No. 04-1552

In the Supreme Court of the United States

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether statements that petitioner made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed under the Sixth Amendment as the fruits of earlier unwarned and uncounseled post-indictment questioning.

2. Whether the court of appeals erred by concluding that any error in the admission of petitioner's statements was harmless beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 397 F.3d 1090. A prior opinion of the court of appeals (Pet. App. 23a-30a) is reported at 285 F.3d 721. The order of the district court (Pet. App. 31a-36a) and the report and recommendation of the magistrate judge (Pet. App. 37a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. The petition for a writ of certiorari was filed on May 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months of imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. 23a-30a. This Court reversed and remanded. *Id.* at 17a-22a. On remand, the court of appeals again affirmed petitioner's conviction, but remanded his case for resentencing in accordance with *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. 1a-15a.[1]

1. On February 24, 2000, after a federal grand jury indicted petitioner for conspiring to distribute and possess with intent to distribute methamphetamine, two police officers went to petitioner's home in Lincoln, Nebraska, to arrest him. One of the officers told petitioner that he was there to discuss petitioner's involvement in methamphetamine distribution. The officer told petitioner that he had a federal warrant for petitioner's arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine with "persons such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, and Mark Farfalla." Pet. App. 33a; *id.* at 18a. As petitioner sat on his sofa sipping from a mug, see *id.* at 32a; Suppression Hearing Tr. 11, 43-44, petitioner implicitly acknowledged that he knew the four people the officers named by indicating that at the time he had associated with them, he had been going through a variety of finan-

[1] On May 2, 2005, the district court sentenced petitioner to a term of 102 months of imprisonment. Pet. 11 n.*.

cial and personal problems, among them methamphetamine use. He did not, however, link them with drug distribution. See Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84. The officers then arrested petitioner and transported him to the county jail. Pet. App. 1a, 18a. During the approximately 20-minute ride, the officers asked petitioner no questions. See *id.* at 33a, 41a.

At the jail, the officers advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his rights and signed a written waiver-of-rights form. Petitioner then explicitly acknowledged that he knew Kuenning, Sardeson, Geffs, and Farfalla, admitted that he also had associated with other individuals whom he had not previously identified (Val Green, Leon Thompson and Ernie Lawrence), and said that he had purchased methamphetamine from Kuenning and Sardeson for personal use. See Pet. App. 2a, 42a. Petitioner also admitted that he had loaned money to Kuenning, even though he suspected that the money might have been used for drug transactions. See *id.* at 2a, 18a. Petitioner repeatedly denied that he had ever sold methamphetamine and denied that he had purchased methamphetamine from Sardeson or Kuenning in quantities sufficient for resale. See *ibid.*

2. Before trial, petitioner moved to suppress both the statements he had made at his home, in the absence of *Miranda* warnings, and his subsequent statements made at the jail. The district court granted the suppression motion as to the statements that petitioner made at his home, adopting the findings of the magistrate judge that petitioner was in custody at the time of the statements at his home and that the statements were made in

response to remarks of the officers which were "implicitly questions." Pet. App. 31a; see *id.* at 32a, 35a. The district court declined, however, to suppress petitioner's subsequent statements at the jail. The court reasoned that because petitioner voluntarily made the jailhouse statements after waiving his *Miranda* rights, those statements were admissible under *Oregon* v. *Elstad*, 470 U.S. 298 (1985), which held that, although *Miranda* requires that an unwarned statement be suppressed, the admissibility of any subsequent statement made after administration of warnings turns solely on whether it is knowingly and voluntarily made. Pet. App. 33a-35a (citing *Elstad*, 470 U.S. at 309). The district court concluded that "the unwarned statements of [petitioner] made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings." *Id.* at 35a.

Statements from petitioner's jailhouse interview were admitted into evidence at trial, along with testimony from seven cooperating witnesses who testified about methamphetamine transactions involving petitioner. See Pet. App. 13a; Gov't Supp. C.A. Br. 16-19. The jury found petitioner guilty of conspiring to possess and distribute methamphetamine. Pet. App. 2a.

3. The court of appeals affirmed. Pet. App. 23a-30a. Petitioner contended that the statements at his home were obtained in violation of his Sixth Amendment right to counsel under *Patterson* v. *Illinois*, 487 U.S. 285 (1988), and that his jailhouse statements should have been suppressed as fruits of the Sixth Amendment violation. The court rejected that claim, finding *Patterson* "not applicable" because "the officers did not interrogate [petitioner] at his home." Pet. App. 26a. The court also concluded that petitioner's jailhouse statements

were properly admitted under *Elstad*. The court found that the record "amply support[ed]" the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. *Id.* at 25a-26a. In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers violated petitioner's Sixth Amendment rights by "deliberately elicit[ing]" incriminating information from him without counsel present, but that the jailhouse statements were admissible under the rationale of *Elstad*. *Id.* at 30a.

4. This Court reversed, holding that the officers "deliberately elicited" the statements that petitioner made at his home in violation of "the Sixth Amendment standards established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] and its progeny." Pet. App. 21a. The Court stated that the court of appeals had erred in holding that the absence of "interrogation" foreclosed petitioner's Sixth Amendment claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home, because the proper Sixth Amendment test turns on deliberate elicitation, which is not the same as interrogation. *Ibid*. The Court remanded for the court of appeals to determine whether petitioner's jailhouse statements should be suppressed as fruits of the earlier statement and to address "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." *Id*. at 21a-22a.

5. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-15a. The court held that the rationale in *Elstad* applies in the Sixth Amend-

ment context, reasoning that "[b]oth the deterrence of future Sixth Amendment violations and the vindication of the Amendment's right-to-counsel guarantee have been effectuated through the exclusion of [petitioner's] initial statements." *Id.* at 7a. "In the case of warned confessions that follow unwarned, uncounseled statements," the court stated, "the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements (which have already been suppressed) and the subsequent statements." *Id.* at 8a. The court noted the "similarities between the Sixth Amendment context at issue in [petitioner's] case and the Fifth Amendment context at issue in *Elstad*," explaining that "there is no significant difference between a lawyer's usefulness to a suspect during pre-indictment custodial interrogation and his usefulness at post-indictment questioning." *Id.* at 8a-9a (citing *Patterson*, 487 U.S. at 298-299).[2]

The court also held that even if petitioner's jailhouse statements should have been suppressed, "any error in

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[2] The court also concluded, based on a "multi-factor test derived from" the plurality opinion in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), that "the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings given to [petitioner]." Pet. App. 11a. The court emphasized that in this case and unlike in *Seibert*, the statements were separated in time, took place "in a new and distinct setting," and the subject of the statements overlapped only "to a small degree with his initial unwarned * * * admissions." *Ibid.* In addition, the court found "no evidence that the officers in this case employed * * * a deliberate strategy" to obtain incriminating statements in violation of *Miranda*, and therefore concluded that "the concerns voiced by Justice Kennedy" in his concurring opinion in *Seibert* were not implicated. *Id.* at 12a (citing *Seibert*, 124 S. Ct. at 2614 (Kennedy, J., concurring in the judgment)).

admitting those statements at trial was harmless beyond a reasonable doubt." Pet. App. 12a. The court found that petitioner's admissions that he knew some of the co-conspirators and had used methamphetamine with them "were either corroborated by other government witnesses or were immaterial to the case." *Id.* at 13a. In addition, the court reasoned, the testimony of those witnesses "went largely unchallenged." *Ibid.* The court also noted that petitioner used his statements to the police to his advantage at trial by emphasizing his "vehement[] deni[al] [of] selling or distributing methamphetamine" during his jailhouse statement and arguing it was proof of his innocence "because a police officer who was trained to elicit the truth from suspects could not elicit an admission of distribution from [petitioner]." *Ibid.* Accordingly, the court concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." *Ibid.* Finally, the court noted that in addition to petitioner's statements, the government presented eight witnesses who testified about petitioner's possession and distribution of methamphetamine. Although the individual witnesses' credibility could be questioned because of their plea bargains, criminal histories, and drug use, the court concluded that the government's evidence proved that petitioner "conspired to possess methamphetamine with intent to distribute." *Id.* at 13a-14a.

ARGUMENT

Petitioner contends that his jailhouse statements should have been suppressed as the fruits of an earlier violation of Sixth Amendment standards and that the

court of appeals erroneously relied on *Oregon* v. *Elstad*, 470 U.S. 298 (1988), in holding otherwise. The court of appeals' decision rejecting petitioner's claim is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, the United States is unaware of any other court of appeals decision that even has addressed whether the rationale of *Elstad* applies in the Sixth Amendment context, cf. Pet. 14. Even if *Elstad* did not apply, petitioner still could not establish that his statements should be suppressed as fruits. And, finally, as the court of appeals concluded, any error in the admission of petitioner's jailhouse statements was harmless beyond a reasonable doubt. For all of those reasons, further review is not warranted.

1. Petitioner contends (Pet. 11-23) that this Court should grant review to make clear that the rationale of *Oregon* v. *Elstad*, *supra*, does not apply in the Sixth Amendment context, and that instead, the broad derivative-evidence exclusion developed for completed Fourth Amendment violations should be applied under such circumstances. That claim lacks merit.

a. In *Oregon* v. *Elstad*, this Court rejected the claim under the Fifth Amendment that a suspect's giving of an initial voluntary statement without *Miranda* warnings tainted his later voluntary statement made after he received warnings and waived his rights. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, this Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement," a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the

earlier statement." 470 U.S. at 314. The Court explained that, in the absence of police coercion, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318.

As the court of appeals concluded, the rationale of *Elstad* is equally applicable in this context. In *Elstad*, the Court reasoned that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." 470 U.S. at 308. The same is true with respect to an indicted defendant's decision whether to deal with questioning by the police "with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). Because the assistance of counsel serves a similar role during pretrial questioning by the police regardless of whether the right to counsel arises under the Fifth or Sixth Amendment, this Court has held that advising an accused of his *Miranda* rights is generally sufficient to permit a knowing and intelligent waiver of the Sixth Amendment right to counsel during police questioning. *Id.* at 298-299 & n.12. The *Miranda* warnings convey to the accused at the time of questioning "the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.* at 293. The warnings thus "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." *Id.* at 294. Once an indicted defendant has received that information through *Miranda* warnings, it neutralizes the earlier police error

in conducting unwarned questioning and can render the later statement admissible.

b. Petitioner contends (Pet. 16-19) that the rationale of *Elstad* is inapplicable here because counsel serves a different role in the Sixth Amendment context: "the assistance of counsel ensures 'equality in [the] adversary confrontation' by protecting the accused from his own 'lack of familiarity with the law,'" and by "advis[ing] the defendant whether it is in his best interest, in light of the charges against him, to speak or remain silent." Pet. 19 (quoting *United States* v. *Ash*, 413 U.S. 300, 317 (1973)). Also, petitioner claims (*ibid.*), counsel serves a "broader Sixth Amendment interest in those circumstances where government officers have previously * * * elicited incriminating information from a defendant," because counsel could "inform the defendant * * * of the legal rules concerning the admissibility of the prior * * * statement." Pet. 17. But as the Court held in *Patterson*, the *Miranda* rights "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." 487 U.S. at 294. Even if the warnings themselves do not provide all the legal advice an attorney could, they equip a suspect to make the decision whether to speak with police immediately without the assistance of counsel, or to wait for counsel to advise him on those matters before again speaking to police. See *id.* at 291.

c. Petitioner also contends (Pet. 14-16) that the rationale of *Elstad* is premised on the fact that unwarned interrogation is only a violation of the prophylactic *Miranda* rule rather than the Fifth Amendment itself. He therefore argues that it does not apply here because the deliberate elicitation of a response from an accused constitutes a completed violation of the Sixth Amend-

ment. The Court's opinion in this case pointedly avoided stating that the officers' deliberate elicitation at petitioner's home violated the Sixth Amendment, instead stating only that their actions "violate[d] the Sixth Amendment *standards* established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] * * * and its progeny." Pet. App. 21a (emphasis added); *id.* at 22a (discussing "police questioning in violation of Sixth Amendment *standards*") (emphasis added). See generally *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting) ("It is * * * the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim."); accord *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).

But even if there were a completed Sixth Amendment violation at the time of unwarned questioning, *Elstad*'s rationale would still apply in this context. There is no question that this Court has recognized a limited "fruits" doctrine as applied to certain forms of derivative evidence after the denial of counsel at a critical stage in the prosecution. See *United States* v. *Wade*, 388 U.S. 218 (1967); *Nix* v. *Williams*, 467 U.S. 431 (1984). As discussed below, however, neither case involved the accused's own subsequent statements. When such statements *are* involved, the critical factor in determining whether "fruits" analysis applies is that the infringement of Sixth Amendment standards in conducting unwarned deliberate elicitation is closely analogous to the omission of *Miranda* warnings in *Elstad*. In both cases, there is a failure to ensure that the suspect could make an intelligent choice whether to waive his rights—and in both cases, the provision of that information breaks any link to the antecedent unwarned questioning.

Relying on *Wade* and *Nix*, petitioner contends (Pet. 12-13) that this Court has already held that "the traditional derivative-evidence rule" in the case of Fourth Amendment violations applies in determining whether a defendant's voluntary, warned statement is the fruit of a prior Sixth Amendment violation. Those cases—both of which predate *Elstad*—do not govern this context. In *Wade*, the Court only held that a post-indictment lineup was a critical stage under the Sixth Amendment and remanded for the lower courts to determine whether a witness's in-court identification of the defendant was tainted by an earlier post-indictment lineup conducted without the presence of counsel. 388 U.S. at 239-243. The Court's remedy directly protected the adversary process at trial, by requiring examination of whether the later in-court identification was the product of the earlier denial of counsel. In *Nix*, the Court rejected a defendant's claim that physical evidence (of the location and condition of a murder victim's body) should not have been admitted at his trial because it was the fruit of officers' earlier elicitation of incriminating statements, in violation of his right to counsel. The Court noted that it had applied the "fruit of the poisonous tree" doctrine to Sixth Amendment violations, 467 U.S. at 442 (citing *Wade*), but held that the evidence was properly admitted under the inevitable-discovery exception to the exclusionary rule because the victim's body would inevitably have been discovered. *Id*. at 440-450.

In this case, unlike *Wade* and *Nix*, the evidence claimed to be the fruit of a prior Sixth Amendment violation is a second statement voluntarily made by a defendant after receiving *Miranda* warnings and knowingly and intelligently waiving his right to counsel. In this situation, the defendant's decision to speak to the offi-

cers without counsel is an independent act of free will that breaks the causal link to the prior illegality. *Elstad* thus supplies the appropriate framework for analysis and ensures that a proper balance is struck between protecting the defendant's right to counsel and honoring his free choice to waive it.[3]

This does not, as petitioner contends, make *Miranda* warnings a "cure-all" (Pet. 22) or "provide[] the police with a road map to eviscerate the right[s] of criminal defendants," Pet. 11. The argument that police might find in the decision below a "road map" to secure admissible statements by deliberately violating Sixth Amendment standards ignores this Court's analysis in *Missouri* v. *Seibert*, 124 U.S. 2601 (2004), which suggests that a later set of *Miranda* warnings would not be effective if officers had purposely conducted unwarned questioning to undermine later warnings. *Id.* at 2610-2613 (plurality opinion) (requiring objectively effective warnings and distinguishing *Elstad*); *id.* at 2614-2616 (Kennedy, J., concurring in the judgment) (curative measures required, beyond those in *Elstad*, when officers deliberately use a two-step technique to undermine *Miranda* warnings).[4]

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[3] *United States* v. *Patane*, 124 S. Ct. 2620 (2004), which petitioner also cites (Pet. 13), is even less helpful to him. *Patane* did not involve a Sixth Amendment violation at all, and the plurality opinion merely cited *Nix* in passing as "discussing the exclusionary rule in the Sixth Amendment context and noting that it applies to '*illegally* obtained evidence [and] other incriminating evidence derived from [it].'" 124 S. Ct. at 2629 (quoting *Nix*, 467 U.S. at 441).

[4] As the court of appeals held (Pet. App. 12a), there is nothing in the record here to suggest that the officers employed a deliberate strategy to undermine the effectiveness of the later warnings. See n.2, *supra*; cf. *Seibert*, 124 S. Ct. at 2612 n.6 (plurality opinion).

Petitioner also errs in claiming (Pet. 23) that extending the *Elstad* rationale to the Sixth Amendment context would mean that "nothing at all is changed by the fact that the government has violated" Sixth Amendment standards. A later set of warnings does nothing to permit the admission of the initial unwarned and uncounseled statement. And when the defendant gives a second statement after knowingly and intelligently waiving counsel, the government must still establish that the waiver of rights was voluntary. *Patterson*, 487 U.S. at 292 n.4. Badgering or misleading conduct by authorities may preclude such a showing. *Harvey*, 494 U.S. at 353-354. Where investigators obtain the unwarned initial statement through coercion or the application of excessive psychological pressure, the defendant may not be able to make a knowing and voluntary decision to speak because the "continuing effect of the coercive practices" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944)) may carry over to the second encounter despite the warnings. Cf. *Elstad*, 470 U.S. at 310 (requiring a break in the chain of events "[w]hen a prior statement is actually coerced"). There is therefore no need to apply a broad fruits doctrine in this context to deter police misconduct.

2. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. Indeed, no other court of appeals has squarely addressed whether *Elstad*'s rationale applies to the admissibility of statements made by an indicted defendant who, after police "deliberately elicit" statements from him without first informing him of his rights, see *Massiah*, 377 U.S. at 206, is then informed of his *Miranda* rights, voluntarily waives them, and makes further statements. The court of appeals decisions peti-

tioner cites (Pet. 13) are inapposite.[5] The absence of any "conflict of decision in the federal system" on this issue strongly counsels in favor of "the issue receiv[ing] further study" in the courts of appeals "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 962-963 (1983) (Stevens, J., respecting the denial of certiorari).

3. This Court's review is particularly unwarranted because petitioner's jailhouse statements would not be subject to suppression even under the fruits analysis

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[5] None of those cases involved the question whether a defendant's second statement, voluntarily made after receiving *Miranda* warnings, should be suppressed as the fruit of prior improper questioning. See *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1112-1117 (11th Cir. 1990) (applying "fruit of the poisonous tree" doctrine to testimony of other witnesses derived from Sixth Amendment violation); *United States* v. *Kimball*, 884 F.2d 1274, 1278-1279 (9th Cir. 1989) (affirming suppression of co-conspirator statements that were fruits of Sixth Amendment violation). The other cases either involve no Sixth Amendment issue, see *United States* v. *Faulkingham*, 295 F.3d 85, 94 (1st Cir. 2002) (need for deterrence did not warrant suppression of fruits of negligent violation of defendant's *Miranda* rights), cert. denied, 124 S. Ct. 2931 (2004); *United States* v. *Tedford*, 875 F.2d 446, 450-451 (5th Cir. 1989) ("fruit of the poisonous tree" doctrine does not apply to violations of Fed. R. Crim. P. 41(c)), or involved the separate question of whether statements elicited in violation of Sixth Amendment standards with respect to pending charges are admissible at the defendant's trial on "very closely related subsequent charges." And one decision, *United States* v. *Mitcheltree*, 940 F.2d 1329, 1339-1345 (10th Cir. 1991) (admission of recorded conversation between defendant and informant required reversal of defendant's conviction for witness tampering, even though defendant had not been indicted on that charge when recording was made), rests on a Sixth Amendment premise that is no longer good law. See *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001) (when Sixth Amendment right to counsel attaches, it encompasses only those offenses that "would be considered the same offense under the *Blockburger* [v. *United States*, 284 U.S. 299 (1932),] test").

that he advocates. In the Fourth Amendment context, to determine whether a subsequent statement was sufficiently independent to dissipate the taint of the illegal search or seizure, the Court has examined the "temporal proximity" of the constitutional violation to the discovery of the derivative evidence in question, "the presence of intervening circumstances, and * * * the purpose and flagrancy of the official misconduct," to determine whether the confession was "an act of free will [sufficient] to purge the primary taint." *Kaupp* v. *Texas*, 538 U.S. 626, 632, 633 (2003) (per curiam) (quoting *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), and *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)). Under that standard, petitioner's jailhouse statement was not the fruit either of police misconduct or of his earlier statement, but was an independent and informed act of free will.

Although petitioner emphasizes (Pet. 21) that "only a half-hour" passed between petitioner's statement at his house and his interview at the jail, this Court has made clear that "relatively short" periods are sufficient to dispel the taint of illegality if, as here, the encounter with police was not "under the strictest of custodial conditions." *Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 108 (1980) ("relatively short" 45-minute period between illegal detention and warned statement was sufficient to purge taint where suspects were detained "quietly in the living room" and police were courteous). Moreover, the officers' brief statement to petitioner at his house that they had come to discuss his involvement in distribution of methamphetamine and his association with co-conspirators did not "rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of petitioner's subsequent statements. *Id*. at 110. Nothing

the officers did at petitioner's house could have influenced petitioner's later decision, after receiving *Miranda* warnings, to waive counsel and answer questions. The officers, who were dressed in plain clothes and were not carrying weapons visibly, Suppression Hearing Tr. 8, 62, 66, did not offer petitioner any promises or inducements, did not apply any pressure, and did not even seek to persuade him of the wisdom of cooperating. In contrast to the cases on which petitioner relies (Pet. 19-22), nothing about the police conduct here suggests that the officers intended to overpower the defendant's will to resist. See *Kaupp*, 538 U.S. at 631-632 (warrantless arrest of a minor at 3 a.m., followed by his "removal from [the] house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene"); *Brown*, 422 U.S. at 605 (defendant arrested at gunpoint without probable cause, ordered to stand against wall, and subjected to search that was apparently "calculated to cause surprise, fright, and confusion").

In addition, as the court of appeals found, see Pet. App. 11a-12a, it is clear that the officers in this case made no effort to exploit petitioner's initial statement in order to obtain the second. There is no indication that the officers even mentioned the first statement to petitioner during the jailhouse interview, or reminded him of particular statements he had made, let alone attempted to convince petitioner that he had nothing more to lose by providing a full account of his actions. *Id.* at 7a, 11a. To the contrary, the officers gave petitioner full *Miranda* warnings, informing him that he did not have to speak with the officers without counsel present, and confirmed that he understood the warning. And the second statement did not merely repeat the minimal acknowledgment in his initial statement that he knew the

persons mentioned in the indictment and used methamphetamine in the past (without linking the two, see Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84). Rather, it covered new subjects that petitioner could not have believed he had already revealed to police, such as that he had bought drugs from some of the persons named by the officers, had loaned money to Kuenning that he suspected she had used for drugs, and knew other persons not named in the indictment. See Pet. App. 11a (second statement overlapped only "to a small degree with his initial unwarned * * * admissions"). Petitioner's valid waiver of his right to counsel makes it unlikely that petitioner was induced to speak by the knowledge that he had already made a statement to the officers. See *Rawlings*, 448 U.S. at 107 (fact that defendant "received *Miranda* warnings only moments before he made his incriminating statements" is "important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of" a constitutional violation). Based on all of the relevant factors, petitioner's decision to speak with the officers at the jailhouse was "sufficiently an act of free will to purge the primary taint" of the Sixth Amendment violation. *Wong Sun*, 371 U.S. at 486.

4. Review also is not warranted in this case because the court of appeals correctly ruled that any error in the admission of petitioner's jailhouse statement was harmless beyond a reasonable doubt. Like other constitutional errors, Sixth Amendment violations are harmless when it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)); see *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972)

(*Massiah* violation harmless where "[t]he jury * * * was presented with overwhelming evidence of [the defendant's] guilt").

a. As the court of appeals noted (Pet. App. 13a), in addition to petitioner's statements to police, at trial "the government presented eight witnesses who detailed the extent of the conspiracy as well as [petitioner's] involvement in both possession and distribution of methamphetamine"). Petitioner's admissions during the jailhouse interview that he was acquainted with the other conspirators named in the indictment, that he had purchased small quantities of methamphetamine from individuals the officers identified, and that he had loaned money to Kuenning to pay her bills were largely, if not entirely, cumulative of the other witnesses' testimony, which, as the court of appeals noted, "went largely unchallenged." *Ibid.*; Gov't Supp. C.A. Br. 16-19. Petitioner contends that the admission of his jailhouse statements could not have been harmless because it corroborated the testimony of the seven cooperating witnesses, who, he claims, had "severe credibility problems." Pet. 25. But that overlooks the fact that the cooperating witnesses corroborated each other's testimony in important respects. See, *e.g.*, *United States* v. *Salimonu*, 182 F.3d 63, 71-72 (1st Cir. 1999) (concluding that error in admitting evidence was harmless beyond a reasonable doubt, emphasizing that "[t]he fact that the three co-conspirators' testimony was detailed and basically consistent * * * was substantial evidence of guilt"); *United States* v. *Valley*, 928 F.2d 130, 135 (5th Cir. 1991) (in determining that error was harmless beyond a reasonable doubt, noting that testimony of co-conspirators "was consistent and highly detailed"). For example, Kuenning, Geffs, and Sardeson each testified about a trip Kuenning and

Geffs made to Grand Island, Nebraska, to buy methamphetamine, and both Sardeson and Geffs confirmed that petitioner had supplied them with $1000 to purchase methamphetamine. See Trial Tr. 197-202, 316-322, 327, 382-386. Both Cotton and Kuenning (who also was called as a defense witness) testified that they went together to Tommy Gonzales to purchase methamphetamine, some of which they then supplied to petitioner. *Id.* at 248-252, 530-531, 537-563. Kuenning and Ernest Lawrence both testified that they traveled to Colorado together to buy methamphetamine and that they stopped by petitioner's house before they left and he gave them money, although their accounts of what Kuenning and petitioner said at his house differed. *Id.* at 237-241, 287-288, 497-506. Their testimony also was corroborated by physical evidence (for example, telephone records and personal address books, see *id.* at 140-145, 224).

Moreover, as the court of appeals noted (Pet. App. 13a), the jailhouse statements supported petitioner's defense theory—*i.e.*, that he was a methamphetamine user but was not involved in distributing the drug—and petitioner's counsel himself relied on the statements in his closing argument, noting that petitioner had steadfastly denied selling methamphetamine, despite being questioned repeatedly by a skilled interviewer who had been trained in interrogation techniques. See *ibid.*; Gov't Supp. C.A. Br. 19-20. Thus, as the court of appeals correctly concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." Pet. App. 13a. In any event, the factbound application of settled harmless-error principles does not

warrant review by this court. See *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (noting that this Court reviews harmless-error claims "sparingly"); S. Ct. R. 10.

b. Petitioner contends (Pet. 23-25) that review is warranted because the court of appeals "did not apply the *Chapman* standard" (Pet. 23), and improperly equated harmless error review with sufficiency-of-the-evidence review. That claim is based on the court of appeals's statement in passing that "the evidence presented by the government * * * is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute," Pet. 24 (quoting Pet. App. 14a) (emphasis omitted), and on the court's citation of a sufficiency-of-the-evidence case in the course of its discussion. See *ibid.* (citing *United States* v. *Angular-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)). That claim lacks merit. Petitioner overlooks that the court recited the correct standard of review and noted that while "a defendant's own confession is 'a particularly potent piece of evidence,' its erroneous introduction is harmless where the other evidence against him is so substantial that it 'assured beyond a reasonable doubt that the jury would have returned a conviction even absent the confession.'" Pet. App. 12a (quoting *United States* v. *Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000)); accord *Hasting*, 461 U.S. at 512 (noting strength of evidence against defendant in determining whether error was harmless beyond a reasonable doubt); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence.").

In light of the court's recitation of the correct standard, the court of appeals' passing reference to "sufficien[cy]" (Pet. App. 14a) to discuss one established

factor in constitutional harmless-error analysis—the strength of the government's case—does not justify concluding that the court of appeals applied the incorrect standard. That is especially true because the Eighth Circuit (including in opinions written by the author of the decision below) repeatedly has emphasized that "sufficiency of the evidence and harmlessness of an error are different questions," *United States* v. *Kenyon*, 397 F.3d 1071, 1082 (2005), and that "sufficiency of the evidence alone is not enough to support a finding of harmless error." *United States* v. *Azure*, 801 F.2d 336, 341 (1986) (citing *United States* v. *Slader*, 791 F.2d 655, 657 n.2 (8th Cir. 1986)); see also *United States* v. *Hazelett*, 80 F.3d 280, 283 (1996) ("To say that absent certain inadmissible evidence the jury might have reached a different result is not at all the same thing as saying that without that evidence no jury could lawfully convict."); cf. *United States* v. *Ryan*, 153 F.3d 708, 712 (1998) (Wollman, J., for the court) (emphasizing that "a materiality determination [for purposes of *Brady* v. *Maryland*, 373 U.S. 83 (1963)] is not a sufficiency of evidence test"). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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