The California Legal Update

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Vol. 21 March 31, 2016 No. 4

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*If someone with multiple personalities threatens to kill himself, it is considered to be a hostage situation*?" (Anonymous)

IN THIS ISSUE:

CASES:

***Knock and Talks*:**
***Protective Sweep*:**
***Inevitable Discovery*:**

United States v. Lundin **(9th Cir. Mar. 22, 2016) __ F.3rd __ [2016 U.S. App. LEXIS 5236]**

Rule: (1) The "knock and talk" exception to the warrant requirement does not apply when officers, without a warrant or exigent circumstances, encroach upon the curtilage of a home at an unreasonable hour with the intent to arrest the occupant. (2) Protective sweeps of a residence require an articulable suspicion to believe that there is someone in the house who might constitute a threat. (3) The "Inevitable Discovery" doctrine does not save evidence searched for, and seized, without a warrant, merely because a warrant was eventually obtained.

Facts: Humboldt County Sheriff's Deputy Scott Aponte responded to the Mad River Community Hospital at 12:24 a.m. where 63-year-old Susan Hinds reported to him that defendant, who was an acquaintance of her adult son, had accosted her in her mobile home and kidnapped her. Per Hinds, defendant accused her son, Joseph Miller, who lived with Hinds but was at the store at the time, of stealing marijuana from him. Defendant had held Hinds by the neck, threatened her with two firearms he had with him, forced her to swallow a pill claiming it to be methadone, and threatened to overdose her on the pills.

Defendant told Hinds that as a member of the Mongols motorcycle gang, he doesn't leave witnesses, repeatedly telling her she was going to die. After smashing her television set, defendant, holding a firearm to her temple, forced Hinds to call Miller to tell him to come home. Defendant then forced Hines into his pickup truck and drove her out of the mobile home park. Miller was just driving into the park at the same time. Defendant told Hinds to wave good-bye to her son because she would never see him again.

Driving around for the next 15 minutes, defendant made Hinds ingest two more pills while pointing out locations where he could safely dispose of her body. He then spoke with Miller by cellphone. Whatever was said between the two of them convinced defendant that Miller was not responsible for stealing his marijuana. Telling Hinds that he only meant to scare her, and warning her not to call the police, defendant returned her to her trailer. Miller was also interviewed by Deputy Aponte and evidence was collected from Hinds' trailer. A "BOLO" ("Be On the Look Out") was issued with instructions to arrest defendant if located, listing the charges as burglary, false imprisonment, kidnapping, vandalism, brandishing a firearm, administering a drug to commit a felony, administering a controlled substance, and battery. The BOLO was issued just before 2:00 a.m.

Upon receiving the BOLO, Officer Matthew O'Donovan of the Arcata Police Department determined through vehicle registration files where defendant lived. Driving to his house, he noted that defendant's truck was parked in the driveway and there were lights on inside the house. Other officers responded to assist, with everyone arriving by just before 4:00 a.m.; some 3½ to 4 hours after the crime. Officers approached defendant's front door and knocked loudly. After the second knock, several loud crashing noises were heard coming from the back of the house. The officers ran to the backyard where defendant was found and arrested. A protective sweep of the house was conducted with negative results. While in the backyard, a clear plastic freezer bag containing defendant's two firearms was observed in plain view and within arm's reach of a common walkway.

A search warrant for the house describing the above events was subsequently obtained resulting in the recovery of more guns, some cellphones, a prescription pill bottle for methadone, computers and hard drives, and various Mongols-related paraphernalia. Defendant was charged in federal court with being a felon in possession of a firearm and ammunition (18 U.S.C. § 922(g)(1)) along with some other charges related to the kidnapping. Defendant brought a motion to suppress the evidence seized from his backyard (the two handguns) and from inside the house (from the search warrant), along with incriminating statements he made to the officers. The trial court granted defendant's motion as to the two handguns found on the patio, denying the remainder of the motion. The U.S. Attorney's Office appealed, contesting the suppression of the two firearms.

Held: The Ninth Circuit Court of Appeal affirmed, upholding the trial court's suppression of the handguns. (1) On appeal, defendant argued that, consistent with the trial court's ruling, the recovery of the two handguns found on his back patio were the product of the officers' illegal warrantless entry into the curtilage of his home. The Ninth Circuit agreed. It is well settled that law enforcement officers may conduct a warrantless search of a home, including its curtilage, when the exigencies of the situation excuse the lack of a warrant. However, exigent circumstances do not justify a warrantless search when the police themselves create the exigency by engaging in conduct which itself violates the Fourth Amendment.

The Court did not discuss whether the officers, upon approaching defendant's house at 4:00 a.m., were acting upon exigent circumstances (but see "Note," below). The exigency the Court was talking about was the noise they heard coming from the backyard. The "illegal act" committed by the officers that created this exigency, per the Court, was entering onto defendant's front porch at 4:00 a.m. and then knocking on his front door without having an arrest or search warrant. The area immediately surrounding and associated with one's home, referred to as the "curtilage," is treated as "part of [the] home itself for Fourth Amendment purposes." The curtilage is generally given the same constitutional protections as exist within the home itself.

The front porch and door at issue here were clearly both within the curtilage of defendant's home. Searches and seizures by law enforcement that occur either within the home itself, or the curtilage of the home, are "presumptively unreasonable." It's an issue of where a homeowner has a "reasonable expectation of privacy." The existence of a warrant, or exigent circumstances, tends to rebut this presumptive unreasonableness, allowing law enforcement officers to legally intrude into those areas where the homeowner otherwise has a reasonable expectation of privacy, which includes within the curtilage. The primary issue in this case, therefore, was the lawfulness of the officers' warrantless entry onto defendant's front porch and the knocking on his door.

The Government argued that the officers were allowed to do this under the so-called "*knock and talk*" exception to the warrant requirement. Pursuant to this rule, law enforcement officers, as with anyone else, are allowed to "encroach upon the curtilage of a home for the purpose of asking questions of the occupants." The "knock and talk" exception stems from the "social convention," or "custom," "conform(ing) to the habits of the country," that implies the homeowner's consent for persons to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." "Knock and talks," allowing law enforcement to contact private persons at their front doors, with or without probable cause and with or without a warrant, have consistently been upheld by case law. However, there are exceptions.

The Court here found that for two reasons, the officers' entry onto defendant's front porch "exceeded the scope of the customary license to approach a home and knock," and was therefore unlawful. *First*, unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours, and not at 4:00 o'clock in the morning. "(W)ithout evidence that (defendant) generally accepted visitors at that hour, and without a reason for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance," the officers' 4:00 a.m. intrusion did not comport with the established "social convention" or "custom" of visitors coming onto one's front porch and knocking on their door. *Secondly*, the scope of a license to enter the curtilage of one's home is generally limited to the

specific purpose of asking questions of the occupants. The officers' purpose here was to make a warrantless arrest of defendant.

Citing U.S. Supreme Court authority (i.e., *Florida v. Jardines* (2013) 133 S.Ct. 1409, 1416-1417.), the Ninth Circuit ruled that contrary to the general rule that an officer's subjective intent is irrelevant (See *Whren v. United States* (1996) 517 U.S. 806), the officers' subjective intent here, upon approaching defendant's front door (i.e., to arrest him), made such a warrantless entry unlawful. "(T)he actual motivation of the officers matters." Finding that the officers violated the Fourth Amendment by entering the curtilage of defendant's home and knocking on his door, the noise from the back yard was held to be the product of that illegal warrantless intrusion. The Government, therefore, cannot rely upon that exigency as an excuse to enter the backyard where the guns were found. (2) The Government also argued that the officers were legally entitled to conduct a "*protective sweep*" of the home. Protective sweeps, however, are limited to those circumstances when "there are articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene."

In this case, there was absolutely no reason to believe that anyone other than defendant was in the house. (3) Lastly, the Government suggested that because a search warrant was eventually obtained, the firearms would have inevitably been discovered anyway. It is a clear rule of law, however, that the "*inevitable discovery*" exception to the search warrant requirement does not apply when officers have probable cause to apply for a warrant but simply fail to do so. Obtaining a search warrant after the fact does not cure the illegal search for, and warrantless seizure of, the firearms. The trial court, therefore, properly suppressed those guns as the product of an illegal entry into the backyard.

Note: The Court, by the way, does not invalidate the "*knock and talk*" theory in general. It in fact noted that "(a)n officer does not violate the Fourth Amendment by approaching a home *at a reasonable hour* and knocking on the front door with the intent merely to ask the resident questions, even if the officer has probable cause to arrest the resident." (Italics added) This is consistent with the Supreme Court's ruling in *Kentucky v. King* (2011) 563 U.S. 452, 459-472, where it was held that so long as the officers' actions in knocking on the door, and presumably seeking a consensual entry, does not itself constitute a violation or threatened violation of the United States Constitution (i.e., the Fourth Amendment), there is no penalty for doing so. Should the occupants then attempt to destroy or secret evidence, thus revealing its existence or location to law enforcement, that's their choice.

So, recognizing that the primary issue here was the legality of the officers approaching defendant's front door at 4:00 a.m., and knocking, all without a search or arrest warrant, one has to ask himself; whatever happened to the "*fresh pursuit*" exception to the warrant requirement? This valid legal theory for finding an exigency was not even discussed by the Court. I have a whole pile of cases, including out of the Ninth Circuit, holding that a continuous investigation from crime to the arrest of a suspect in his home, within a limited time period (e.g., within hours), and without an opportunity to stop and obtain an arrest warrant, is "*fresh pursuit*." Contrary to what is often referred to as a "*hot pursuit*," for "*fresh pursuit*" to apply, it is not necessary that the suspect be physically in view during that "pursuit." With every reason to believe that defendant might secret or dispose of physical evidence of his crimes (i.e., the firearms, the methadone pills, the Mongols paraphernalia), which had been perpetrated a mere

three and a half to four hours earlier, it is certainly arguable that taking the time to obtain an arrest or search warrant was not required before defendant was taken into custody and his home secured pending the obtaining of a search warrant. This is another ludicrous Ninth Circuit decision that needs to be tested at the Supreme Court level.

***Street Terrorism, per P.C § 186.22(a)*:**

People v. Velasco **(Mar. 13, 2015) 235 Cal.App.4th 66**

Rule: For purposes of the "street terrorism" statute, per P.C. § 186.22(a), it must be proved that a gang member acted with one or more members of his own gang while engaging in a pattern of criminal gang activity, willfully promoting, furthering, or assisting in any felonious criminal conduct by members of "that gang."

Facts: Marvin Bransford lived in a doublewide trailer in a mobile home park in Victorville, in Riverside County's High Desert. On November 28, 2010, Brenda de la Paz, who used to live in another space at the same park, came visiting late in the evening, asking if she could stay the night. Bransford let her use the spare bedroom. When Bransford got up the next morning, de la Paz was already gone. That afternoon, however, she showed up again, this time with defendant in tow, who she introduced as "Toker." De la Paz proceeded to accuse Bransford of stealing a coat from her along with $40. Bransford denied the allegation. During the argument, defendant produced a handgun and proceeded to strike Bransford with it about the head and face. De la Paz, in the meantime, ripped the phone from the wall. Bransford managed to escape, running to a neighbor's trailer where he called the Sheriff. De la Paz and defendant fled before the sheriff could respond. Bransford sustained some minor injuries, but otherwise survived. De la Paz was subsequently located and interviewed by Riverside County Sheriff's deputies. She admitted to most of what Bransford had reported, but claimed to have returned to his trailer to find methamphetamine and $40 that she'd left there.

During this conversation, de la Paz told the deputies that she was a member of the 18th Street gang, and believed that defendant, who she referred to as "Toker" or "Tokes," was from a gang called "La Puente." Asked why she was in the car with defendant, she responded, "because us gang members stick together." Meanwhile, other officers responded to defendant's mother's house in San Bernardino County. Defendant was found there wearing a blue bandana indicative of a Puente 13 gang member around his neck. A search of the house resulted in the recovery of a loaded .25-caliber semiautomatic handgun and a notebook with "Puente 13" written on it. The writing indicated that defendant was from the Ballista Street Clique and that his moniker was "Toker." Inside the notebook were pay/owe sheets for the sales of narcotics. Defendant was arrested and charged in state court with a number of robbery-related offenses, as well as one count of "street terrorism," per P.C. § 186.22(a).

At trial, Sergeant Glen Eads of the Los Angeles County Sheriff's Department testified as an expert on the Puente 13 street gang, describing for the jury the gang's origin, history, and primary purposes. He also testified to the details of two "predicate offenses" of the gang, necessary to qualify it as a gang under the elements of P.C. § 186.22(a). "Ballista," according to Sgt. Eads, is one of 16 cliques for this gang. He also testified that like all Southern California

Hispanic gangs, Puente 13 and its cliques pay taxes to the Mexican Mafia, which is a prison gang. The gang's rivals have never included the 18th Street gang. Sgt. Eads was also familiar with defendant himself, knowing him to be a member of Puente 13. Officer Joe Scida, of the Los Angeles Police Department, testified as an expert on the 18th Street gang. He testified as to this gang's history, purposes, and its predicate offenses, noting that it also paid taxes to the Mexican Mafia. Per Officer Scida, Puente 13 is not one of this gang's rivals.

San Bernardino County Sheriff's Detective Luke Gaytan also testified as a gang expert. He personally interviewed de la Paz. Based upon her criminal history, her admissions to him, as well as her tattoos, Detective Gaytan knew de la Paz to be an active participant in the 18th Street gang. Detective Gaytan was of the opinion, based upon defendant's tattoos and other evidence, that defendant was a member of the Ballista Street clique of the Puente 13 gang "in good standing." Defendant was convicted of all charges as well as one count of street terrorism (P.C. § 186.22(a)). With a prior strike, defendant was sentenced to 28 years and eight months in prison. He appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed his conviction on the street terrorism charge, but otherwise affirmed. Defendant's argument on appeal was that the evidence did not support his conviction for street terrorism. Section 186.22(a) states as follows: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of "*that gang*," shall be punished . . . in the state prison for 16 months, or two or three years." (Italics added) Street terrorism, under these provisions, consists of three elements; i.e., (1) participation in a street gang that is more than nominal or passive; (2) knowledge that the gang's members engage in, or have engaged in, a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of that gang.

The third element is the one at issue in this case, with defendant arguing that there was no evidence that he promoted felonious criminal conduct with a member of "*that gang*." At issue was what the statute meant by the phrase "*that gang*." Defendant argued that it referred to some member of his own gang; i.e., Puente 13. The People's counter argument was that the section requires only that two gang members act together, and that the other person can, conceivably, be a member of any gang. De la Paz, of course, was a member of a different gang than that to which defendant belonged. The issue for the court was: "Does the statute require that the defendant promote, further, or assist in any felonious criminal conduct by a member of the defendant's gang, or will a gang member from another gang suffice?" The Court sided with defendant on this issue. Engaging in some "statutory interpretation," "analyz(ing) the statute according to its 'plain, commonsense meaning,'" the Court noted that the word "*that*" immediately precedes the term "*gang*," which strongly indicates that it refers to the same "gang" previously referenced in the first clause of section 186.22(a). Nowhere in the statute does the Legislature hint that it didn't intend to limit these provisions to a single gang. "'(T)hat gang' clearly refers back to the 'gang' in which the defendant is an active participant." The fact that defendant and de la Paz's respective gangs were not rivals, and that both pay taxes to the Mexican Mafia, is insufficient to overcome the statutory requirement that both individuals be members of the same gang. Absent evidence that the 18th Street gang and Puente 13 are merely

subsets of a primary gang and that they typically work together, defendant's conviction on the street terrorism charge cannot stand. There being no such evidence, defendant's conviction on that charge was reversed.

Note: This makes perfect sense to me. But not being an expert in gang cases, and never having prosecuted a P.C. § 186.22(a) charge, I'll leave it up to the gang experts (law enforcement and prosecutors) to tell me whether this decision is valid. I await your cards and letters.

***Juvenile Probation Conditions and Electronic Social Media*:**

In re Malik J. **(Sep. 29, 2015) 240 Cal.App.4th 896**

Rule: Search and seizure probation conditions imposed upon a minor must not be overbroad to the extent that they bear no relationship to the minor's crimes, unnecessarily violating the minor's (or a third party's) right to privacy. Conditions that require a minor (and his family) to reveal passwords for their social media accounts, and that give law enforcement unfettered access to electronic devices, are overbroad.

Facts: On September 21, 2014, 17-year-old Malik J., with a couple of companions, physically assaulted and robbed three different women near the MacArthur Street Bay Area Rapid Transit station. Defendant was already on juvenile probation at the time for a prior robbery, and on standard search and seizure conditions. The Alameda County District Attorney filed a notice of probation violation alleging that defendant had committed three robberies and possessed eight baggies of marijuana. Defendant admitted to the probation violations.

When the Juvenile Court magistrate ordered defendant to be detained in Juvenile Hall pending out-of-home placement, continuing him on all previously ordered terms and conditions of probation, the prosecutor interjected that defendant had been working with two other individuals which "would indicate electronic devices might be used to coordinate with other people, and one of these robberies involved an iPhone, which means electronic devices on his person might be stolen." In response, the magistrate added the following: "So you're to—and the family—is to provide all passwords to any electronic devices including cellphones, computers and notepads within your custody and control, and submit to search of devices at any time to any peace officer. And also provide any passwords to any social media sites, including [F]acebook, Instagram, and submit those [s]ites to any peace officer with or without a warrant." The signed minute order, however, came out a bit different, omitting any references to defendant's family or to social media sites, and limiting the requirement that he provide passwords to "any electronic devices, including cellphones, computers or [notepads], within your custody or control, and submit such devices to search at any time without a warrant by any peace officer." Defendant appealed.

Held: The First District Court of Appeal (Div 3) modified the probation conditions, and as so modified, affirmed. Welfare and Institutions Code section 730 authorizes the juvenile court to "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." This gives the Juvenile Court broad discretion in formulating probation conditions; more so than when an adult is sentenced. That's because juvenile probation conditions are imposed for the

purpose of ensuring the minor's rehabilitation, and not just his punishment. But the Juvenile Court's discretion in this regard is not unlimited.

A probation condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. Probation conditions that are unconstitutionally vague or overbroad are also invalid. In this case, the Court found that attempting to impose search conditions on defendant's family (if that is in fact what the Juvenile Court intended) was clearly unlawful. Not being subject to the Court's jurisdiction, extending defendant's search and seizure conditions to his family members violated the family member's Fourth Amendment search and seizure (and Fourteenth Amendment due process) rights. As for defendant himself, the Court also found that the Juvenile Court's order was overbroad insofar as it allowed for unfettered searches of defendant's electronic communications devises, including having to reveal passwords to any social media sites, in that it significantly encroached on his, and potentially third parties,' constitutional rights of privacy and free speech.

Any conditions imposed on defendant had to be reasonably related to preventing him from using an electronic device to coordinate with others in committing crimes and to insure that the device was not stolen. Recognizing that modern cellphones and "other devices" (e.g., computers) contain all the "privacies of life," with their capacity both to store and to remotely access vast quantities of personal information not contained in the phone or computer itself, the Court determined that the conditions imposed on defendant here had to be limited in some way to restrict law enforcement's ability to view anything other than information in defendant's possession or control, and that is related to his crimes. "Information stored in a remote location cannot be considered in the probationer's possession nor entirely within his or her control." The Court therefore ordered the conditions of defendant's probation be modified to omit any reference to the passwords to social media sites, and to authorize warrantless searches of electronic devices in defendant's custody and control only after the device has been disabled from any Internet or cellular connection and without utilizing specialized equipment designed to retrieve deleted information that is not readily accessible to users of the device. As so modified, the judgment was affirmed.

Note: This is a confusing case, but with a simple rule in the end. Being on probation with search and seizure conditions does not mean a minor has waived all his privacy rights. While "Fourth waivers" are generally very broad, there are limits. The Court's biggest concern here appeared to be with how allowing access to defendant's electronic devices, given the fact that it can easily lead to private information concerning third parties, implicated more than just defendant himself. Note also that the various divisions of the First District Court of Appeal have published in rapid succession no less than *six* separate other decisions (for a total of seven) on this issue, apparently attempting to fine-tune the rules for social media-related probation conditions: The first six (including *Malik J.*, here) are all summarized in the Fourth Amendment Search & Seizure Outline which I've recently published, with #7 being added since. If you didn't get the Outline, let me know and I'll send it to you, plus the added case #7.

***Miranda and the Two-Step Interrogation Technique*:**

Reyes v. Lewis **(9th Cir. Aug. 14, 2015) 798 F.3rd 815**

Rule: When police deliberately employ a two-step interrogation technique, obtaining an un-*Mirandized* confession from an in-custody suspect before admonishing and reinterrogating him, and where curative measures are not taken to ensure that the belated *Miranda* warnings are genuinely understood, any subsequent confession will be suppressed even if otherwise voluntary.

Facts: Fifteen-year-old Adrian Reyes, the defendant, while walking home from La Sierra High School (where he was a freshman) in Riverside County on January 10, 2006, was accosted by a carload of "South Side Riverside 51-50" gang members. When defendant told them, in response to their challenge, that he claimed "Delhi," one of the gangsters punched defendant in the eye. Defendant had recently moved to Riverside from Santa Ana in Orange County, where the Delhi gang does its thing. The next day, defendant, with a different carload of gangsters, confronted Derek Ochoa, a La Sierra High School senior. Defendant was in the back seat while Andres Munoz—defendant's older cousin—drove.

Defendant got out of the car and shot Ochoa three times, killing him. The resulting homicide investigation eventually led to defendant and Munoz as suspects. Defendant was briefly contacted at his aunt's house on January 13, acknowledging to detectives only that he had known Ochoa and, being originally from Orange County, he'd heard of the Delhi gang. On February 9, detectives, supported by a SWAT team of 15 to 20 officers, executed a search warrant at defendant's aunt's home, recovering no more than papers on which "Delhi" was written. Defendant consented to going with the detectives to the police station for questioning. Unaccompanied by an adult, he was told that he was not under arrest and that he was free to discontinue the questioning at any time. No *Miranda* warnings were administered.

For the next several hours, detectives used a number of interrogation tactics, unsuccessfully attempting to get defendant to admit to at least being at the scene of the murder, if not being the shooter himself. Such tactics included, but were not limited to, false allegations of there being witnesses placing defendant at the scene, that the officers had the murder weapon (which in fact was never recovered), and that the detectives already knew what had happened, claiming to know more than what they really did. Defendant's repeated attempts to invoke his right to silence ("*I don't really want to say nothing no more*, . . ." and; "*Stop asking me questions*.") were ignored. Defendant, however, throughout the 40-minutes-to-an-hour interview held fast, continuing to deny any knowledge about Ochoa's murder. He was eventually taken back to his mother's house for the night, but picked up again the next morning for a polygraph exam. He was driven to the San Bernardino Sheriff's station where an experienced, expert polygraphist administered the test. Again, no *Miranda* warnings were given.

After the test, defendant was told that he'd "failed." The examiner then pressured him to "cooperate" and to "give details about what he had done," inferring that it would be better for him to do so. When defendant expressed some concerns about what punishment he was looking at, the examiner told him that "(f)ifteen year olds don't go to state prison." Eventually, the detectives came back into the room and took over the questioning. The same interrogation

tactics were thus begun again, including providing defendant with a face-saving suggestion that perhaps Ochoa had a gun and that defendant had to shoot him in self-defense. (Ochoa had no gun.) Defendant eventually agreed that Ochoa had come up to him and was reaching for a gun ("*He was reaching for it*" and "*He had a grip on it*."), and that he had to shoot him ("*I don't know. I just shot*.").

This admission came at some seven pages into the transcript of this interview. After some 35 more pages of ingratiating, "friendly" discussions on unrelated topics, conducted "in a nonconfrontational, sympathetic way," defendant was driven back to the Riverside police station—some fifteen miles away—where he was put into an interview room. At the station, the detectives interjected the fact that defendant "came clean" earlier, but that there were more questions the DA's Office wanted answered, so they were going to talk some more "*just to, to clarify stuff*." "*Can we talk about the stuff we talked about earlier today*?" But first, and for the first time, defendant was finally read his *Miranda* rights which he said he understood and agreed to waive.

After repeating his confession, some 5 to 6 hours (four hours of which had been spent at the San Bernardino Sheriff's station where the polygraph had been administered) after being picked up that morning, defendant was provided something to eat and then taken to Juvenile Hall. Charged in adult court (along with his cousin, Munoz) with first degree murder, defendant made a motion to suppress his confession. The trial court determined that defendant's initial confession, made at the San Bernardino Sheriff's station after the polygraph test, was made while defendant was in custody but without the benefit of a *Miranda* advisal and waiver. Although voluntarily obtained, it was suppressed due to the *Miranda* violation. However, the judge refused to suppress the post-warning confession made at the Riverside police station.

At trial, the evidence conflicted as to whether defendant or Munoz was the shooter. The jury eventually determined, presumably based upon his confession, that it was defendant who had been the shooter. Defendant was sentenced to 25 years to life for the murder conviction plus another 25 years for the firearm enhancement. He appealed. His conviction was upheld on appeal by the California appellate courts and through subsequent habeas corpus writs, both state and federal. Defendant appealed the denial of his writ of habeas corpus made to the federal district court.

Held: The Ninth Circuit Court of Appeal reversed. As he did in the trial court and with the California appellate courts, defendant argued that (1) his confession was inadmissible as the product of coercion, and (2) that it was also obtained in violation of the principles announced in the Supreme Court's decision of *Missouri v. Seibert* (2004) 542 U.S. 600. The Court found that the interrogating officers in this case did in fact violate *Seibert*, making it unnecessary to discuss the coercion issue (but see "*Note*," below). Over three decades ago, the United States Supreme Court decided the case of *Oregon v. Elstad* (1985) 470 U.S. 298, where it held that in talking to an in-custody suspect, a few un-*Mirandized* questions and answers did not necessarily poison a later *Miranda* waiver and confession. Taking advantage of this rule, police officers have developed an interrogative technique of getting a suspect to confess in an un-*Mirandized* interrogation, under circumstances that despite the lack of a *Miranda* admonishment and waiver,

were still "voluntary" (i.e., uncoerced), and then following this up by a proper admonishment of rights, a waiver, and a second confession.

The idea is that once the "*cat is out of the bag*," the average suspect would see no harm in waiving his rights and providing his interrogators with a second confession. At trial, then, although the jury would never hear the first confession, the second would be admitted into evidence against him. The Supreme Court, however, in condemning this "*two-step interrogation technique*," limited its *Elstad* holding to its facts. (In *Elstad*, upon first confronting the defendant in his home, there was minimal un-*Mirandized* questioning involved; i.e., "*Do you know why we're here*?", "*Do you know* (*the victim*)?", and "*I think you were involved*." He was then moved to the police station where he was properly advised and a confession obtained.) In *Missouri v. Seibert*, the Supreme Court condemned the "*two-step*" interrogation practice where a complete un-*Mirandized* confession is purposely obtained before properly admonishing the suspect, pointing out that such a practice "render(s) (the subsequent) *Miranda* warnings ineffective by waiting for a particularly opportune time to give them;" i.e., "after the suspect has already confessed."

After having once confessed, "a reasonable person in the suspect's shoes would *not* (italics added) have understood (such belatedly given *Miranda* warnings) to convey a message that she (continued to retain) a choice about continuing to talk." In effect, the subsequent waiver is not "*knowingly and intelligently made*," having, in effect, been tricked into waiving his or her rights. The *Seibert* rule, however, is read to apply only in those situations where the two-step interrogation technique is done (1) intentionally, and (2) nothing is done to properly explain to the suspect that his first confession is inadmissible and that there is still some value in him choosing to invoke should he decide to do so.

As noted in *Seibert*, "even a voluntary postwarning confession must be excluded where law enforcement officials *deliberately* withheld *Miranda* warnings until after obtaining an in-custody confession, and where *insufficient curative measures* had been taken to ensure that the suspect understood the meaning and importance of the previously withheld warnings." (Italics added) Absent an intentional *Seibert* violation, or at least "*curative measures*" being taken, the admissibility of post-warning statements are to continue to be governed by the principles of *Elstad*. Also, the voluntariness of the first (i.e., the un-*Mirandized*) confession is irrelevant to the finding of a *Seibert* violation, so that issue need not be decided. In this case, there were no "curative measures" taken to impress upon defendant the continued value of an invocation after his un-*Mirandized* confession. The only issue, therefore, was whether the detectives here intentionally employed a two-step interrogation technique as condemned in *Seibert*.

Some of the factors to consider in making this determination include (but are not limited to) "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the pre- and postwarning statements." Recognizing that officers will seldom admit to purposely using a two-step interrogation technique, the Court must consider the "objective circumstances." In this case, three experienced homicide detectives (plus an equally experienced polygraph examiner) conducted two (three, if you consider the polygraph examiner's questioning) separate interrogations that were described by the Court as "systematic, exhaustive, and managed with psychological skill." When finally admonished,

nothing was said that might "ensure that (defendant) understood 'the import and effect of the *Miranda* warning and of the *Miranda* wavier'" (i.e., "curative measures"). To the contrary, after two (or three) exhaustive unwarned interrogations, culminating in defendant's confession, the record reflects some 36 pages of "nonconfrontational, sympathetic" small talk, apparently intended to put defendant at ease.

When finally advised of his *Miranda* rights, the detectives "played down their importance" by telling defendant that the district attorney wanted some more information and that he (the detective) just wanted to "*clarify stuff*" already admitted to. Defendant was told that it was then necessary to read him his rights because he was in a room with the door locked and while he was no longer free to leave. "To a reasonable person not trained in the law, let alone a fifteen-year-old high school freshman, these stated reasons were hardly an effective means of conveying the fact that the warning he was about to give could mean the difference between serving life in prison and going home that night." And when the detective did finally read defendant his rights, it included the following: "*Do you understand each of these rights that I've explained to you*? *Yeah*? *OK. Can we talk about the stuff we talked about earlier today*?", tying the waiver inextricably in with that "*cat*" that had already been "*let out of the bag*."

The Court further found the "psychological, spatial, and temporal break between the unwarned and the warned interrogations" to be insufficient to cure the *Seibert* violation, with the same officers involved throughout for both days, and the same interrogation site (the Riverside police station) beginning and ending the process. In sum, the Court concluded that not only was the violation of *Seibert* intentional, but also that "far from taking 'curative measures,' they took affirmative steps to ensure that (defendant) did not 'understand the import and effect' of the *Miranda* warning he was finally given at the Riverside police station." The lower court was therefore ordered to grant defendant's writ of habeas corpus, and that defendant was to be given a new trial.

Note: *Seibert* and it's condemnation of the "*two-step interrogation technique*" has been around now for over a decade. If the facts in this case are anywhere near as described in the Court's written decision (an issue of which I am always wary in Ninth Circuit cases, particularly when the California courts and a federal district trial court judge all reached a contrary conclusion), there is no excuse for three experienced, homicide detectives to be ignorant of the fact that you just can't do what was so obviously and intentionally done in this case. The other issue not discussed in this case, it being irrelevant to the eventual outcome, was the voluntariness of defendant's confession irrespective of the validity of the eventual waiver.

In the last *California Legal Update* (Vol 21, #3), I briefed *In re Elias V.* (2015) 237 Cal.App.4th 568, which, in the court's exhaustive written decision, criticized many of the interrogation practices that were also employed in this case, at least when used against minors. The goal is to avoid a coerced, and thus unreliable, confession. While I have no doubt that the defendant in this case was in fact present at the scene of the murder and at the very least a co-conspirator, I also note that he was led into admitting to being the shooter by the detective providing him with a face-saving suggestion that the victim was armed and reaching for a gun (when no such gun existed), under circumstances, based upon defendant's comments, where he was also concerned with not getting his cousin, Andres Munoz, into trouble, and where there was substantial other

evidence presented at trial that Munoz was in fact the actual shooter. I also note that defendant arguably invoked his right to silence a number of times, each of which was ignored. Although defendant's confession in this case was found to be voluntary by the California courts, the decision in *Elias V.* casts some doubt as to that conclusion. The detectives in this case might do well by reading my brief on *Elias V.* as well.