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Oregon v. Elstad: THE CAT IS NOT OUT OF THE BAG

In an opinion harshly criticized by dissenting Justices Brennan, Marshall, and Stevens, Justice O'Connor and the Supreme Court have delivered a new approach to the fifth amendment's self-incrimination clause. Though fairly narrow, the holding that a subsequent confession gained after *Miranda* warnings is valid even where a previous uncoerced confession was obtained from a suspect absent *Miranda* rights discards well-founded doctrines which for years have buttressed the *Miranda* rationale. As the dissenters intimate, it is more the reasoning than the actual holding of the Court which fosters a nervous reaction.

Oregon v. Elstad, 105 S.Ct. 1285 (1985), involved an 18-year-old accused of burglarizing his neighbor's home. After being contacted by a witness to the burglary, the sheriff's office dispatched two officers to the home of Michael Elstad with a warrant for his arrest. Upon arriving at the home, both officers were escorted to Elstad's bedroom by his mother. After dressing, Elstad accompanied them into the living room, sat down with one of the officers, and following a brief discussion of the burglary, confessed to the crime. His *Miranda* rights had not been given. Approximately one hour after reaching the sheriff's headquarters, Elstad was given his *Miranda* rights, which he subsequently waived. He then gave a full statement confessing to the burglary.

The trial court found Elstad guilty of burglary. On appeal, that decision was reversed on the grounds that the defendant's inadmissible earlier confession "tainted" the later confession which occurred after the defendant was advised of his *Miranda* rights. *Oregon v. Elstad*, 61 Ore. App. 673, 658 P.2d 552 (1983). In the words of the court, "the cat was sufficiently out of the bag to exert a coercive impact on [the respondent's] later admission." *Id.* at 678, 658 P.2d at 555. The Supreme Court granted certiorari to consider whether the self-incrimination clause of the fifth amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights solely because the police had obtained an earlier voluntary admission without warnings from the defendant.

In her opinion, Justice O'Connor suggests that, "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" is not enough to taint a subsequent voluntary and informed waiver. *Elstad*, 105 S.Ct. at 1293. The

counter argument to this coercion-based analysis was espoused in *U.S. v. Bayer*, 331 U.S. 532 (1947).

After the accused has once let the cat out of the bag by confessing, 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, the secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first.

Id. at 540-41.

Until *Elstad*, the state had the burden of showing that the lack of a warning did not taint subsequently obtained evidence. See *Alderman v. United States*, 594 U.S. 165 (1969). *Elstad* changes this and seems to have placed the burden on the defendant. Justice Brennan explains, "the Court today appears to adopt a 'go ahead and try to prove it' posture toward citizens whose fifth amendment *Miranda* rights have been violated, an attitude that marks a sharp break from the Court's traditional approach to official lawlessness." *Elstad*, 105 S.Ct. at 1312.

— Tom Swisher

Archer v. Archer: PROFESSIONAL DEGREE IS NOT MARITAL PROPERTY

In *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985), the Maryland Court of Appeals joined a majority of jurisdictions and held that professional degrees and licenses earned by a spouse during the marriage are not marital property and, therefore, are not subject to a monetary award. MD. FAM. LAW CODE ANN. § 8-205 (1984).

The court recognizes a broad definition of "property," embracing everything which has exchangeable value or goes to make up a person's worth. Nevertheless, the court held a professional degree to be a mere "expectancy of future enhanced income," "an intellectual attainment," and not a present property interest.

The parties to the litigation, Jeanne and Thomas Archer, were married in 1977 after Thomas Archer's first year of medical school. At that time, Jeanne Archer was pursuing an undergraduate degree but left school and began to work full-time. During their marriage, Jeanne Archer worked and had two children and Thomas Archer attended medical school. Thomas Archer received medical school expenses, a monthly stipend and other monies from the United States Navy. Citing recent Maryland court decisions, the court stated that the Family Law Article requires that non-monetary contributions should be recognized in determining the acquisition of marital property. Careful consideration should be given to both monetary and non-monetary contribution by the spouses so that property interests can be fairly and equitably adjusted.

The appellant, Jeanne Archer, argued that marital property defined in the Family Law Article as "the property, however titled, acquired by one or both of the parties during marriage" should be liberally construed and include medical degrees or licenses in order to effect the broad remedial purposes of the Act. However, the Maryland Court of Appeals rejected this view.

The court seemed to adopt the reasoning of *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978), which held that an advanced degree or professional license lacks the traditional attri-

