was the fifth amendment right to be free from "compulsory self-incrimination."<sup>124</sup> Quoting *Elkins v. United States*,<sup>125</sup> Rehnquist wrote that the principal purpose behind the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>126</sup> "In a proper case," Rehnquist added, "*this rationale would seem applicable to the Fifth Amendment context as well.*"<sup>127</sup>

*Tucker* was not the appropriate case. Pinpointing both the inadvertence of the police conduct at issue, and the variance between *Tucker's* facts and the "historical circumstances underlying the privilege against compulsory self-incrimination,"<sup>128</sup> Rehnquist held that no constitutional right had been violated, and the fruit of the poisonous tree doctrine did not apply to the facts of *Tucker*. The second generation derivative evidence, Henderson's third-party testimony, would not be excluded.<sup>129</sup> "Where there has been *genuine compulsion* of testimony," Rehnquist wrote, "the right has been given broad scope."<sup>130</sup> There had been no genuine compulsion in *Tucker*. The police had simply failed to read Tucker a right—to appointed counsel—that the police did not yet know was required prior to any custodial interrogation.

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119. *Id.*

120. *Id.* at 451 (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

121. *Id.* at 439.

122. *Id.*

123. *Id.* at 438.

124. *Id.*

125. 364 U.S. 206 (1960).

126. *Tucker*, 417 U.S. at 446 (quoting *Elkins*, 364 U.S. at 217).

127. *Id.* at 447 (emphasis added).

128. *Id.* at 444.

129. *Id.* at 452.

130. *Id.* at 440 (emphasis added).



The critical distinction in *Tucker* was that the thing violated was not itself a constitutional right but only a "prophylactic rule[] developed to protect that right."<sup>131</sup> In the context of *Tucker*'s specific facts, the distinction makes sense. *Tucker* had been apprised of his general right to counsel in full compliance with pre-*Miranda* law. *Tucker* said he understood he had such a right, and explicitly said he did not wish to see a lawyer.<sup>132</sup> The failure, Rehnquist wrote, was only "to make available to [*Tucker*] the full measure of procedural safeguards associated with that right since *Miranda*."<sup>133</sup> Coupled with the inadvertence of the police, *Tucker* presented a very strong case for *not* applying the fruit of the poisonous tree doctrine to the second generation derivative evidence.

Rehnquist's opinion, however, suggests three factors—not present in *Tucker*—which might just as strongly argue for the application of *Wong Sun*'s fruits doctrine in the appropriate case. First, a violation of the right to counsel in *Escobedo*,<sup>134</sup> for example, might be such a case. "We do not have a situation such as that presented in *Escobedo v. Illinois*," Rehnquist wrote, and "*Escobedo* is not to be broadly extended beyond the facts of that particular case."<sup>135</sup> Arguably, the *essential Escobedo* facts are often present, however, in the *Miranda* setting.<sup>136</sup> A person in custodial interrogation tries to invoke his right to counsel, and the police refuse to honor that request. A second factor is whether "the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."<sup>137</sup> Inadvertence falls below that standard. The police must do something wrong before the exclusionary sanction can have any deterrent effect. An *Escobedo* violation, again, would present such a case. The third factor is related closely to the other two factors. Would "future *unlawful police conduct*" actually be deterred?<sup>138</sup> This could be called the limiting factor of diminishing returns.<sup>139</sup>

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131. *Id.* at 439.

132. *Id.* at 436.

133. *Id.* at 444.

134. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

135. *Tucker*, 417 U.S. at 438 (referring the reader to *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966); *Kirby v. Illinois*, 406 U.S. 682 (1972); and *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)).

136. *Downing, Wilson, Edwards, and Escobedo* are just a few instances of police refusal to honor a custodially interrogated suspect's attempt to invoke his right to counsel.

137. *Tucker*, 417 U.S. at 447. This factor often seems to be at the heart of recent Supreme Court decisions in fourth, fifth and sixth amendment law. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980).

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

139. There seems to be no persuasive reason to exclude otherwise reliable evidence using a deterrence rationale if no actual deterrence will occur. No good faith exception exists outside the fourth amendment context. *See United States v. Leon*, 468 U.S. 897 (1984). Nevertheless, a factor approximating police good faith enters the calculus of fifth and sixth amendment cases also. "Where the official action was pursued in complete good faith, however," Rehnquist

*Tucker*, in light of those three factors, and on its peculiar and historically limited facts,<sup>140</sup> presented a weak case for application of the full-blown *Wong Sun* fruit of the poisonous tree doctrine. Rehnquist's distinction between prophylactic safeguards—interchangeably called procedural rules—and constitutional rights was both potent and difficult. The lower courts would wrench it out of context, however, when confronted with the question of whether to apply *Wong Sun* to *Edwards* violations.<sup>141</sup> *Tucker* strongly suggests the fruits doctrine should apply to an *Escobedo* violation.<sup>142</sup> The implication must be that *Miranda* not only announced a series of procedural safeguards—the litany roll call of an arrested person's four rights—but also something very like a constitutional right. A genuine fifth amendment violation would bring the fruits doctrine into play, Rehnquist wrote, “in the proper case.”<sup>143</sup> So, impliedly, would an *Escobedo* violation.<sup>144</sup> Though the right announced in *Escobedo* may not have been a constitutional right in the fifth amendment's sense, Rehnquist *had* distinguished *Escobedo* from the procedural/prophylactic safeguards at issue in *Tucker*.

*Miranda* right to counsel violations and the fruit of the poisonous tree doctrine was still an open question after *Tucker*.<sup>145</sup>

observed in *Tucker*, “the deterrence rationale loses much of its force.” 417 U.S. at 447. If the Court were using a privacy rationale, of course, the extent of the deterrent effect on the police would make no difference. Deterrence, though, is now the key rationale.

140. *Tucker's* facts occurred before *Miranda* was announced. After *Miranda* there will be no confusion about the retroactivity of *Miranda's* rules.

141. In *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, *cert. denied*, 459 U.S. 1092 (1982), for example, the Georgia Supreme Court completely ignored the implication of Justice Rehnquist's discussion of *Escobedo*.

142. *Tucker*, 417 U.S. at 438.

143. *Id.* at 447.

144. *Id.* at 438.

145. There were other approaches suggested to the question of the applicability of the fruits doctrine to *Miranda* in the concurrences and dissent to *Tucker*. Concurring on the grounds that *Tucker's* facts occurred pre-*Miranda*, Justice Brennan suggested the fruits doctrine *might* apply to post-*Miranda* fact patterns. *Tucker*, 417 U.S. at 458 (Brennan, J., concurring). Brennan referred readers to the lower court opinions on *Tucker*, 19 Mich. App. 320, 172 N.W.2d 712 (1969) and 385 Mich. 594, 189 N.W.2d 290 (1971); *United States v. Cassell*, 452 F.2d 533 (7th Cir. 1971); and *People v. Peacock*, 39 A.2d 762, 287 N.Y.S.2d 166 (1968), for other discussions on *Miranda* and the fruits doctrine. Justice White's concurrence, on the other hand, suggested that the fruits of *Miranda* violations involving voluntary confessions should be admitted. *Tucker*, 417 U.S. at 460-61 (White, J., concurring). “The same results would not necessarily obtain with respect to the fruits of involuntary confessions.” *Id.* at 461. This seems to be the same approach both Rehnquist and O'Connor have taken, although lower courts have relied on Justice White's concurrence in refusing to exclude derivative evidence. See *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442. There was a finding in *Wilson* that the confession was voluntary, but the burden of establishing that after an *Escobedo* or *Edwards* violation should be very high. Justice Douglas, the lone dissenter, found absolutely that the fruits doctrine should apply to *any* violation of *Miranda*:

The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the ‘requirements of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege,’ . . . [Tucker's]

B. Elstad: "Cat Out of the Bag"<sup>146</sup>

In *Oregon v. Elstad*,<sup>147</sup> the Court considered a related but slightly different question. *Elstad*'s factual situation, at least, occurred after *Miranda*.<sup>148</sup> If any doubts had been raised by *Tucker*'s odd procedural history, *Elstad* conclusively answered the question whether the fruits doctrine would ever apply to mere technical violations of *Miranda*. *Elstad* held the fruits doctrine did not apply to violations of *Miranda*'s "prophylactic"<sup>149</sup> warnings.

Police in the Polk County Sheriff's Office in Salem, Oregon, were contacted by a witness to a burglary in December, 1981. \$150,000 in art objects and other goods had been burgled from a local house.<sup>150</sup> The witness implicated 18-year-old Michael Elstad. The police secured an arrest warrant and drove to Elstad's parents' house. Elstad's mother answered the front door and escorted the officers to her son's room. Elstad was lying on his bed listening to his stereo. Elstad accompanied one officer into the living room. A second officer took Mrs. Elstad into the kitchen to explain the situation. The first officer asked Elstad if he knew why the police were there. Elstad said no. The first officer asked Elstad if he knew someone named Gross. Elstad replied he had heard there had been a robbery at their house. The officer told Elstad he thought Elstad had been involved. Elstad replied, "Yes, I was there."<sup>151</sup> No *Miranda* warnings had yet been given.

Elstad was then taken to headquarters. Approximately one hour later the same officers joined Elstad in an office. Elstad for the first time was advised

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statements were thus obtained 'under circumstances that did not meet constitutional standards for protection of the privilege [against self-incrimination].'

*Tucker*, 417 U.S. at 462-63 (Douglas, J., dissenting) (citing *Miranda v. Arizona*, 384 U.S. 436, 476, 491 (1966)) (emphasis in original). Again, this approach seems consistent with the others expressed by different members of the Court. Justice Douglas was simply prepared to find a constitutional violation at an earlier stage. All the Court members were in apparent agreement on the test to be applied.

One final case mentioned in Justice White's concurrence is interesting in the *Miranda* and fruits context. *Orozco v. Texas*, 394 U.S. 324 (1969), involved both a confession and the second generation evidence of a gun and ballistics evidence. The court reversed *Orozco*'s conviction and suppressed his confession. "Although the issue was presented," White noted, "the Court did not expressly deal with the admissibility of the ballistic tests and gave no intimation that the evidence was to be excluded at the anticipated retrial." *Tucker*, 417 U.S. at 461 (White, J., concurring). The fruits issue was still open after *Tucker*.

146. "[A]fter an accused has once let the cat out of the bag by confession, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag." *Oregon v. Elstad*, 470 U.S. 298, 311 (1985) (quoting *United States v. Bayer*, 331 U.S. 532, 540-41 (1947)).

147. 470 U.S. 298.

148. *Miranda* was decided in December 1966. *Elstad*'s facts took place in December 1981.

149. *Elstad*, 470 U.S. at 318.

150. *Id.* at 300.

151. *Id.*

fully of his *Miranda* rights. Elstad stated he understood his rights, and waived them. Elstad then confessed a second time.<sup>152</sup>

The question in *Elstad* was whether the second warned confession must be suppressed as the fruit of the first unwarned confession. The Court, relying heavily on *Tucker*, held the fruits doctrine inapplicable here to the second confession. Once again—just as in *Tucker*—the Court found the violation to be one only of “prophylactic” safeguards.<sup>153</sup>

Justice O’Connor tried to go farther than *Tucker*. O’Connor implied at the start of her opinion that *Wong Sun’s* fruits doctrine was a fourth amendment doctrine and inapropos in *Miranda’s* fifth amendment context. She noted that defendant Elstad’s counsel’s arguments in favor of suppression relied heavily on both the fruits and “cat out of the bag” metaphors.<sup>154</sup> The metaphors, O’Connor noted:

should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so the evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’<sup>155</sup>

The *Miranda* warnings were only prophylactic rules. They were not the fifth amendment right against compulsory self-incrimination itself. Nor did violation of *Miranda’s* procedural safeguards rise to the level of fourth amendment violations “which have traditionally mandated a broad application of the ‘fruits’ doctrine.”<sup>156</sup>

O’Connor’s opinion thus abandons the initial apparent suggestion that *Wong Sun’s* poisonous fruits doctrine might not be appropriate outside the fourth amendment context, and falls more in line with Rehnquist’s *Tucker* analysis.<sup>157</sup>

Quoting *Tucker*, O’Connor writes, the test is whether “ ‘[a] constitutional privilege’ ” or only a “ ‘prophylactic standard’ ”<sup>158</sup> has been violated. An actual violation of a fifth amendment right—of any constitutional right—apparently would bring the fruits doctrine into play. “If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.”<sup>159</sup> This is critical in considering

152. *Id.* at 300.

153. *Id.* at 318.

154. *Id.* at 303.

155. *Id.* at 304.

156. *Id.* at 306.

157. Compare *Tucker*, 417 U.S. at 437-52 with *Elstad*, 470 U.S. at 308-13.

158. *Elstad*, 470 U.S. at 309 (citing *Tucker*, 417 U.S. at 446).

159. *Id.*

whether *Wong Sun's* extension of the exclusionary rule should apply to *Edwards* violations. *Elstad* suggested at its outset that the fruits doctrine simply was not applicable to *Miranda* violations, but ended up repeating *Tucker's* test. The essential distinction is whether a prophylactic rule or a constitutional right has been violated.<sup>160</sup>

*Elstad* adds little to an analysis of *Miranda* right to counsel violations. All four required *Miranda* warnings were omitted in *Elstad*. *Elstad's* issue was a general procedural issue. *Elstad's* focus was primarily on the general fifth amendment right to be free from compelled self-incrimination. *Elstad* simply reiterates the position Rehnquist took in *Tucker* that the fruits doctrine might apply to the appropriate *Miranda* violation. Violations of the reading of the warnings, both *Tucker* and *Elstad* teach, are technical violations of prophylactic safeguards, and *Wong Sun's* fruits doctrine does not apply. The *Edwards* fruits issue was still open after *Elstad*.

Curiously enough, despite Justice O'Connor's apparent hostility to *Wong Sun's* fruits doctrine in *Miranda's* fifth amendment context, the *Elstad* opinion makes full use of *Wong Sun's* doctrinal elements.

*Elstad's* first confession was suppressed. "*Miranda* requires that the unwarned admission must be suppressed . . ." <sup>161</sup> The failure to give a defendant in a custodial interrogation setting any warnings is the poison tree. The confession is the first generation fruit. This is classic fruit of the poisonous tree analysis. Technically, *Wong Sun's* fruits doctrine always applies to *Miranda* violations. The real question is whether its exclusionary reach encompasses more remote generation evidence.

In deciding in *Elstad* that the second generation evidence—here the subsequent confession to the unwarned confession—was admissible, Justice O'Connor applied *Wong Sun's* own test in reaching the conclusion that the doctrine did not apply. One test was whether "the suspect's choice . . . to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" <sup>162</sup> This inquiry, verbatim, is *Wong Sun's* own. O'Connor later noted, "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best." <sup>163</sup> Attenuation is the *Wong Sun* inquiry to determine whether the causal connection between the poison tree and the alleged fruit is so weak that the exclusionary rule should not be applied.<sup>164</sup> *Wong Sun* himself did not benefit from the doctrine which bears his name. *Wong Sun's*

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160. *Id.*

161. *Id.*

162. *Id.* at 311 (citing *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

163. *Elstad*, 470 U.S. at 313 (emphasis added).

164. See *Wong Sun*, 371 U.S. at 487 (citing the *Nardone* test: "[whether] the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

confession, in contradistinction to Toy's, was held to be voluntary and admissible.<sup>165</sup> Justice O'Connor, echoing this prong of *Wong Sun*, writes, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made."<sup>166</sup>

This Note has suggested that the historical fruit of the poisonous tree doctrine, as announced in *Silverthorne* and *Nardone* and *Wong Sun* itself, is not a bright-line doctrine. Its inquiries are sophisticated and the decision whether to apply it in a given case depends "on the learning, good sense, fairness and courage of federal trial judges."<sup>167</sup> Justices Rehnquist and O'Connor both appropriately refused to apply *Wong Sun's* exclusionary sanction in the context of *Tucker's* and *Elstad's* fact patterns. *Tucker* and *Elstad* both presented cases in which the failure to give the required *Miranda* warnings had been inadvertent, and each case additionally involved a defendant who waived his rights and gave a voluntary confession under any reasonable test of voluntariness.<sup>168</sup> Inadvertent errors in the giving of technical warnings plus subsequent voluntary confessions in the absence of traditional coercion equals admissibility of second generation derivative evidence in the context of *Miranda's* prophylactic safeguards.

*Elstad* may even stand for the "grand notion" that *Wong Sun's* fruits doctrine never applies to *Miranda* violations in any context.<sup>169</sup> The broadest reading of *Elstad* is that *Miranda* itself is wholly procedural. *Miranda* is a prophylactic shield protecting the constitutional right against self-incrimination. A *Miranda* violation, under this reading of *Elstad*, will always be a technical or prophylactic violation. Second generation evidence, then, will never be excluded. (The language of *Elstad's* holding, however, is much narrower.)<sup>170</sup>

Assuming arguendo that this is *Elstad's* proposition, the possibility still remains that a *Miranda* violation may also involve the violation of other rights.<sup>171</sup> *Miranda's* paradox is that it simultaneously comprises both pro-

165. *Wong Sun*, 371 U.S. at 491.

166. *Elstad*, 470 U.S. at 318.

167. *Nardone*, 308 U.S. at 342.

168. The funny thing about this is that *Miranda* announced its bright-line rules in part to try to replace the old voluntariness inquiry. See *Miranda*, 384 U.S. 436. Apparently there is no getting around a determination of voluntariness, and probably there should not be.

169. Professor Craig Bradley, Charles L. Whistler Professor of Law, Indiana University School of Law-Bloomington, offered this suggestion in a class session during the autumn 1985 school term.

170. "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Elstad*, 470 U.S. at 318.

171. See *Elstad*, 470 U.S. at 306 (citing *Tucker*, 417 U.S. at 444). "The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *Id.*

phylactic rules and larger rights. The question, in both *Tucker's* and *Elstad's* terms, is whether those rights are constitutional.

#### IV. CONSTITUTIONAL RIGHTS

##### A. Miranda

The source of the paradox is *Miranda* itself. The confusion comes from Chief Justice Warren's contradictory purposes in his opinion. Three strands can be identified. First, Warren was announcing new "procedures."<sup>172</sup> These procedures, the familiar warnings, are the things Rehnquist and O'Connor call prophylactic rights. Secondly, the procedural warnings were established to "assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."<sup>173</sup> This strand is clearly constitutionally based. It is the language of the fifth amendment itself. The warnings were established to protect this right. If genuine compelled self-incrimination could be shown, *Wong Sun's* fruits doctrine would apply.<sup>174</sup> In such a case, however, there would be no need to rely on a *Miranda* violation. There would be a full-blown violation of the Constitution itself. Finally, *Miranda* tried to join in one opinion rights recognized in earlier decisions of the Court. "[O]ur holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."<sup>175</sup> Specifically, these were the right to remain silent,<sup>176</sup> and the right to counsel.<sup>177</sup> It is this middle-level strand which presents the problem. The actual rights to silence and counsel mediate between the mere prophylactic reading of the procedural warnings and the constitutional fifth amendment right itself. The question is whether these mediating rights, in any setting, ever rise to a level requiring the protection of fully applied constitutional doctrines.<sup>178</sup>

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

173. *Id.*

174. This observation is based on comments by Rehnquist in *Tucker* and O'Connor in *Elstad*. The Justices seem to agree the fruits doctrine applies whenever an actual constitutional violation can be shown. Conceivably, a fifth amendment violation—that is, actual coerced self-incrimination—could be shown completely apart from a *Miranda* violation. Paradoxically, *Miranda*, by focusing the attention of a court on whether the prophylactic rules have been read to a defendant and their attempted invocation honored, deflects inquiry from the underlying larger constitutional issue whether the fifth amendment, *Miranda* wholly aside, has been violated. A prophylactic shield intended to protect a constitutional right may end by insulating that right from effective assertion.

175. *Miranda*, 384 U.S. at 442.

176. *Id.* at 440.

177. *Id.*

178. See *Oregon v. Elstad*, 470 U.S. 298 (1985); *Michigan v. Tucker*, 417 U.S. 433 (1974).

The heart of *Miranda* is the concern Rehnquist expressed in *Tucker* and O'Connor expressed in *Elstad*. The Court wanted to ensure that confessions were being voluntarily given. "Unless adequate protective devices are employed," Warren wrote in *Miranda*, "to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."<sup>179</sup>

Rehnquist did not invent the notion of prophylactic safeguards out of whole cloth. The notion came from Warren's *Miranda* opinion. Warren's decision is sprinkled throughout with references to this difficult notion.

"In *McNabb*, and in *Mallory*, we recognized both the dangers of interrogation and the appropriateness of *prophylaxis* stemming from the very fact of interrogation,"<sup>180</sup> Warren wrote at one point in *Miranda*. The inherent compulsions in custodial interrogation required a protective shield for the fifth amendment right not to self-incriminate against one's will. The four *Miranda* warnings were to operate as such a device, but they were not required.<sup>181</sup> Other equally effective warnings or devices, as Rehnquist emphasized in *Tucker*, would also suffice.<sup>182</sup> Therefore, the four warnings—the reading of the four warnings, that is—could not be constitutional rights.

Early in the opinion Warren calls the four warnings "procedural safeguards."<sup>183</sup> These specific four warnings, however, were "to be employed, *unless other fully effective means are devised . . .*"<sup>184</sup> Beyond the notion of prophylaxis, other language in Warren's opinion invited lower courts, and even the Supreme Court itself, not to accord constitutional status to *Miranda*.

Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor it is intended to have this effect.<sup>185</sup>

The four warnings, then, were like seat belts. If an equally effective device, such as an air bag, were employed, that would be perfectly fine. A verbatim reading of the *Miranda* warnings, then, was only constitutionally suggested, as crazy as that seems. In his attempt to create the brightest of all bright-line rules, Warren had constructed instead another Chinese puzzle. Even though there apparently was a constitutional right to be read *some* warnings, there was not a constitutional right to be read the warnings in a constitutionally mandated way.

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179. *Miranda*, 384 U.S. at 458.

180. *Id.* at 463 (emphasis added).

181. *Id.* at 467.

182. *Id.*

183. *Id.* at 444.

184. *Id.* (emphasis added).

185. *Id.* at 467.



Other things were clearer. Confessions, "in the absence of a fully effective equivalent"<sup>186</sup> to the suggested litany of warnings which were "prerequisites to the admissibility of any statement made by a defendant,"<sup>187</sup> were always to be excluded.<sup>188</sup> If a defendant indicated he wished "to remain silent, the interrogation must cease."<sup>189</sup> Similarly, "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present."<sup>190</sup> A suspect could waive these rights, but the government was under a "heavy burden"<sup>191</sup> to demonstrate such a waiver, and the waiver was to be judged by the strict standard of *Johnson v. Zerbst*.<sup>192</sup> In selecting *Zerbst* as the *Miranda* waiver standard, Warren wrote, "[t]his Court has always set high standards of proof for the waiver of *constitutional rights*."<sup>193</sup>

Warren was not writing about the fifth amendment right to be free from self-incrimination, nor was he writing about the prophylactic warnings. Warren had in mind, rather, the intermediate rights, the rights to silence and counsel. The *Zerbst* waiver standard was to be applied to the government's assertion of a waiver of *those* rights.

The right to silence—although outside the scope of this Note—was a constitutional right. In fact, it was a very old right. "The privilege was elevated to *constitutional* status," Warren wrote in a review of its history, "and has always been 'as broad as the mischief against which it seeks to guard.'" <sup>194</sup> *Malloy v. Hogan*<sup>195</sup> reiterated that view.

Warren had more extensive things to say about the constitutional basis for the right to counsel. The extent of that right in the context of custodial interrogation—which was the precise *Miranda* setting—had been announced two years earlier in *Escobedo v. Illinois*.<sup>196</sup> Warren, in fact, undertook his analysis in *Miranda* with a backward look to *Escobedo*.<sup>197</sup>

"Statements," taken in violation of *Escobedo*, "were *constitutionally* inadmissible."<sup>198</sup> *Escobedo* "was but an explication of basic rights that are enshrined in our Constitution . . ."<sup>199</sup> The basic rights protected in *Escobedo* were two. Quoting the Constitution, Warren wrote, "No person . . .

186. *Id.* at 476.

187. *Id.*

188. *Id.*

189. *Id.* at 474.

190. *Id.*

191. *Id.* at 475.

192. 304 U.S. 458 (1938). A *Zerbst* waiver must be knowingly and intelligently made.

193. *Miranda*, 384 U.S. at 475 (emphasis added).

194. *Id.* at 459-60 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)) (emphasis added).

195. 378 U.S. 1, 8 (1964).

196. 378 U.S. 478 (1964).

197. *Miranda*, 384 U.S. at 440.

198. *Id.* (emphasis added).

199. *Id.* at 442.

shall be compelled in any criminal case to be a witness against himself,' ” and that “ ‘the accused shall . . . have the Assistance of Counsel . . . .’ ”<sup>200</sup> In footnote thirty-five of *Miranda*, Warren made the constitutional meaning of *Escobedo* crystal clear: “[In *Escobedo*] [t]he police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake.”<sup>201</sup>

*Miranda* explicitly reaffirmed *Escobedo* right at the start of Warren’s opinion.<sup>202</sup> It is fundamental sixth amendment law that the sixth amendment’s right to counsel attaches at the start of adversary proceedings.<sup>203</sup> *Miranda*, reiterating the Court’s position in *Escobedo*, found that moment to be: “when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences.”<sup>204</sup> *Miranda* went even further. The sixth amendment right to counsel, according to both *Escobedo* and *Miranda*, attached as soon as custodial interrogation began, warnings or no warnings. According to Warren, in *Miranda* the sixth amendment right to counsel could kick in even before custodial interrogation began. All a suspect had to do was ask for an attorney. “An individual need not make a pre-interrogation request for a lawyer . . . [but] such request affirmatively secures his right to have one.”<sup>205</sup>

There is no need to try to prove too much from this. *Miranda* is a long and complicated opinion. It comprehends both the notion that it is announcing bright-line prophylactic nonconstitutionally mandated rules and the notion that it is reaffirming previously recognized constitutional rights. The dichotomy between a prophylactic rule and a constitutional right—when both came clothed in precisely the same language—was guaranteed to cause confusion. When *Miranda*’s paradox was added to *Wong Sun*’s Chinese puzzle, there was even greater complexity. The jurisdictional split over the application of the fruit of the poisonous tree doctrine to *Edwards*<sup>206</sup> violations was inevitable.

It is easy to lose sight of the big picture when lost in the intricacies of competing doctrines and complicated cases. Warren steeped himself in the literature of the fifth amendment before writing *Miranda*. Two of the quotes

200. *Id.* (quoting the language of the fifth and sixth amendments).

201. *Id.* at 465 n.35 (emphasis added).

202. *Id.* at 442.

203. For a short, elegant analysis of when the sixth amendment right to counsel attaches, see S. Smith, A Good Faith Exception to the Right to Counsel (May 1985) (unpublished manuscript).

204. *Miranda*, 384 U.S. at 477.

205. *Id.* at 470 (emphasis added).

206. *Edwards v. Arizona*, 451 U.S. 477 (1980).

Warren used in *Miranda* have relevance to the *Edwards* fruits issue. Warren quoted the Wickersham Commission Report:

[I]n the language of the present Lord Chancellor of England . . . "It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means." Not only does the use of the third degree involve a *flagrant violation of law by the officers of the law*, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, "It is a short cut and makes the police lazy and unenterprising."<sup>207</sup>

Earlier, in a section of *Miranda* concerned with the judicial role vis-à-vis the Constitution, Warren quoted from *Weems v. United States*.<sup>208</sup> "[The Constitution's] general principles would have little value and be converted by precedent into impotent and lifeless formulas [if judges failed to fulfill their roles]. *Rights declared in words might be lost in reality.*"<sup>209</sup>

Citing *Silverthorne*, Warren wrote in *Miranda*, "it was necessary in *Escobedo* . . . to insure . . . what was proclaimed in the Constitution had not become but a 'form of words,' in the hands of government officials. And it is in this spirit, *consistent with our role as judges*, that we adhere to the principles of *Escobedo* today."<sup>210</sup>

### B. "What About *Escobedo*?"<sup>211</sup>

*Escobedo*, as noted earlier, has been limited to its facts.<sup>212</sup> *Escobedo*, however, has not been overruled. *Escobedo*, despite its place of prominence in *Miranda*, has simply been overlooked. Even assuming arguendo that *Escobedo* must be limited to its facts, it makes the strongest possible ar-

207. *Miranda*, 384 U.S. at 447 (citing IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931) (Wickersham Commission Report) (emphasis added)). Ignoring a suspect's request for counsel is not the third degree, but it is a short cut nevertheless.

208. 217 U.S. 349, 373 (1910).

209. *Miranda*, 384 U.S. at 443 (citing *Weems*, 217 U.S. at 373 (emphasis added)).

210. *Id.* at 444 (citation omitted) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)) (emphasis added).

211. See discussion in 38 CRIM. L. REP. (BNA) 4096 (1985). Justice Marshall asked a government lawyer during oral argument in the then pending case of *Burbine v. Moran*, 753 F.2d 178 (1st Cir. 1985) (involving the attempt by a third party to assert a suspect's right to counsel without the suspect's knowledge, and the withholding from the suspect of information of that third party's attempt) whether *Escobedo* would be addressed by the government. The government lawyer answered that "*Escobedo* was a dead end." 38 CRIM. L. REP. (BNA) at 4096. Since *Escobedo* arguably stands for the proposition that the sixth amendment right to counsel attaches at the point custodial interrogation begins, regardless of whether that right is invoked by the suspect, *Escobedo* would per se be a dead end for the government's position. Maybe it is time for *Escobedo* to be resurrected.

212. See *supra* note 135 and accompanying text.

gument that the thing violated in an *Edwards* setting is nothing less than the sixth amendment right to counsel.

On the night of January 19, 1960, Escobedo's brother-in-law was shot and killed. Escobedo was arrested at 2:30 the next morning without a warrant, was interrogated, and released on a writ of habeas corpus at five the afternoon of the same day. The writ had been secured by Escobedo's lawyer. Escobedo had made no statement to the police.<sup>213</sup>

Another prisoner in custody subsequently identified Escobedo to police as the firer of the fatal shots. Escobedo was arrested a second time on January 30, 1960. Escobedo gave uncontradicted testimony at trial that "[the] detective[s] said they had us pretty well, up pretty tight, and we might as well admit to this crime." Escobedo refused the gambit; he testified that he told the detectives, "I am sorry but I would like to have advice from my lawyer."<sup>214</sup> Of critical importance for this Note's purposes, *Escobedo had not yet been formally charged*. The existing situation when Escobedo made his first request to see his lawyer was custodial interrogation.<sup>215</sup>

Escobedo, a 22-year-old male of Mexican descent, was then subjected to a long period of interrogation. *Escobedo's lawyer was at the police station*, and repeatedly asked to see his client. Escobedo himself repeatedly asked to see his lawyer. Escobedo's lawyer was told to go get another writ of habeas corpus. Escobedo was told that his lawyer "didn't want to see him."<sup>216</sup> Testimony indicated Escobedo was handcuffed in a standing position, had dark circles under his eyes, and was nervous, upset, and agitated because he had not slept properly in over a week.<sup>217</sup>

The police confronted Escobedo with the informant's claim that Escobedo had shot his brother-in-law. Escobedo said the informant was lying. Asked if he would repeat that to the informant, Escobedo replied, "yes."<sup>218</sup> The informant was brought into the room with Escobedo. Escobedo said, "I didn't shoot Manuel, you did it."<sup>219</sup> This was the first time Escobedo admitted any knowledge of the crime. Escobedo made further incriminating statements. The police then brought in an assistant state's attorney to take Escobedo's formal statement. At no time during the interrogation, nor during the taking of the formal statement, was Escobedo informed of his constitutional rights.<sup>220</sup> The issue certified to the Supreme Court was whether

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213. *Escobedo*, 378 U.S. at 479.

214. *Id.*

215. *Id.*

216. *Id.* at 480-81.

217. *Id.* at 482.

218. *Id.*

219. *Id.* at 483.

220. *Id.*

Escobedo's *sixth amendment right to counsel* had been violated in these circumstances.<sup>221</sup>

In a 5-4 decision, the Supreme Court held that Escobedo's constitutional sixth amendment right to counsel had been violated.

We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, [where Escobedo's lawyer was present at the police station] the accused must be permitted to consult with his lawyer.<sup>222</sup>

*Escobedo* adds two critical factors to the calculus of the issue under review in this Note. The first is the factor present in every *Edwards*-tainted violation. A person held in custody by the police asks for the assistance of counsel, and that request is denied, or, as the *Escobedo* opinion worded it, "the suspect has requested and been denied an opportunity to consult with his lawyer."<sup>223</sup> The more interesting factor is the *Escobedo* Court's holding that the moment the sixth amendment right to counsel attaches is not the moment when the formal arraignment or indictment occurs but is, instead, nothing more or less than the moment of custodial interrogation.<sup>224</sup> *Escobedo* teaches that once there is custodial interrogation, and a suspect asks the aid of a lawyer and the police refuse that request, the sixth amendment right to counsel has fully attached.<sup>225</sup> The *Escobedo* right to counsel, once invoked, is the full-blown constitutional sixth amendment right.

"The interrogation here was conducted before petitioner was formally indicted," Justice Goldberg wrote, "[b]ut in the context of this case, that fact should make no difference. . . . [Escobedo] had become the accused, and the purpose of the interrogation was to 'get him' to confess . . . despite his *constitutional right* not to do so."<sup>226</sup> Ruling that the sixth amendment counsel right attaches at the moment of custodial interrogation made all the sense in the world. "It would exalt form over substance," Goldberg later wrote, "to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder."<sup>227</sup> Professor Yale Kamisar has made the same point<sup>228</sup> in his

221. *Id.* at 479, 484.

222. *Id.* at 492.

223. *Id.* at 491.

224. *Id.* at 495.

225. *Id.* at 491.

226. *Id.* at 485 (emphasis added).

227. *Id.* at 486.

228. Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 211 (1980).

In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned (or, to update this rule in light of *Brewer v. Williams*, judicial proceedings have com-

discussion of *Brewer v. Williams*.<sup>229</sup> The moment of the attaching of the sixth amendment right to counsel should not be left to police—or state—manipulation. Formal charges can be delayed. The recognized rule in criminal procedure is that the right to counsel under the sixth amendment attaches whenever “the critical stage” takes place. In *Escobedo* the critical stage was moved up to custodial interrogation. “[The circumstance in *Escobedo*] was a stage surely as critical as was the arraignment in *Hamilton v. Alabama*.”<sup>230</sup>

The core of *Escobedo* is that a right must be given wide enough scope to ensure the effectiveness of that right. “[N]o meaningful distinction can be drawn between interrogation of an accused before and after formal indictment,”<sup>231</sup> Goldberg wrote for the *Escobedo* majority. It is hard to quarrel with the observation.

The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.<sup>232</sup>

Recent Supreme court decisions involving the sixth amendment, without disavowing *Escobedo*, have retreated from its finding that the right to counsel attaches at the moment of custodial interrogation, or have ignored that holding.<sup>233</sup>

Even Chief Justice Warren in *Miranda* failed to highlight this most important of *Escobedo*'s teachings. In pointedly reaffirming *Escobedo* in *Miranda*, and even trying to extend *Escobedo*'s logic, Warren lost sight of *Escobedo*'s most critical ruling. In the massiveness of the *Miranda* opinion, Warren only twice mentioned *Escobedo*'s—and, also, *Miranda*'s—most crucial fact. Too fine metaphorical distinctions—the supersubtle bifurcation between prophylactic and constitutional rights—obscured the brightness of *Escobedo*'s holding. In announcing its constitutionally suggested nonmandated bright-line rules, *Miranda* tarnished the bright-line rule *Escobedo* had announced less than two years earlier.

*Escobedo*'s was the brightest of all possible rules. There was a sixth amendment right to counsel which attached at the moment of custodial interrogation, and it came from the Constitution.<sup>234</sup> The question yet un-

menced). It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment (or the initiation of judicial proceedings) than he is an hour after . . . .

*Id.* This is a wonderfully provocative essay in a book devoted to fifth and sixth amendment problems. See also *id.* at 28.

229. 430 U.S. 387 (1977).

230. *Escobedo*, 378 U.S. at 486 (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961)).

231. *Escobedo*, 378 U.S. at 486.

232. *Id.* at 488.

233. See, e.g., *Brewer*, 430 U.S. 387; *infra* notes 256-82 and accompanying text.

234. *Escobedo*, 378 U.S. at 491.

answered, but raised by *Edwards*, is what impact a suspect's request for counsel has when the suspect, unlike *Escobedo*, has not yet secured a lawyer or the lawyer is not present at the police station.

### C. *Edwards*

In *Edwards v. Arizona*,<sup>235</sup> the Supreme Court once again took up the general issue of when the right to counsel attaches. Once again a suspect in custodial interrogation requested assistance of counsel, and the request was not honored by police.<sup>236</sup> *Edwards'* historical facts are cheek-and-jowl with the facts in *Escobedo* except that the suspect in *Edwards* did not yet have a lawyer. Two additional circumstances are also different. *Edwards* post-dated the Court's decision in *Miranda*; and the Court decided the case under the fifth amendment, although the sixth amendment right to counsel issue was also certified. For the purposes of this Note, the fundamental question *Edwards* raises is whether the reading of *Miranda's* warnings, at least until indictment or arraignment or formal judicial proceedings have begun, effectively blocks a suspect from his sixth amendment right to counsel when the suspect has no lawyer. The Court did find a fifth amendment right to counsel violation in *Edwards*.<sup>237</sup>

After *Edwards* there were two decisions out from the Supreme Court on the consequences of the police not honoring a suspect's invocation of his right to counsel. *Escobedo* held this was a full-fledged sixth amendment right.<sup>238</sup> *Edwards* found the right in the fifth.<sup>239</sup> Paradoxically, the *unwarned* defendant in an *Escobedo* situation may end up in a better position than the *warned* defendant in an *Edwards* setting. An *Escobedo* violation is a violation of constitutional rights.<sup>240</sup> By deciding *Edwards* under the fifth amendment, the Supreme Court left unclear once more whether the violated right was constitutional in nature, or merely prophylactic.<sup>241</sup>

On January 19, 1976, an arrest warrant was issued in Arizona against the defendant *Edwards* based on a complaint charging *Edwards* with robbery, burglary, and first-degree murder. *Edwards* was arrested the same day.<sup>242</sup> At the police station, *Edwards* was read his *Miranda* rights. *Edwards* said

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235. 451 U.S. 477.

236. *Id.* at 479.

237. *Id.* at 484-85.

238. See *Escobedo*, 378 U.S. at 491.

239. *Edwards*, 451 U.S. at 484-86.

240. See *Escobedo*, 378 U.S. at 491.

241. See *Edwards*, 451 U.S. at 485. This discussion in *Edwards* seems to indicate that both the rights to silence and counsel are procedural in the *Miranda* context, but that the right to counsel is more important than the right to silence. See *infra* note 254; see also *Michigan v. Mosley*, 423 U.S. 96 (1975).

242. *Edwards*, 451 U.S. at 478.

he understood his rights and was willing to be questioned. Just as in *Escobedo*, Edwards was told another suspect in custody had implicated him. Edwards denied involvement, gave a taped alibi statement, and tried to strike a deal.<sup>243</sup> An officer said he had no authority to make a deal, and gave Edwards the phone number of a county attorney. Edwards made a phone call, but hung up shortly thereafter. "I want an attorney before making a deal," Edwards said. Interrogation, as *Miranda* required, immediately ceased.<sup>244</sup>

The next morning two new detectives arrived at the jail and asked to see Edwards. The officers told Edwards they wanted to speak with him. Edwards said he did not want to talk to them; Edwards was told "he had" to talk. Edwards was again read his *Miranda* rights. Edwards asked to hear the tape of the custodial suspect who had implicated him. After hearing the tape, Edwards agreed to talk, but refused to have his own comments taped. Edwards then implicated himself. Edwards had not reasserted his right to counsel on the second day of interrogation.<sup>245</sup>

Except for the fact that Edwards did not yet have a lawyer and the interposition of the reading of the *Miranda* warnings, the facts in *Edwards* are essentially the same as those in *Escobedo*.<sup>246</sup> The Supreme Court in *Edwards* never once mentioned *Escobedo*, however. There is a good possibility the Court was simply deciding *Edwards* in light of its decision in *Michigan v. Mosley*.<sup>247</sup> In *Mosley* the Court had held that interrogation must cease after the right to silence under *Miranda* had been asserted. At an unspecified future time, though, the police could once again attempt to question a *Mosley* defendant. The Court in *Edwards* held the right to counsel required greater protection than the right to silence.<sup>248</sup>

The thrust of *Edwards* is not the scope of a suspect's rights once in custody, but the scope of permissible activity allowed the police in the interrogation process:

[A]nd we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his

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243. *Id.* at 478-79.

244. *Id.* at 479.

245. *Id.*

246. See *Escobedo*, 378 U.S. at 478-79; *supra* notes 211-34 and accompanying text.

247. 423 U.S. 96 (involving a second session of interrogation after the suspect had invoked his right to silence). Under *Mosley's* specific facts, the Court allowed the confession obtained during the second interrogation session into evidence.

248. *Edwards*, 451 U.S. at 484-85. The police are not allowed to initiate further communication with an *Edwards* suspect until the suspect has been provided a lawyer unless the suspect himself initiates the exchange. The *Edwards* right to counsel, otherwise never lapses. The *Mosley* right to silence on the other hand does not attach for all time once invoked by a defendant. If enough time passes the police are allowed to attempt to question the suspect again.



rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.<sup>249</sup>

The scope and source of the suspect's right to counsel was not fully explored in *Edwards*. That right came from the fifth amendment,<sup>250</sup> and was announced in *Miranda*.<sup>251</sup> The real inquiries in *Edwards* were: (1) whether Edwards or the police initiated further interrogation after Edwards asked for counsel; and (2) whether Edwards had knowingly and intelligently waived his right to counsel on day two after its invocation on day one.

The *Edwards* Court repeatedly emphasized, nevertheless, that the right to counsel, once invoked, was a special right.<sup>252</sup> Justice White, quoting *Fare v. Michael C.*<sup>253</sup> with approval, noted the Court in that case had "referred to *Miranda's* rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."<sup>254</sup> The difficulty for other courts trying to decide whether to apply *Wong Sun's* fruit of the poisonous tree doctrine to an *Edwards* violation is that *Edwards* does not explicitly distinguish between fifth amendment prophylactic and constitutional rights.

At one point in his opinion, Justice White did write, "the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards . . . ."<sup>255</sup> There is no mention of *Wong Sun* or *Nardone* or *Silverthorne*, however. In the context of *Miranda*, as this Note has earlier explained, a confession is always the first-generation fruit of the poison tree police refusal to honor the attempted invocation of the right to counsel.

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249. *Id.* (footnote omitted).

250. *Id.*

251. *Id.* at 484-85.

252. *Id.* at 485.

253. 442 U.S. 707 (1979).

254. *Edwards*, 451 U.S. at 485 (citing *Michael C.*, 442 U.S. at 719) (emphasis added). Trying to unpack the meaning of these cases is sometimes as difficult as reading the tax code. Retracing one's steps from *Edwards* through *Michael C.* back to *Miranda's* source waters, one finds this:

In *Carnley v. Cochran*, 369 U.S. 506, 513 . . . (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.

*Miranda*, 384 U.S. at 471. This comports perfectly with the constitutional scope of the right to counsel announced two years earlier in *Escobedo*. Of course, the *Escobedo* right came from the sixth amendment. This passage in *Miranda* clearly says the right to counsel under discussion is a fifth amendment right. The portions of *Miranda* which discuss the prophylactic nature of this right do not square as easily with this language. The solution might simply be that a constitutional right can simultaneously be a prophylactic right protecting another constitutional right.

255. *Edwards*, 451 U.S. at 485.

The language of *Edwards* seems to indicate the fruits doctrine of *Wong Sun* would apply to *Edwards* violations, but in the absence of a Supreme Court decision holding second-generation derivative evidence suppressible, the question remains open.

There seems no principled reason to favor the unwarned defendant under *Escobedo* who asserts his right to counsel from the warned defendant under *Edwards* and *Miranda* who asserts *his* right to counsel. An *Escobedo* defendant should not be constitutionally favored because counsel has already been secured and is present at the police station. The fruit of the poisonous tree doctrine should apply, or not apply, equally to both situations. The giving of the *Miranda* warnings, even if invoked, should not operate as a shield deflecting suspects from full assertion of their constitutional rights. Since the factual settings in both the fifth and sixth amendment settings are *virtually* identical, at least once the right to counsel has been asserted, the doctrinal consequences under the constitution ought to be the same.

#### D. The Sixth Amendment Counsel Right<sup>256</sup>

Once the sixth amendment counsel right attaches, the full scope of *Wong Sun's* fruit of the poisonous tree exclusionary rule theoretically applies. The famous "Christian burial speech" case of *Brewer v. Williams*<sup>257</sup> apparently answered the question whether the fruits doctrine fully applies once a court finds a sixth amendment right to counsel violation.

In *Brewer*, the defendant Robert Williams turned himself in to the police in Davenport, Iowa, on the advice of his lawyer in Des Moines. Williams had been accused of kidnapping a ten-year-old girl on Christmas Eve 1968 from the Des Moines YMCA.<sup>258</sup> He was later convicted in the Iowa state courts of murder.<sup>259</sup>

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256. The issue of the fruit of the poisonous tree doctrine and its application to *Miranda* right to counsel violations implicates fourth, fifth, and sixth amendment concerns. Among the leading sixth amendment cases are *Nix v. Williams*, 467 U.S. 431 (1984) (adopting the inevitable discovery exception to the exclusionary rule); *United States v. Henry*, 447 U.S. 264 (1980); *Rhode Island v. Innis*, 446 U.S. 291 (1980); and especially *Brewer v. Williams*, 430 U.S. 387 and *Massiah v. United States*, 377 U.S. 201 (1964). The Supreme Court recently reaffirmed the wide scope of the sixth amendment counsel right in *Maine v. Moulton*, 106 S. Ct. 477 (1985) (extending *Henry* to setting outside the police controlled atmosphere of the station-house). See also *Michigan v. Jackson*, 106 S. Ct. 1404 (1986); *Moran v. Burbine*, 106 S. Ct. 1135 (1986). Among the scholarly works helpful in the preparation of this Note were: George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478 (1967); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99; and Note, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit*, 41 BROOKLYN L. REV. 325 (1974).

257. 430 U.S. 387.

258. *Id.* at 390.

259. *Id.* at 389.

At the Davenport jail, Williams secured a second lawyer. Both lawyers advised Williams not to make a statement to police until he had been returned to Des Moines and had consulted again with his Des Moines lawyer. The Davenport police were aware of all of this.<sup>260</sup>

Before being driven back to Des Moines, Williams was arraigned before a Davenport judge.<sup>261</sup> The judge advised Williams of his *Miranda* rights. The day Williams was driven by two police officers back to Des Moines, he was once again advised of his *Miranda* rights.<sup>262</sup> On the snowy ride to Des Moines, Williams was urged to consider the miserable winter weather conditions and the possibility the girl's body might never be found, and the need to give her a " 'Christian burial.' " <sup>263</sup> Williams then implicated himself by both word and deed. Among other things, Williams led the two officers to the buried body.<sup>264</sup>

The Supreme Court decided *Brewer v. Williams* under the sixth amendment.<sup>265</sup> Although the facts of the case suggested *Miranda* could have been the basis for its decision, the Court chose to rely on *Massiah v. United States*<sup>266</sup> instead. The chief distinction between the fifth and sixth amendment rights to counsel, if there is such a distinction, is that the sixth amendment right automatically attaches:

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."<sup>267</sup>

The *Edwards* counsel right in contrast, and maybe even the *Escobedo* right, perhaps have to be asserted by the defendant. Under the *Massiah* doctrine, as exemplified in *Brewer v. Williams*, the attaching of the counsel right did not depend on its assertion.<sup>268</sup>

Having found a *Massiah* sixth amendment right, a court must apply two tests: First, was there a valid waiver of that right? The standard again is the *Johnson v. Zerbst* standard of " 'an intentional relinquishment or abandonment of a known right of privilege.' " <sup>269</sup> Second, under *Massiah*, were the defendant's incriminating statements " 'deliberately elicited' " <sup>270</sup>

260. *Id.* at 390-91.

261. *Id.* at 391.

262. *Id.*

263. *Id.* at 392-93.

264. *Id.*

265. *Id.* at 398.

266. 377 U.S. 201.

267. *Brewer*, 430 U.S. at 398 (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

268. See *Brewer*, 430 U.S. 387; *Massiah*, 377 U.S. 201.

269. *Brewer*, 430 U.S. at 404 (citing *Johnson v. Zerbst*, 304 U.S. at 464).

270. *Massiah*, 377 U.S. at 206. In *Massiah*, Justice Stewart wrote, "We hold that the petitioner

In *Brewer*, the Court found no waiver of the right to counsel, and that Detective Leaming's speech had deliberately elicited the incriminating evidence from Williams.<sup>271</sup> "[S]o clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned."<sup>272</sup>

The Supreme Court affirmed the Court of Appeals for the Eighth Circuit's decision that Williams' sixth amendment rights had been violated.<sup>273</sup> Both his statements to Detective Leaming and evidence of finding the body were suppressed.<sup>274</sup>

This seems to be a classic application of the fruit of the poisonous tree doctrine to both first-generation and second-generation derivative evidence. Nothing is ever simple in criminal procedure, however. After affirming the judgement of the Eighth Circuit, Justice Stewart, writing for the Court, attached a footnote:

The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as 'fruit of the poisonous tree.'" We, too, have no occasion to address this issue. . . . While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.<sup>275</sup>

The essence of Justice Stewart's footnote twelve in *Brewer* is not that the fruits doctrine does not apply in the sixth amendment context, but that the harshness of that doctrine might be softened a little by the creation of another device which would supplement the independent source and attenuation components of *Wong Sun's* fruit of the poisonous tree doctrine.<sup>276</sup>

The case returned to the Iowa state courts, and both the Iowa Supreme Court and the United States District Court affirmed Williams' second conviction under the inevitable discovery exception to the exclusionary rule.<sup>277</sup> The Supreme Court affirmed the conviction and the new exception in *Nix v. Williams*.<sup>278</sup>

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was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel." *Id.* (emphasis added).

271. *Brewer*, 430 U.S. at 405.

272. *Id.* at 406.

273. *Id.* at 405.

274. *Id.* The Supreme Court actually affirmed the suspension of the issuance of the writ of habeas corpus which would have set Williams free.

275. *Id.* at 406-07 n.12 (citation omitted).

276. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

277. See *Nix*, 467 U.S. 431.

278. *Id.*

After *Nix v. Williams* there could no longer be any doubt that the fruit of the poisonous tree doctrine at least sometimes applied to violations of fourth, fifth, and sixth amendment rights. As the Court observed:

Although *Silverthorne* and *Wong Sun* involved violations of the Fourth Amendment, the "fruit of the Poisonous tree" doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, see *United States v. Wade*,<sup>17791</sup> . . . as well as of the Fifth Amendment.<sup>280</sup>

The adoption of the inevitable discovery exception was calculated to even the balance of interests at issue when applying the fruits doctrine to violations of constitutional rights. The fruits doctrine had been created by the Supreme Court in *Silverthorne* and its progeny to give full effect to the exclusionary rule announced by *Weeks*, and *Weeks* had announced its sanction to give effective force to constitutional fourth amendment rights. Strict application of the fruits doctrine, however, could at times produce unwanted results. In *Brewer v. Williams*, for example, there was only one dead body, and that body could only be found once. Since the body would have been found without the police misconduct, suppression of the body would have shifted the balance too far in the defendant's favor.

The Court had invented the doctrine which had made the *corpus delicti* and all evidence relating to that body disappear.<sup>281</sup> The law, after the requisite showing had been made,<sup>282</sup> made the body reappear. The fruits doctrine was supplemented by the inevitable discovery exception.

A doctrine one Supreme Court Justice had called a "chinese puzzle" was touched by another Supreme Court Justice's sleight-of-hand. The fruit of the poisonous tree doctrine now offers the possibility that constructive inevitably discovered evidence can be admissible. This is simply a reasonable elaboration and refinement of existing doctrine.

The fruit of the poisonous tree doctrine did apply to fourth, fifth and sixth amendment constitutional violations. The open question was still whether an *Edwards* violation was constitutional or not.

## V. CONCLUSION

A person is suspected of having committed a crime. The police arrest her. No formal charges are filed. There is no preliminary hearing, indictment,

279. 388 U.S. 218 (1967).

280. *Nix*, 467 U.S. at 442 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) in the fifth amendment context).

281. Theoretically, this is the practical effect of the full application of *Silverthorne's* and *Wong Sun's* fruits doctrine.

282. See *Nix*, 467 U.S. at 444-45 n.5.

information, or arraignment.<sup>283</sup> The woman is simply being detained by the police under a valid arrest warrant, or otherwise. From the point of view of the police, there is no reason to file formal charges until they secure more information from the woman that would justify the institution of judicial proceedings.

The police desire to question the woman. She is properly advised of all four of her *Miranda* rights. The woman says she understands her rights, and asks for the help of a lawyer. The police refuse to honor the request. The woman is confronted with an informant who implicates her. The woman reacts to this deliberate elicitation and incriminates herself. The woman then gives a fuller statement. The police have both a confession and the evidence developed by taking advantage of information from the confession. The stage of the criminal process has not passed beyond custodial interrogation, and yet the woman's fate is sealed unless the derivative evidence is excluded along with her confession.

Had judicial proceedings begun—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"<sup>284</sup>—the woman's sixth amendment right to counsel would have been deemed to have attached at law, and without the need for that right's assertion; or, if the woman's lawyer were at the police station and she asked to see counsel, *Escobedo* teaches that the woman's sixth amendment right would also have attached. One of the *Miranda* warnings tells the woman she has the right to counsel. The woman asserts that right. *Edwards* held that the woman's fifth amendment right to counsel has now attached. The question is whether the scope of the *Edwards* right to counsel should be narrower than the general sixth amendment right to counsel.

The history of the exclusionary rule from *Weeks v. United States*<sup>285</sup> to *Mapp v. Ohio*<sup>286</sup> has some bearing on this issue. *Wolf v. Colorado*<sup>287</sup> held that the fourth amendment is applicable to the states through the fourteenth, but *Wolf* specifically failed to impose *Weeks*' exclusionary remedy on the state courts.<sup>288</sup> *Mapp* rectified the oversight:

[W]e can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.<sup>289</sup>

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283. See *supra* note 267 and accompanying text.

284. *Id.*

285. 232 U.S. 383 (1914).

286. 367 U.S. 643 (1961).

287. 338 U.S. 25 (1949).

288. *Id.*

289. *Mapp*, 367 U.S. at 660. See also *United States v. Crews*, 445 U.S. 463, 470 (1980).  
 "The exclusionary prohibition extends as well to the indirect as the direct products of such

The fruit of the poisonous tree doctrine, itself an extension of the *Weeks* doctrine, should apply to *Edwards* right to counsel violations for the same reason. *Elstad* should be read to mean that the fruits doctrine does not apply to *procedural Miranda* violations, but does apply to constitutional violations.

The police should not be doubly encouraged to manipulate the law to evade the exclusionary sanction of constitutional doctrines. By allowing second-generation derivative evidence to be admissible, courts encourage the police in two wrongs. They invite the police to disregard a custodial suspect's request for the aid of counsel. The confession itself under *Miranda* will be per se inadmissible. The second-generation derivative evidence may not be as damaging to the suspect, but, in the eyes of the police, it is better than no evidence at all. The purpose of the exclusionary sanction is to deter improper police behavior. Even *Tucker* suggests the behavior of the police at issue in *Edwards* is the very behavior to which the exclusionary rule of the fruit of the poisonous tree doctrine should apply.<sup>290</sup> Beyond that, the police are encouraged to delay the institution of formal judicial proceedings. There is no reason for the courts to grant the police the power to delay the attaching of a suspect's sixth amendment right to counsel.

*Escobedo* should be vigorously reapplied. The logical time for the sixth amendment right to attach is the moment when custodial interrogation begins. *Miranda* would have more force in logic, and at law, if it were interpreted by the Supreme Court to have incorporated that portion of *Escobedo*'s holding. Subsequent sixth amendment cases have not departed from *Escobedo*. They have stated only that the sixth amendment right to counsel attaches *at least* at the institution of judicial proceedings.

*Miranda*'s distinction between prophylactic and constitutional rights is a difficult concept. When interpreted properly, however, as both the *Tucker* and *Elstad* Courts interpreted it, the distinction makes sense. A right to be read a set of rules differs from the rights those rules represent. Various courts have held post-*Miranda* that the rights to silence and counsel—both as read, and when invoked—are merely prophylactic devices protecting the fifth amendment right to be free from compelled self-incrimination. The better weight of authority is that the rights to silence and counsel are constitutional rights themselves.<sup>291</sup> The use of one constitutional right to

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invasions.' . . . As subsequent cases have confirmed, the exclusionary sanction applies to any 'fruits' of a constitutional violation . . . ." *Crews*, 445 U.S. at 470 (citing *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)).

290. *Cf. Michigan v. Tucker*, 417 U.S. 433, 438 (1974).

291. Though beyond the scope of this Note, the fruits doctrine should be equally applicable to police violations of a suspect's attempt to invoke the right to silence. This Note has focused on the sixth and fifth amendment rights to counsel because the United States Supreme Court has seemed more protective of the counsel right than of the right to silence in the cases decided thus far.

protect another constitutional right should not make the first constitutional right any less worthy of protection when that right is violated.

The fruit of the poisonous tree doctrine is the most flexible of judicially-created devices. It is utilized by courts to ensure that the scope of constitutional rights is wide enough to be effective. Refusal by the police to honor a suspect's invocation of the right to counsel in an *Edwards* setting is indistinguishable in principle from the same refusal in *Escobedo*. Constitutionally, the two fact patterns should be treated the same. *Escobedo's* is an explicit sixth amendment violation. Whether an *Edwards* violation is called a fifth or sixth amendment violation should be immaterial. The interposition of the reading of *Miranda's* prophylactic rules should not change a thing. The same consequences should attach. The fruit of the poisonous tree doctrine should apply to both situations.

The right to counsel at issue in both cases is the same. At the very least, once invoked, the courts should reaffirm the earlier Supreme Court holding that this right to counsel is a constitutional right. The fruit of the poisonous tree doctrine, especially as applied in *Nix v. Williams*,<sup>292</sup> gives courts wide enough latitude to accommodate any unusual circumstances. The doctrinal elements of independent source, attenuation, and inevitable discovery, as well as the general voluntariness inquiry, are adequate devices to allow courts to use their discretion in deciding whether or not to exclude second-generation derivative evidence after an *Edwards* violation.

Saying the fruit of the poisonous tree doctrine applies to *Edwards* violations does not mean all second-generation derivative evidence will automatically be inadmissible. Only evidence that comes from police exploitation or police illegality should be inadmissible. In this calculus of criminal procedure, the character of the police impropriety will be a factor of varying weight. The more deliberate, knowing and willful the police illegality, the more appropriate the use of the fruit of the poisonous tree's exclusionary sanction will be. It is a simple thing, though, to honor an *Edwards* or *Escobedo* request for counsel. Any justification offered by the police for failure to honor that request, or any claim that the invocation of the right was later waived, should be viewed skeptically by the courts. The "heavy burden" on the government to show a knowing and intelligent waiver under *Johnson v. Zerbst* is sufficient.<sup>293</sup>

The bright-line rules *Miranda v. Arizona* announced, the so-called prophylactic safeguards, should not be allowed to block the effective assertion

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292. 467 U.S. 431 (1984).

293. For a clear and excellent discussion contrasting a bright-line model with a quasi-tort model in the fourth amendment context, see Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985). The same approach could be used in the fifth and sixth amendment right-to-counsel settings.



of other rights, constitutional in nature, which *Miranda* reaffirmed. Metaphorical devices should not be allowed to obscure and confuse thought. The right to counsel, once invoked by a suspect in a custodial interrogation setting whatever its source, is more than a mere procedural device. The courts should closely examine deliberate *Edwards* violations by the police. *Wong Sun's* fruit of the poisonous tree doctrine should apply with its full and reasonable vigor to second generation derivative evidence after an *Edwards* violation.

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