

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JAN 28 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ARLENE B. WHITNEY,

Petitioner - Appellant,

v.

PEOPLE OF THE STATE OF  
CALIFORNIA; LEO MCCARTHY;  
GLORIA HENRY,

Respondents - Appellees.

No. 07-55471

D.C. No. CV-98-02010-BTM

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted January 13, 2009  
Pasadena, California

Before: TROTT, KLEINFELD and IKUTA, Circuit Judges.

We affirm the district court's denial of Arlene B. Whitney's habeas petition and dismissal with prejudice. Whitney filed her petition after April 16, 1996, so

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

our review is limited by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). See Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004).

Because of the state court's Chapman error, see Chapman v. California, 386 U.S. 18, 24 (1967), we assume without deciding that a de novo standard of review applies to the harmless error analysis and "linked issues" under Frantz v. Hazy, 533 F.3d 724, 736–37, 739 (9th Cir. 2008) (en banc). The state court's confinement of Whitney, however, is not pursuant to a judgment "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Under Oregon v. Elstad, 470 U.S. 298, 317–18 (1985), the un-Mirandized first confession, if it was that, did not require suppression of the second confession given after the Miranda warning. Id. at 318. Application of Missouri v. Seibert, 542 U.S. 600 (2004), would require a determination of whether the interrogation followed the two-step technique, which Seibert establishes as an exception to Elstad. Id. at 622 (Kennedy, J., concurring in judgment); see also United States v. Antelope, 395 F.3d 1128, 1133 n.1 (9th Cir. 2005). Application of Seibert, however, is barred by Teague v. Lane, 489 U.S. 288, 310–11 (1989). See Williams v. Taylor, 529 U.S. 362, 412 (2000). Accordingly, no evidentiary hearing is

necessary to determine whether there was a Seibert violation. Schriro v. Landrigan, 550 U.S. 465, \_\_\_\_\_, 127 S. Ct. 1933, 1940 (2007).

Admission of the second confession, proper under Elstad, rendered any Miranda error from admitting the putative first confession harmless under any standard. Further, under any standard, there was no coercion such that the second confession would be inadmissible, despite a proper Miranda warning and waiver. See Colorado v. Connelly, 479 U.S. 157, 167 (1986); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); see also Frazier v. Cupp, 394 U.S. 731, 739 (1969).

**AFFIRMED.**