What's Done is Done:[1] Recent Developments in Self-Incrimination Law

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Introduction

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by the negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "the exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation.[2]

In making such a bold statement in the plurality opinion in *United States v. Patane*,[3] Justice Thomas attempted to shut the door on the unresolved issue of whether the fruit of the poisonous tree doctrine[4] applies to evidence derived from an unwarned, yet voluntary, statement.[5] According to the *Patane* plurality, an unwarned, yet voluntary, statement is not a poisonous tree.[6] Therefore, its fruit should not be excluded as tainted in a criminal trial.[7] What's done is done and the complete remedy for a *Miranda* violation is the exclusion of the unwarned statement itself[8]—any further extension of the Fifth Amendment's automatic exclusionary rule is unnecessary and unjustified.[9]

Patane is one of five Supreme Court cases decided last year in self–incrimination law.[10] Only one of these cases—*Fellers v. United States*[11]—was decided by a unanimous court. The other four cases, the Supreme Court decided by 5-4 majorities, two of which involved plurality opinions.[12] Furthermore, these two plurality opinions, released on the same day,[13] pushed the envelope in the area of self-incrimination law. In one case, *Missouri v. Seibert*, the plurality established a new standard for determining the admissibility of statements taken after *Miranda* violations.[14] In the other case, *Patane*, a different plurality made the bold assertion that police violate neither the Constitution nor the *Miranda* rule itself when they merely fail to warn.[15]

The military courts also decided numerous cases in the area of self-incrimination law last year. Unlike the Supreme Court cases, none of these military cases established new law. Rather, the military courts simply applied the recognized rule of law to the issue. Most of these cases involved the admissibility of properly warned statements that are obtained following

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[1] *Cf.* WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 2 ("Things without all remedy. Should be without regard: what's done is done.").

[2] United States v. Patane, 124 S. Ct. 2620, 2629 (2004).

[3] *Id.*

[4] *See* Wong Sun v. United States, 371 U.S. 471 (1963) (introducing the "fruit of the poisonous tree" doctrine and applying it to the Fourth Amendment). The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV.

[5] *See* Lieutenant Colonel David H. Robertson, *Self-Incrimination: Big Changes in the Wind*, ARMY LAW., May 2004, at 44-46 (providing a general overview of the admissibility of derivative evidence resulting from *Miranda* violations).

[6] *Patane*, 124 S. Ct. at 2630.

[7] *Id.* at 2624.

[8] In *Miranda*, the Supreme Court held that prior to any custodial interrogation, the police must warn a suspect that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. If the police do not administer these rights warnings, any subsequent confession is *per se* involuntary and, therefore, inadmissible in court. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[9] *Patane*, 124 S. Ct. at 2630.

[10] Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, et al., 54 U.S. 177 (2004); Missouri v. Seibert, 124 S. Ct. 2601 (2004); Yarborough v. Alvarado, 541 U.S. 652 (2004); Fellers v. United States, 540 U.S. 519 (2004).

[11] *Fellers*, 540 U.S. at 519.

[12] *See* Missouri v. Seibert, 124 S. Ct. 2601 (2004) (plurality opinion); United States v. Patane, 124 S. Ct. 2620, 2629 (2004) (plurality opinion).

[13] The Court decided both *Seibert* and *Patane* on 28 June 2004.

[14] *Seibert*, 124 S. Ct. at 2601.

[15] *Patane*, 124 S. Ct. at 2629.

a statement taken in violation of Article 31,[16] Uniform Code of Military Justice (UCMJ), the Fifth Amendment,[17] or the voluntariness doctrine.[18]

This article aims to assist the military practitioner in evaluating the new developments in self-incrimination law. Because these cases involve various aspects of self-incrimination law, this article first provides a brief overview of self-incrimination law. This overview outlines the basic framework military practitioners should use when evaluating any self-incrimination issue in the military. The article then proceeds to review each of the five Supreme Court cases and the significant military cases in the area of self-incrimination law last term.

Self-Incrimination Law

In the military justice system, the area of self-incrimination law encompasses Article 31, UCMJ, the Fifth and Sixth Amendments,[19] and the voluntariness doctrine.[20] Each source of law provides unique protections triggered by distinct events. Therefore, when analyzing a self-incrimination issue, it is imperative that the practitioner categorize the analysis.[21] First, determine the relevant source(s) of law. Next, evaluate the situation and decide if the protections afforded under the source of law have been triggered. If so, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law and, therefore, requires several steps of analysis. The confession or admission is admissible when the rights afforded under each source of applicable law have been observed.[22] If those rights have been violated, however, the statement will be inadmissible unless one of the limited exceptions applies.[23] Furthermore, the practitioner must evaluate the admissibility of any evidence derived from an inadmissible statement.

Scope of Protections

The privilege against self-incrimination under the Fifth Amendment and Article 31, UCMJ, applies only to evidence that is testimonial, communicative, and incriminating in nature.[24] Consequently, oral and written statements are protected.[25] Furthermore, verbal acts are protected.[26] Physical characteristics, such as bodily fluids[27] and handwriting samples,[28] are not protected.

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[16] UCMJ art. 31(b) (2002). Article 31(b) states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

[17] U.S. CONST. amend. V. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

[18] The voluntariness doctrine embraces the common law voluntariness, due process voluntariness, and Article 31(d). *See* Captain Frederic I. Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) (detailing historical account of the voluntariness doctrine).

[19] U.S. CONST. amend VI. The Sixth Amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id*.

[20] *See* Lederer, *supra* note 18, at 67.

[21] *See generally* Lieutenant Colonel David H. Robertson, *Bless Me Father For I Have Sinned: A Year in Self-Incrimination Law*, ARMY LAW., Apr./May 2003, at 116-18.

[22] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(a) (2002) [hereinafter MCM].

[23] *Id*.

[24] *See* United States v. Hubbell, 530 U.S. 27 (2000); *see also* United States v. Williams, 23 M.J. 362 (C.M.A. 1987).

[25] *See* Pennsylvania v. Muniz, 496 U.S. 582 (1990) ("Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component.").

[26] *See Hubbell*, 530 U.S. at 27.

[27] Schmerber v. California, 384 U.S. 263 (1967) (holding that blood samples are not protected); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (holding urine samples are not protected); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980) (holding that blood samples are not protected).

[28] Gilbert v. California, 388 U.S. 263 (1967); United States v. Harden, 18 M.J. 81 (C.M.A. 1984).

In 2004, the Supreme Court and the Army Court of Criminal Appeals (ACCA) decided cases addressing the scope of protections against self-incrimination. In *Hiibel v. Sixth Judicial District Court of Nevada*,[29] the Supreme Court determined that, under most circumstances, a person's identity is not protected under the Fifth Amendment; therefore, it upheld a Nevada "stop and identify" statute[30] requiring a person to identify himself during the course of a valid *Terry*[31] stop. In *United States v. Hammond*, the ACCA found that the requirement under Article 134, UCMJ,[32] for a soldier to remain at the scene of an accident does not violate the protections afforded under either Article 31 or the Fifth Amendment.[33]

In *Hiibel*, someone called the sheriff's department to report seeing a man assault a woman in a truck[34] Responding to this report, a deputy sheriff arrived at the scene to find Hiibel standing by a truck, with a young woman inside.[35] The officer observed skid marks behind the truck, leading him to believe that the truck had come to a sudden stop.[36] He also observed that Hiibel appeared to be intoxicated.[37] After explaining to Hiibel that he was investigating a reported fight, the officer asked for proof of identity from Hiibel eleven separate times, warning Hiibbel that he would arrest him if he did not comply.[38] Hiibel refused each request and taunted the officer "by placing his hands behind his back and telling the officer to arrest him and take him to jail."[39] The officer then arrested Hiibel for violating a Nevada statute requiring individuals to identify themselves to officers investigating criminal activity.[40]

Convicted for violating the "stop and identify" statute, Hiibel challenged his conviction under the Fourth[41] and Fifth Amendments.[42] After determining that neither the officer's conduct nor the Nevada statute violated the Fourth Amendment, the Court turned its attention to the self-incrimination issue raised by Hiibel.[43]

The Court first noted that the Self-Incrimination Clause of the Fifth Amendment only protects communications that are "testimonial, incriminating, and compelled."[44] For a communication to qualify as incriminating, the witness must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used.[45] Providing personal identification is normally insignificant, the Court reasoned, and would be incriminating in only the most unusual circumstances.[46] In this case, Hiibel failed to show that his refusal to comply with the

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[29] Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, et al., 124 S. Ct. 2451 (2004).

[30] *Id.* at 2455-6. NEV. REV. STAT. (NRS) § 171.123 (2004) provides in relevant part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
> . . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Id.

[31] Terry v. Ohio, 392 U.S. 1 (1968) (holding that a police officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and investigate further).

[32] UCMJ art. 134 (2002) (fleeing scene of accident).

[33] United States v. Hammond, 60 M.J. 512, 513 (Army Ct. Crim. App. 2004).

[34] *Hiibel*, 124 S. Ct. at 2455.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id*.

[41] U.S. CONST. amend. IV. The Fourth Amendment states, "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

[42] *Hiibel*, 124 S. Ct. at 2460.

[43] *Id*.

[44] *Id*. (citing United States v. Hubbell, 530 U.S. 27 (2000)).

[45] *Id*. at 2461.

[46] *Id*. The Supreme Court noted that "even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." *Id*.

officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him.[47] Finding that Hiibel's identity was not incriminating and, therefore, the disclosure of which was not protected under the Fifth Amendment, the Court upheld Hiibel's conviction.[48]

The case's ultimate significance does not lie in the Supreme Court's specific holding that Hiibel's identity was not protected under these circumstances. Rather, this case is significant because the Court refused to hold that a person's identity is *per se* outside the scope of Fifth Amendment protections.[49] First, the Court declined to resolve the case on the basis that a person's identity is nontestimonial and, thus, always outside the scope of the privilege against self-incrimination.[50] The Court noted instead that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" and that "stating one's name may qualify as an assertion of fact relating to identity."[51] In other words, furnishing one's identity could qualify as both communicative and testimonial. Second, the Court carefully limited the reach of its decision by focusing on the lack of reasonable danger of incrimination in this particular case.[52] Thus, the Court concluded its opinion by leaving open the possibility of a case arising when requiring an individual to furnish identification would lead to evidence needed to convict the individual of a separate offense and, therefore, be protected by the Fifth Amendment.[53]

The Army court addressed a similar issue in *United States v. Hammond*.[54] In this case, Specialist Hammond was driving with his wife on Fort Gordon, Georgia. Specialist Hammond and his wife began to fight, and as he pulled to the side of the road, his wife jumped out and rolled free of the moving vehicle.[55] Specialist Hammond turned around, accelerated to approximately thirty-five miles per hour, hit his wife, and fled the scene.[56] Specialist Hammond was convicted of, among other things, leaving the scene of a collision in violation of Article 134, UCMJ.[57]

Reasoning that any requirement for him to remain at the scene would "necessarily compel incriminating responses," Hammond argued that punishing him for fleeing the scene of the collision violated his Fifth Amendment privilege against self-incrimination and his Article 31, UCMJ, rights.[58] The ACCA disagreed, affirming Hammond's conviction.[59] The Army court first looked to the Supreme Court's decision in *California v. Byers*,[60] which addressed a California "hit and run" statute requiring those involved in car accidents to stop and identify themselves.[61] In that case, a plurality concluded that revealing one's name in such circumstances is not, by itself, incriminating.[62] Justice Harlan, concurring in judgment, stated that "the statute did not violate the Fifth Amendment because it had the 'noncriminal governmental purpose' of gathering information to ensure financial responsibility for accidents, self-reporting was a necessary means of securing the information, and minimal disclosure was required."[63]

Next, the ACCA looked to the *United States v. Heyward* decision,[64] a case in which the Court of Military Appeals (CMA)[65] held that an otherwise valid Air Force regulation requiring its members to report drug abuse of other members

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[47] *Id*.

[48] *Id*.

[49] *Id*. at 2460.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 2461.

[53] *Id*.

[54] 60 M.J. 512 (Army Ct. Crim. App. 2004).

[55] *Id.* at 514.

[56] *Id.*

[57] *Id*.

[58] *Id*. at 517.

[59] *Id.* at 520.

[60] 402 U.S. 424, 425 (1971) (plurality opinion).

[61] *Hammond,* 60 M.J. at 517.

[62] The *Byers* plurality explained: "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence." *Id.* (quoting *Byers*, 402 U.S. at 434).

[63] *Id*. (quoting *Byers*, 402 U.S. at 440, 458).

[64] 22 M.J. 35 (C.M.A. 1986).

violated the privilege against self-incrimination when applied to members who are also using drugs at the time the duty to report arises.[66] In *Heyward*, the CMA distinguished *Byers* because, unlike the California "hit and run" statute, the "drug reporting requirement was directed at an 'essentially criminal area of inquiry' and that disclosure of the drug use had a more significant 'incriminating potential' than, for example, merely staying at the scene of an accident."[67] The CMA used a balancing test between the "important governmental purpose in securing . . . information"[68] and a servicemember's privilege against self-incrimination.[69]

Applying this balancing test in *Hammond*, the Army court found that the requirement of stopping and identifying oneself at the scene of an accident does not implicate the privilege against self-incrimination in the same manner as in *Heyward*.[70] The court pointed out that "although staying at the scene 'may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence.'"[71] Thus, the ACCA held that Hammond's conviction violated neither the Fifth Amendment nor Article 31.[72]

What do *Hiibel* and *Hammond* mean for the practitioner? Essentially, they mean that under typical situations, "hit and run" and "stop and identify" statutes do not violate an individual's privilege against self-incrimination. Both courts, however, left the door open for those atypical cases for advocates to distinguish. The scope of protections analysis remains the same: if evidence is testimonial, communicative, and directly incriminating in nature, then the privilege against self-incrimination, under both the Fifth Amendment and Article 31, applies.

The *Miranda* Trigger: Custodial Interrogation

Custodial interrogation triggers the requirement for *Miranda* warnings, because of "the compulsion inherent in custodial surroundings."[73] The test for custody is an objective one determined from the perspective of the person being interrogated: Would a reasonable person feel that they were in custody or deprived of movement in any significant way?[74] The test for interrogation is also an objective one, but is determined from the perspective of the interrogator: Would a reasonable interrogator view his words or actions as likely to elicit an incriminating response?[75]

The Supreme Court addressed the specific issue of determining when someone is in custody in *Yarborough v. Alvarado*.[76] In this case, Alvarado, five months short of his eighteenth birthday, was at a Los Angeles County mall with a group of teenagers.[77] One of the others in the group, Paul Soto, decided to steal a truck and Alvarado agreed to assist him.[78]

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[65] The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces effective 5 October 1994.

[66] *Hammond*, 60 M.J. at 517.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. (quoting California v. Byers, 402 U.S. 424, 434 (1971)).

[72] *Id*.

[73] Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).

[74] Berkemer v. McCarty, 468 U.S. 420 (1984). In *Thompson v. Keohane*, the Supreme Court further elaborated on this objective test:

> Two discrete inquiries are essential to the [custody] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was the formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

516 U.S. 99, 112 (1996).

[75] Rhode Island v. Innis, 446 U.S. 291 (1980). Note that the definition of interrogation is the same for both Fifth Amendment purposes and Article 31 purposes. *See infra* note 106.

[76] Yarborough v. Alvarado, 541 U.S. 652, 660 (2004).

[77] *Id.* at 656.

[78] *Id*.

When the driver refused Soto's demands for money and the keys to the truck, Soto shot and killed the driver.[79] Alvarado helped Soto hide his gun.[80]

About a month later, the lead detective in the murder investigation contacted Alvarado's mother and informed her that she wished to speak with her son.[81] Alvarado's parents took him to the police station and waited in the lobby while the detective took Alvarado to a separate room.[82] The detective interviewed Alvarado for approximately two hours, but never informed him of his *Miranda* rights.[83] During this two hour recorded interview, Alvarado eventually admitted to his involvement in the attempted robbery and murder.[84] Although the detective never told Alvarado during the course of the interview that he was free to leave, she offered him two breaks, which he declined, and after the interview she returned him to his parents, who drove him home.[85]

At Alvarado's trial for murder and attempted robbery, the court denied his motion to suppress his admissions to the detective, holding that the interview was noncustodial.[86] In affirming Alvarado's conviction, the state appellate court ruled that Alvarado had not been in custody during the interview; therefore, *Miranda* warnings were not required.[87] Alvarado subsequently filed a writ for habeas relief in federal district court under the Antiterrorism and Effective Death Penalty Act of 1996,[88] which authorizes a federal court to grant habeas relief when a state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States."[89] Although the federal district court agreed with the state court, the Ninth Circuit Court of Appeals reversed, ruling that the state court unreasonably applied clearly established law when it held that Alvarado was not in custody for *Miranda* purposes.[90] The Ninth Circuit held that Alvarado's age and experience must be considered for the *Miranda* custodial inquiry and that it was "simply unreasonable to conclude that a reasonable seventeen-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave."[91]

The Supreme Court reversed the Ninth Circuit.[92] The Court noted that the facts of this case could lead fair-minded jurists to disagree over whether Alvarado was "in custody" for Miranda purposes.[93] Facts supporting the conclusion that he was in custody were: (1) police asked Alvarado's parents to bring him in for questioning, but never obtained his direct consent for the interview; (2) police never informed Alvarado that he was free to leave; (3) police refused the parents' request to be present during the interrogation; and (4) the interrogation lasted two hours.[94] Facts supporting the conclusion that Alvarado was not in custody were: (1) police did not bring him to the station; (2) police did not threaten him with arrest and prosecution if he did not cooperate, instead they appealed to his interest in being truthful and helpful; (3) Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief; (4) during the interview, police primarily focused on the culpability of Alvarado's accomplice; (5) twice, police asked Alvarado if he would like a break from the interrogation; and (6) at the conclusion of the interview, he was allowed to go home.[95] For these reasons, when the Court applied the required deferential habeas corpus review standard, it found that the state court's application of clearly established law was reasonable.[96]

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[79] *Id*.

[80] *Id*.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*at 657-58.

[85] *Id*. at 658.

[86] *Id*.

[87] *Id*. at 659.

[88] 28 U.S.C. § 2254(d) (2000).

[89] *Id*.

[90] Alvarado v. Hickman, 316 F.3d 841 (2002), *rev'd*, *Alvarado*, 541 U.S. at 652.

[91] *Alvarado*, 541 U.S. at 660 (quoting *Alvarado*, 316 F.3d at 854–55).

[92] *Id*. at 668.

[93] *Id.* at 664.

[94] *Id*.

[95] *Id*. at 665.

[96] *Id*.

Most importantly, the Supreme Court specifically rejected the Ninth Circuit's holding that juvenile status is a factor that must be considered when applying the *Miranda* custody inquiry.[97] The Court noted that *Miranda* and its progeny established an objective test for custody, designed to give clear guidance to police.[98] Whereas "age and inexperience with law enforcement" are individual characteristics of a suspect, which if required to be considered for a custody determination, would create a subjective test.[99]

As one commentator noted, *Yarborough v. Alvarado* has little, if any, precedential value.[100] First, this case was a deferential-review habeas corpus case and the court merely stated that the state court reasonably applied the law.[101] Second, the four dissenters concluded that a suspect's age should be considered if it is known by police, as it was known in this case, because it is "a widely shared characteristic that generates commonsense conclusions about behavior and perception."[102] Requiring consideration of age, therefore, would not complicate the "clear guidance to police" in determining when to administer *Miranda* warnings.[103] Finally, in her concurring opinion, Justice O'Connor did not completely disagree with the dissent, conceding that "there may be cases in which a suspect's age will be relevant," but this was not such a case because Alvarado was so close to the age of majority and it would be difficult to expect police to recognize a suspect is a juvenile in such circumstances.[104]

If this case will have little impact in the civilian world, it will have even less of an impact in the military justice system. First and foremost, Article 31 rights are required regardless of the custody determination.[105] Therefore, few military cases are decided by a *Miranda* custody determination. Second, there are very few instances in the military where a suspect is a juvenile. Regardless of this minimal impact, military interrogators and judge advocates should always be aware of the circumstances of a prior interrogation by civilian police. If such an interrogation was a custodial interrogation, any statements given are inadmissible if *Miranda* warnings are not given, and, as the next section discusses, may impact the admissibility of any subsequent statements given to military interrogators after *Miranda* warnings were provided.

Article 31—Interrogation

As previously noted, few military cases are resolved based on a *Miranda* custody inquiry, because Article 31 rights are triggered by official interrogation regardless of whether the suspect is in custody. The admissibility of many unwarned statements, however, frequently hinges on an "interrogation inquiry." The definition of interrogation is the same for both *Miranda* and Article 31 purposes: words or actions that a reasonable interrogator would see as likely to elicit an incriminating response.[106]

In *United States v. Traum*,[107] the Court of Appeals for the Armed Forces (CAAF) ruled that a request to take a polygraph did not amount to interrogation and, therefore, did not have to be preceded by an Article 31 rights warning.[108] In this case, Senior Airman Traum called emergency medical personnel to report that her eighteen-month-old daughter was not breathing.[109] Following extensive attempts to revive the toddler, medical personnel pronounced her dead.[110] Approximately

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[97] *Id*. at 667.

[98] *Id*.

[99] *Id*. at 668.

[100] *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 6.6(c) (4th ed. Supp. 2004).

[101] *Alvarado*, 541 U.S. at 664-65.

[102] *Id*. at 674 (Breyer, J., dissenting).

[103] *Id*. at 668.

[104] *Id*. at 669 (O'Connor, J., concurring).

[105] Article 31 requires a warning to a suspect or an accused. It does not limit this warning requirement to situations involving custodial interrogation. UCMJ art. 31(b)(2002).

[106] Rhode Island v. Innis, 446 U.S. 291 (1980) (defining interrogation for *Miranda* purposes as words or actions reasonably likely to elicit an incriminating response). Military Rule of Evidence 305(b)(2) requires Article 31 warnings for "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MCM, *supra* note 22, MIL. R. EVID. 305(b)(2).

[107] United States v. Traum, 60 M.J. 226 (2004). The court also determined that the appellant's statement, "she did not want to talk about the details of [that] night . . .," was not an unequivocal invocation of her right to remain silent, but instead left open the possibility that she would be willing to take the polygraph or talk about other aspects of the case. *Id*. at 230. Therefore, agents were not required to cease conversations with her. Instead, agents proceeded with the polygraph and interrogation only after having read, and secured a waiver of, the appellant's Article 31(b) rights. *Id*.

[108] *Id*.

[109] *Id*. at 228.

three weeks later, Traum called Air Force Office of Special Investigations (AFOSI) to request an update on the investigation into the death of her daughter.[111] Having already focused their investigation on Traum, the agents requested that she go to the AFOSI office to discuss the investigation.[112] Traum voluntarily went to the AFOSI office and told the special agent that she needed her daughter's autopsy report and death certificate in order to process her humanitarian assignment.[113] At some point during their conversation, the agent, without administering Article 31 warnings, asked Traum if she would be willing to take a polygraph.[114] Traum eventually agreed to take a polygraph test.[115] Prior to administering the test, the polygraph examiner read Traum her Article 31(b) rights and informed her that she was not required to take the test.[116] Traum waived her rights and took the polygraph test.[117] During a post-polygraph interview, Traum admitted that she intentionally suffocated her daughter.[118]

The CAAF held that the agent was not required to read Article 31 rights prior to asking the appellant if she would be willing to take a polygraph, since an incriminating response was neither sought nor was it a reasonable consequence of the agent's inquiry.[119] Instead, the reasonable consequence from the agent's question was a "yes" or "no" response from Traum.[120] Therefore, since there was not an interrogation, neither the requirements for *Miranda* warnings nor for Article 31 were triggered.[121]

Derivative Evidence of *Miranda* Violations

Out of the five cases reviewed by the Supreme Court in 2004 involving the privilege against self-incrimination, three of them involved the admissibility of derivative evidence of unwarned, yet otherwise voluntary, statements.[122] This section will provide a brief background of this area of law and then examine the three Supreme Court cases.

In 1966, the Supreme Court held, in the landmark case of *Miranda v. Arizona*,[123] that prior to any custodial interrogation, a subject must be warned of certain rights. In establishing this warning requirement, the Court sought to counter the inherently coercive environment of a police dominated, incommunicado interrogation and, thus, protect persons against compelled self-incrimination.[124] If the police do not administer the *Miranda* rights warnings, any subsequent confession is *per se* involuntary and, therefore, inadmissible in court.[125]

The Court, however, has never extended the *Miranda* exclusionary rule to cover derivative evidence obtained through the use of unwarned, yet otherwise voluntary, statements.[126] Rather, the Court has specifically held that, although the unwarned statements themselves are inadmissible, certain derivative evidence of otherwise voluntary statements may be

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[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*. at 229.

[120] *Id*.

[121] *Id*.

[122] Observing that the Supreme Court had granted *certiorari* in all these cases by this time last year, Lieutenant Colonel David Robertson provided a detailed overview and analysis of this area of self-incrimination law in last year's symposium article. Robertson, *supra* note 5, at 44-46.

[123] 384 U.S. 436 (1965).

[124] *Id*. at 457.

[125] *Id*. at 479. The Supreme Court, however, has recognized two exceptions to this exclusionary rule. A statement taken in violation of Miranda may be used to cross examine a defendant. Harris v. New York, 401 U.S. 222 (1971). Furthermore, the Court recognized an emergency exception to the *Miranda* warnings requirement. New York v. Quarles, 467 U.S. 649 (1984).

[126] Robertson, *supra* note 5, at 45.

admissible. First, in *Michigan v. Tucker*,[127] the Court held that although a statement was taken in violation of *Miranda* and is therefore inadmissible, the testimony of a witness identified in the unwarned statement did not also fall within the *Miranda* exclusionary rule. Next, in *Oregon v. Elstad*,[128] the Court held that the exclusionary rule does not apply to a voluntary, warned confession merely because it was obtained after an earlier unwarned, yet voluntary, statement. The *Elstad* Court stated, "The relevant inquiry is whether, in fact, the second statement was also voluntarily made. . . . 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."[129]

Derivative Evidence: Subsequent Warned Statement

Two of the Supreme Court's decisions regarding the derivative evidence of *Miranda* violations involved subsequent warned statements. In *Fellers v. United States*,[130] the Supreme Court remanded the case to the Eighth Circuit Court of Appeals, acknowledging that the Supreme Court had yet to determine whether the *Elstad* rationale applies when the initial violation involved the Sixth Amendment right to counsel instead of the Fifth Amendment right against self-incrimination. In the other derivative statement evidence case, *Missouri v. Seibert*,[131] rather than applying *Elstad*, the Court distinguished it, and thus, set a new standard for determining the admissibility of certain statements made after the administration of *Miranda* warnings.

In *Fellers*, a grand jury indicted Fellers for conspiracy to distribute drugs,[132] thus triggering his Sixth Amendment right to counsel. Under this indictment, police went to Fellers' home to arrest him.[133] During the arrest, and without reading Fellers his *Miranda* rights, the police "deliberately elicited" incriminating statements from Fellers.[134] The officers then arrested Fellers and took him to the police station, where they gave him the appropriate *Miranda* warnings.[135] Fellers waived his *Miranda* rights and, during the subsequent interrogation, repeated his earlier incriminating statements.[136]

The trial court suppressed the unwarned statements, but admitted the warned statements under *Elstad*, because Fellers "knowingly and voluntarily waived his *Miranda* rights before making the statements."[137] The Eighth Circuit Court of Appeals, cursorily finding that the Sixth Amendment was not violated, "for the officers did not interrogate Fellers at his home,"[138] affirmed the trial court's determination that the statements at the police station were nevertheless admissible under *Elstad*.[139] Noting that the Eighth Circuit incorrectly applied the Fifth Amendment's "interrogation" standard, rather than the Sixth Amendment's "deliberate elicitation" standard,[140] the Supreme Court, in a unanimous opinion, ruled that the police violated Fellers' post-indictment Sixth Amendment right to counsel when they "deliberately elicited" information without

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[127] 417 U.S. 433 (1974).

[128] 470 U.S. 298 (1985).

[129] *Id*. at 318.

[130] 540 U.S. 519 (2004).

[131] 124 S. Ct. 2601 (2004).

[132] *Fellers*, 540 U.S. at 521.

[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] *Id*. at 522.

[137] *Id*.

[138] United States v. Fellers 285 F.3d 721, 724 (8th Cir. 2002), *aff'd in part and remanded in part*, United States v. Fellers, 397 F.3d 1090, 1092 (8th Cir., 2005).

[139] *Id*.

[140] *See generally* Robertson, *supra* note 5, at 47–48. The *Fellers* Court:

> [R]eiterated that the test for violations of the Sixth Amendment were separate and distinct from those of the Fifth Amendment. Whereas Fifth Amendment analysis applies a "custodial-interrogation" standard, government agents violate the Sixth Amendment when they "deliberately elicit" information from an individual against whom judicial proceedings have been initiated. The Supreme Court noted that the Eighth Circuit erred when it incorrectly applied the Fifth Amendment's "interrogation" standard, instead of the Sixth Amendment's "deliberate-elicitation" standard. The Eighth Circuit compounded this error when they evaluated the petitioner's subsequent warned statement, given at the jail house – under the standards set forth in *Oregon v. Elstad*, a Fifth Amendment based case.

Id. at 47.

first securing a waiver of counsel.[141] The Court, however, did not rule on the admissibility of the warned statements taken later.[142] Acknowledging that it had never decided whether the rationale of *Elstad* applies to Sixth Amendment right to counsel claims, the Court remanded the case for the Eighth Circuit to address this unresolved issue.[143]

Regardless of the ultimate determination of *Elstad*'s applicability to the Sixth Amendment's right to counsel violations, *Fellers* "serves as a reminder to practitioners of the importance of carefully identifying and applying the correct legal standards"[144] when analyzing self-incrimination issues. The Supreme Court has made it clear that "the standards for each self-incrimination protection are separate and distinct, and that failure to identify or apply them correctly constitutes reversible error."[145] Therefore, practitioners should always apply the analysis set forth in this article's introduction when analyzing the complex and often overlapping sources of self-incrimination law.

In *Seibert*, the lower court arguably applied the correct law set forth in *Elstad*.[146] Nevertheless, a plurality of the Supreme Court created a new standard for determining the admissibility of certain statements made after *Miranda* violations.[147] In this case, Patrice Seibert lived in a mobile home with her five sons and a mentally ill teenager, Donald.[148] Seibert's twelve-year old son, Jonathan, who was severely afflicted with cerebral palsy, died in his sleep.[149] Fearing charges of neglect because Jonathan was covered with bedsores, Seibert conspired with two of her teenaged sons and their two friends to conceal the circumstances of Jonathan's death by burning their mobile home.[150] To avoid the appearance that they left Jonathan unattended, they planned to leave Donald sleeping in the mobile home to die in the fire.[151] Seibert's son, Darian, and his friend set the home on fire.[152] Donald died in the fire, and Darian, who suffered serious burns to his face, was hospitalized.[153]

Five days after the fire, police awakened Seibert at 3 a.m. at the hospital where Darian was being treated.[154] The lead investigator, Officer Hanrahan, specifically instructed the arresting officer not to administer *Miranda* warnings.[155] At the police station, Officer Hanrahan intentionally withheld *Miranda* warnings and interrogated Seibert for approximately forty minutes, continually squeezing her arm and repeating, "Donald was to die in his sleep."[156] Seibert finally admitted that Donald was supposed to die in the fire.[157] After obtaining this admission, Officer Hanrahan gave Seibert a "20-minute coffee and cigarette break."[158]

Following this short break, Officer Hanrahan resumed the interrogation.[159] He turned on a tape recorder, gave Seibert her *Miranda* warnings and obtained a signed rights waiver from her.[160] During this second stage of the interrogation, Officer

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[141] *Fellers,* 540 U.S. at 524.

[142] *Id*. at 525.

[143] *Id*.

[144] *Robertson*, *supra* note 5, at 47.

[145] *Id*. at 48.

[146] State v. Seibert, 93 S.W. 3d 700 (Mo., 2002), *aff'd,* 124 S. Ct. 2601 (2004).

[147] Missouri v. Seibert, 124 S. Ct. 2601 (2004) (plurality opinion).

[148] *Seibert*, 124 S. Ct. at 2605.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*. at 2606.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

Hanrahan referred back to the first stage and confronted Seibert with her earlier unwarned admissions.[161] Seibert eventually repeated her earlier admissions.[162]

Before trial, Seibert sought to exclude both the unwarned admission and the warned tape-recorded admission.[163] At the suppression hearing, Officer Hanrahan testified that he intentionally withheld *Miranda* warnings, thus resorting to an interrogation technique promoted by numerous police organizations: question first, obtain an admission, then give warnings and resume questioning until the suspect repeats their prior admission.[164] The trial court suppressed the first unwarned admission, but admitted the tape recorded admission under *Elstad*.[165]

Distinguishing this case from *Elstad*, the Supreme Court held that the warned confession should have been suppressed also.[166] Rather than focusing on the voluntariness of the suspect's rights waiver, as the *Elstad* Court had, the plurality focused on the effectiveness of the *Miranda* warnings in the first place.[167] It found that the police "question-first" tactic of deliberately withholding *Miranda* warnings and eliciting an initial confession undermines the "comprehensibility and efficacy" of the subsequent *Miranda* warnings. [168] Thus, the plurality stated that the threshold issue is whether warnings administered in such circumstances can function effectively as *Miranda* requires.[169] It set forth the following factors as relevant in making such a determination: (1) the timing and setting of the two interrogations; (2) the completeness and detail of the first round of interrogation; (3) the continuity of police personnel; (4) the degree to which the interrogator referred back to the first interrogation; and (5) the overlapping content of the two elicited statements.[170]

Considering these factors, the plurality distinguished the circumstances in this case from those in *Elstad*, which actually involved two separate and distinct interrogations.[171] Under the circumstances of this case, the Court concluded that it would have been reasonable for Seibert to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions.[172] The mere recital of *Miranda* warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in Seibert's mind: she would not have understood that she had a choice about continuing to talk and repeating the same information previously elicited.[173] Therefore, *Miranda* warnings were never effectively given, and any subsequent statements were presumed involuntary and inadmissible.[174]

Practitioners should be aware that even though the *Seibert* Court established a new additional standard to be applied in the area of self-incrimination law, *Elstad* is still good law. The plurality even stated so in a footnote to its opinion.[175] *Seibert* just adds a new standard for those cases when the warnings are given in the midst of one continuous interrogation.

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[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*. at 2606-13.

[167] *Id*.

[168] *Id*. at 2610. The plurality stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id.

[169] *Id*.

[170] *Id*. at 2612.

[171] *Id*.

[172] *Id*. at 2613.

[173] *Id*.

[174] *Id*.

[175] *Id.* at 2610 n.4.

Derivative Evidence: Physical Evidence

Does the Fruit of the Poisonous Tree Doctrine Apply to the Physical Fruits?

Before the 2004 term, the Supreme Court had never determined the admissibility of derivative physical evidence of *Miranda* violations.[176] In 2004, it finally had an opportunity to answer the question of whether physical evidence obtained solely and directly through the use of unwarned statements is admissible. The answer? An unwarned, yet otherwise voluntary, statement is not a poisonous tree. Therefore, its fruit should not be excluded.

In *United States v. Patane*,[177] police were notified that Patane violated a restraining order by attempting to call his ex-girlfriend and by illegally possessing a gun. Two police officers went to Patane's house and, after asking Patane about his attempts to call his ex-girlfriend, placed him under arrest.[178] Patane, however, interrupted the rights advisement, stating that he knew his rights.[179] Consequently, Patane never received a complete rights warning as required by *Miranda*.[180] The officers then asked Patane about his gun.[181] After some initial reluctance, Patane told the officers where the gun was located and, per their request, gave the officers permission to enter his home and seize it.[182]

Distinguishing this case (involving physical evidence) from *Elstad* and *Tucker*, the lower court ruled that the gun must be suppressed under the fruit of the poisonous tree doctrine.[183] The Supreme Court disagreed, stating, "[T]he *Miranda* rule protects against violations of the Self-Incrimination Clause, which in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements."[184] The Court noted that "[u]nlike the Fourth Amendment's bar on unreasonable searches, the [Fifth Amendment's] Self-Incrimination Clause is self-executing."[185] In other words, the "victims" of *Miranda* violations have, in the *Miranda* exclusionary rule, an automatic protection from the use of their unwarned statements in court.[186] The Court reasoned, however, that creating a blanket suppression rule of the fruit of unwarned, yet voluntary, statements does not serve the Fifth Amendment's goals of "assuring trustworthy evidence" or deterring police misconduct.[187] Thus, five members of the Court held that failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.[188]

> In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective. If yes, a court can take up the standard issues of voluntary waiver and voluntary statement [under *Elstad*]; if no, the subsequent statement is inadmissible for want of adequate *Miranda* warnings, because the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning.

Id.

[176] Note that *Elstad* involved subsequent voluntary statements and *Tucker* involved witness testimony.

[177] United States v. Patane, 124 S. Ct. 2620 (2004) (plurality opinion).

[178] *Id*. at 2624, 2625.

[179] *Id*. at 2625.

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *rev'd and remanded by* United States v. Patane, 124 S. Ct. 2620 (2004).

[184] *Patane*, 124 S. Ct. at 2624.

[185] *Id*. at 2628.

[186] *Id*.

[187] *Id*. at 2629.

[188] *Id*. at 2630. The three person plurality went as far as stating that the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda's* protections are violated only when unwarned statements are admitted at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental "trial right." *Id*. at 2629. Therefore, there is no reason to apply the "fruit of the poisonous tree" doctrine. Although the two justices concurring in judgment agreed with the majority that the rationale of both *Elstad* and *Tucker* is even more applicable in this case, they found it "unnecessary to decide whether the detective's failure to give Patane his full Miranda warnings should be characterized as a violation of the Miranda rule itself, or whether there is 'anything to deter' so long as the unwarned statements are not later introduced at trial. *Id*. at 2632.

When analyzing the admissibility of a statement, it is imperative to categorize the analysis. As the *Fellers* Court emphasized, this is also true when analyzing the admissibility of derivative evidence gained through the use of that statement.[189] Although the Supreme Court's decisions regarding derivative evidence will have a major impact on cases involving *Miranda* violations, these decisions will have far less of an impact on military cases. This is because military practitioners must take one additional step in the self-incrimination law analysis—consider the admissibility of derivative evidence resulting from statements taken in violation of Article 31, UCMJ.

In the military, the admissibility of statements resulting from Article 31 violations is governed by Military Rule of Evidence (MRE) 304.[190] Military Rule of Evidence 304(a) states that "an involuntary statement or any derivative evidence therefrom may not be received in evidence . . . ."[191] Military Rule of Evidence 304(b)(3) provides one exception to this rule: "Evidence that is challenged under this rule as derivative may be admitted . . . if the statement was made voluntarily, that the evidence was not obtained by the use of the statement, or that the evidence would have been obtained even if the statement had not been made."[192]

The CAAF's analysis of derivative statement evidence has always been more stringent than the Supreme Court's analysis in *Elstad*.[193] Consequently, the holding in *Seibert* will have less of an impact in the military than it will in the civilian courts. More importantly, although the Supreme Court held in *Patane* that the fruit of the poisonous tree doctrine does not apply to the physical fruits of *Miranda* violations, the practice in the military remains otherwise when it comes to statements resulting from Article 31 violations: such statements will only be admissible if the government can prove by a preponderance of evidence that the alleged physical fruits of that statement were not obtained by the use of the statement or would have been obtained even if the statement had not been made.[194]

In two of its cases last year, the CAAF grappled with the issue of admissibility of derivative statement evidence gained from a previous unwarned statement: *United States v. Seay*[195] and *United States v. Cuento*.[196] In *United States v. Torres*, the Air Force Court of Criminal Appeals (AFCCA) also dealt with a slightly different twist of this issue: What standard applies when the previous statement resulted from coercive police tactics and not just from a mere *Miranda* violation?[197]

In *United States v. Seay*, Sergeant (SGT) Seay and another sergeant murdered a fellow soldier.[198] After watching the local media coverage of the murder, SGT Seay's wife informed civilian police that she suspected her husband was involved in the murder.[199] A civilian detective then contacted SGT Seay, informed him that he was investigating the murder, and asked him to go to the police station for an interview.[200] At the police station, SGT Seay waived his *Miranda* rights and agreed to the interview.[201] When the detective informed SGT Seay that his co-conspirator was suspected of the murder, however, SGT Seay invoked his right to remain silent.[202] After SGT Seay terminated the interview and returned to his

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[189] Fellers v. United States, 540 U.S. 519, 524 (2004).

[190] MCM, *supra* note 22, MIL. R. EVID. 304.

[191] *Id.* MIL. R. EVID. 304(a).

[192] *Id.* MIL. R. EVID. 304(b)(3).

[193] *See* United States v. Phillips, 32 M.J. 76, 81 (C.M.A. 1991) (holding that

> [C]onsidering all the circumstances—there must be a showing that the admission was not made as a result of the questioner's using earlier, unlawful interrogations. Thus, most precisely, our task under the circumstances of this case is to determine whether the government has shown by a preponderance of the evidence that Phillip's admissions . . . were not obtained by use of the earlier statements.).

[194] MCM, *supra* note 22, MIL. R. EVID. 304(b)(3).

[195] 60 M.J. 73 (2004).

[196] 60 M.J. 106 (2004).

[197] United States v. Torres, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

[198] United States v. Seay, 60 M.J. 73, 75 (2004).

[199] *Id*.

[200] *Id*.

[201] *Id*.

[202] *Id*.

apartment, the detective arranged for SGT Seay's wife to make recorded phone calls in an attempt to get him to confess.[203] Over the course of three phone calls with his wife, SGT Seay did not confess to the murder, but made a number of references as to whether he should get a lawyer.[204] Following these phone calls, the Criminal Investigation Command (CID) took over the investigation from the civilian police.[205]

Concerned for the wife's safety, CID arranged a meeting between the accused and his wife at the CID office.[206] Sergeant Seay voluntarily went to the CID office, where CID informed him that his conversation with his wife would be recorded.[207] Monitoring the conversation from another room, CID terminated the meeting when the wife began asking SGT Seay potentially incriminating questions.[208] The CID then told SGT Seay that his cooperation would be appreciated, advised him that anything he said previously would not be used against him, and informed him of his Article 31 rights.[209] Sergeant Seay agreed to cooperate, waived his Article 31 rights, and provided a detailed narrative of the murder.[210] He later gave a second sworn confession and a videotaped statement describing the murder after being readvised of his Article 31 rights.[211]

The CAAF held that SGT Seay's confession was properly admitted against him at trial.[212] First, the court held that SGT Seay's references to counsel during his conversation with his wife did not constitute an invocation of his right to counsel because these references were ambiguous and nevertheless anticipatory, because they did not occur during custodial interrogation.[213] Second, the court sidestepped the issue of whether the government violated SGT Seay's Fifth Amendment and Article 31 rights by continuing to question him through the pretextual phone calls despite his invocation of his right to silence at the police station.[214] Instead, the court held that, even assuming the government had violated SGT Seay's rights, his eventual confession was untainted, for it did not derive from either the initial interview with civilian police or the "pretextual phone calls."[215] Noting that SGT Seay confessed to the murder after voluntarily driving to CID and meeting his wife, the court held that the CID agent's administration of new rights warnings, as well as a cleansing warning, purged any possible taint:

> In short, immediately prior to [SGT Seay's] confession, "he was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options.' [SGT Seay] waived those rights anew, and in so doing created a clean slate for his confession."[216]

In *United States v. Cuento*,[217] Aviation Structural Mechanic Second Class (E–5) Cuento sexually assaulted his daughter.[218] Following his daughter's molestation allegation, the local civilian police initiated an investigation and twice interrogated Cuento.[219] During the interrogations, Cuento denied intentionally fondling his daughter.[220] According to Cuento, he had accidentally caught his hand in her underwear and penetrated her vagina while they were wrestling.[221]

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[203] *Id*.

[204] *Id*. at 76.

[205] *Id*.

[206] *Id*.

[207] *Id*.

[208] *Id*.

[209] *Id*.

[210] *Id*.

[211] *Id*.

[212] *Id*. at 77.

[213] *Id*. at 78.

[214] *Id*.

[215] *Id*.

[216] *Id*. at 79.

[217] 60 M.J. 106 (2004).

[218] *Id*.

[219] *Id.* at 107.

[220] *Id.* at 108.

[221] *Id.* at 107.

Although the local district attorney declined prosecution, Cuento was removed from the family home and restrained from contacting his children.[222]

The state Child Protective Service, in coordination with the Navy Family Advocacy Program, devised a family reunification plan whereby Cuento could rejoin his family following the successful completion of the plan's requirements.[223] One of these requirements was for Cuento to admit to molesting his daughter.[224] Cuento faithfully participated in group counseling as required by the reunification plan.[225] Seventeen months later, having been questioned by the police and counseled on numerous occasions and having never admitted to intentionally assaulting his daughter, Cuento finally confessed to his psychotherapist.[226] About a week later, Navy Criminal Investigative Service (NCIS) called Cuento and invited him to the NCIS office for questioning.[227] After being advised of and waiving his rights, Cuento gave the same version of the events that he had initially given to the civilian police.[228] When the NCIS agent expressed disbelief, Cuento admitted to the molestation and signed a written confession.[229]

In determining the admissibility of Cuento's confession to NCIS, the CAAF assumed, *arguendo*, that his statements to the counselors were involuntary, resulting from the coercive effect of the reunification plan's requirements.[230] Under such circumstances, any "subsequent confession [was] presumptively tainted as a product of the earlier one."[231] Nevertheless, the subsequent admission was admissible if the government could prove by a preponderance of evidence that it "was not obtained by use of the [coerced] statement, or that the evidence would have been obtained even if the statement had not been made."[232] Under the facts of this case, the court found that the government carried its burden of demonstrating that Cuento's confession to NCIS was both untainted and voluntary.[233] At the time of Cuento's confession to NCIS, seven days had elapsed since his admission to his psychotherapist—"a significant time for cool reflection and consultation with an attorney."[234] Cuento, thirty-seven years old with eighteen years of service, voluntarily went to NCIS and was told he was free to leave at any time.[235] Although they did not administer cleansing warnings, NCIS did not refer to Cuento's statements to his counselors or to the requirements of the family reunification plan.[236] Finally, NCIS made no promises, inducements, or threats during the interrogation.[237] Therefore, the court found Cuento's confession admissible.[238]

In *United States v. Torres*,[239] civilian police found Airman First Class Torres and two runaway girls asleep in a parked stolen car.[240] The police arrested Torres and in the subsequent search of the car found, among other things, a box containing marijuana and methamphetamine.[241] The police transported Torres to the police station for interrogation by a police detective.[242] During the interrogation, Torres invoked his right to remain silent numerous times.[243] Nevertheless, the

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[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id*. at 108.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 109.

[231] *Id.* at 108-09 (quoting United States v. Phillips, 32 M.J. 76, 79 (C.M.A. 1991)).

[232] *Id.* (quoting *Phillips*, 32 M.J. at 79).

[233] *Id.* at 110.

[234] *Id*. at 109.

[235] *Id.*

[236] *Id*.

[237] *Id.*

[238] *Id*.

[239] 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

[240] *Id.* at 561.

[241] *Id.* at 562.

[242] *Id.* at 565.

[243] *Id.* at 566.

detective continued to question Torres without pause,[244] finally convincing him to fully cooperate by explaining the consequences of making the police do things the "hard way."[245] Air Force Office of Special Investigations agents were present at the police station, but did not participate in the detective's interrogation of Torres.[246] Immediately following the initial interrogation, the AFOSI agents interviewed Torres in a different room.[247] Not knowing that he had previously invoked his right to remain silent, the agents did not provide him with a cleansing warning, but otherwise properly advised Torres of his Article 31 rights.[248] Torres waived his rights and provided a confession.[249]

After finding that the search of the car was lawful,[250] the Air Force Court of Criminal Appeals found that Torres' statements to the civilian detective were not just the result of a technical violation of *Miranda* warnings, but the product of deliberate coercion and improper tactics and were, therefore, involuntary.[251] Consequently, as in *Cuento* above, Torres' confession to the AFOSI agents was presumptively tainted and inadmissible, unless the government could prove by a preponderance of evidence that the taint was sufficiently attenuated at the time the statement was made.[252] Because of the close temporal proximity of the two interrogations, the fact that they occurred at the same location (albeit different rooms), and the flagrant nature of the detective's actions, the court found that the government failed to overcome the presumptive taint.[253] Thus, unlike *Cuento*, the confession to AFOSI was tainted and was inadmissible.[254]

Conclusion

Last year was an exciting year in the area of self-incrimination law. Although most cases involved the application of established law to new facts, the admissibility of derivative evidence gained from *Miranda* violations proved to be an area of contention among the Supreme Court justices. The pluralities in both *Patane* and *Seibert* pushed the envelope in their attempts to establish new law. Instead of adding clarity to this area of law, however, this split in the Supreme Court simply provides trial advocates on both sides with ammunition to contest any future cases involving evidence gained from *Miranda* violations.

Because of the unique extra protection afforded service members through Article 31, these Supreme Court cases should have minimal impact on the military justice system. Nevertheless, the military practitioner should be aware of these issues, especially in cases investigated in whole or in part by civilian authorities. As demonstrated in *Torres*, a mistake made by civilian law enforcement can have major ramifications on the latter prosecution of servicemembers.

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[244] *Id.* The detective testified at trial that "[u]ntil they tell me they want a lawyer, I don't have to quit asking questions, and even then I do not have to quit asking them questions." *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id*

[250] *Id.* at 565.

[251] *Id.* at 568.

[252] *Id.*

[253] *Id.* at 568-69.

[254] *Id.* at 569.