IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

vs.

RYAN PAUL ANGOCO,
Defendant-Appellee

Supreme Court Case No.: CRA05-010
Superior Court Case No.: CF0337-05

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on October 6, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; and RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] Defendant-Appellee Ryan Paul Angoco filed a motion to suppress certain statements he made to police, including a written statement he gave after he signed a waiver of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The Superior Court applied the analysis of the United States Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), in determining the validity of the *Miranda* waiver and suppressed the post-*Miranda* written statement. The trial court also found that the police failed to comply with 19 GCA § 5111 and held that violation of the statute provided partial justification for suppressing the post-*Miranda* written statement. Plaintiff-Appellant People of Guam appealed the trial court's suppression of the post-*Miranda* statement. We hold that the trial court erred in its application of *Seibert* and therefore reverse the trial court's suppression of Angoco's post-*Miranda* written statement. We also remand the case to the trial court to determine whether the interrogating officer deliberately used a "question-first" interrogation technique, according to the rules set forth in this opinion. We further hold that violation of 19 GCA § 5111 alone does not warrant suppression of the post-*Miranda* written statement.

I.

[2] On September 30, 2005, at 12:40 a.m., Officer Allan Guzman met Defendant-Appellee Ryan Paul Angoco at the Tumon precinct. Angoco was earlier handcuffed and brought to the precinct after he admitted that he was the driver of a truck allegedly involved in a fatal hit-and-run in Tumon.[1]

[1] The People concede that Angoco was in custody when he was taken by police to the Tumon precinct.

[3] Officer Guzman questioned Angoco without issuing *Miranda* warnings. During questioning, Angoco stated that he was the driver of the truck and that he did not remember the accident because he blacked out.

[4] Angoco's parents were later contacted and arrived at the Tumon precinct at 2:20 a.m. Officer Guzman told the parents that he believed Angoco drove the truck that killed a Japanese tourist. Officer Guzman then questioned Angoco with the parents present, in the same room where Angoco was earlier questioned. Officer Guzman subsequently left Angoco and his parents alone in the room.

[5] At 2:35 a.m., Officer Guzman returned to the room with a "Custodial Interrogation" form, which listed *Miranda* rights and included a waiver of the rights. Angoco and his parents signed the form.

[6] Officer Guzman then instructed Angoco to make a written statement. Angoco started writing at 3:31 a.m. and completed his written statement at 4:20 a.m. Angoco stated in writing that he and his friend inhaled an "air duster" while driving the truck to Tumon, that Angoco lost consciousness, that Angoco awoke to his friend saying that Angoco hit a pedestrian with the truck, and that Angoco did not remember hitting anyone.

[7] On October 7, 2005, a grand jury returned an indictment charging Angoco with Manslaughter (As a 1st Degree Felony), Vehicular Homicide (As a 2nd Degree Felony), Negligent Homicide (As a 2nd Degree Felony), Leaving the Scene of an Accident (A Felony), Reckless Conduct (As a Misdemeanor), Reckless Driving with Injuries (As a Misdemeanor), Leaving the Scene of an Accident (As a Petty Misdemeanor), and Reckless Driving (As a Petty Misdemeanor).

[8] On November 3, 2005, Angoco filed a motion to suppress the statements he made to police, including the written statement he gave after he signed the form waiving his *Miranda* rights. The

Superior Court held hearings on the motion from November 15, 2005 to November 18, 2005. The trial court granted the motion on November 18, 2005. Plaintiff-Appellant People of Guam appealed the decision on November 21, 2005. The decision was entered on the docket on November 25, 2005. The appeal was timely filed. 8 GCA § 130.40 (2005).[2]

II.

[9] This court has jurisdiction over an appeal from a Superior Court decision and order granting a motion to suppress evidence. 7 GCA § 3107(b) (2005); 8 GCA § 130.20(a)(6) (2005).

III.

[10] A motion to suppress is reviewed de novo by this court. *People v. Sangalang*, 2001 Guam 18 ¶ 10 (citing *People v. Hualde*, 1999 Guam 3 ¶ 19). We review de novo the voluntariness of a waiver of *Miranda* rights, and review for clear error the knowing and intelligent nature of the waiver. *Id.*

[11] The legal question of whether *Miranda* warnings were adequate is subject to de novo review. *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989); *see United States v. Hernandez*, 93 F.3d 1493, 1501 (10th Cir. 1996). Jurisdictions applying this standard have stated:

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[2] The People appealed the suppression of statements made by Angoco after he signed a "Custodial Interrogation" form waiving his *Miranda* rights. The trial court's decision, however, only addressed the post-*Miranda* written statement given by Angoco.

Conflicting evidence exists with regard to other oral statements Angoco may have made after he waived his *Miranda* rights. Officer Allan Guzman reported that he interviewed Angoco at 2:40 a.m., five minutes after Angoco signed the *Miranda* waiver. Appellee's Supplemental Excerpts of Record ("SER"), tab 6R at 3 (Supp. Rep. prep. by Guzman). Officer Guzman's report stated that Angoco told the officer that Angoco was the driver of a truck allegedly involved in a fatal hit-and-run, that Angoco inhaled an "Air Duster Spray" while driving in Tumon, and that Angoco passed out, among other things. SER, tab 6R at 3 (Supp. Rep. prep. by Guzman). On the record, however, Officer Guzman testified that Angoco's parents told the officer "as to what Ryan had consulted with them and how the story had occurred." Transcripts ("Tr."), Vol. III at 24, 26 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman also testified that he learned about Angoco's use of the air duster from the parents. Tr., Vol. III at 53, 59, 72 (Cont'd. Mot. to Supp., Nov. 16, 2005). More importantly, the trial court never addressed the existence or admissibility of post-*Miranda* oral statements in its decision and order. Appellant's Excerpts of Record ("ER") at 8-14 (Dec. & Ord. re Mot. to Supp.).

In light of the reversal and remand ordered by this court, we therefore leave the task of resolving this factual discrepancy to the trial court, as part of its reconsideration of the present case in accordance with the rules set forth in this opinion.

> De novo review is appropriate because the adequacy of *Miranda* warnings involves application of a legal standard to a set of facts, which require[s] the consideration of legal concepts and involves the exercise of judgment about the values underlying the legal principles. . . . In contrast, the factual findings underlying the adequacy challenge, such as what a defendant was told, are subject to clearly erroneous review.

Id. (citations and quotation marks omitted); *see United States v. Caldwell*, 954 F.2d 496, 501 n.8 (8th Cir.1992).

IV.

[12] The decision of the trial court was anchored by its analysis of *Missouri v. Seibert*, 542 U.S. 600 (2004), decided by the United States Supreme Court. Thus, the primary focus of the present case is the trial court's interpretation and application of *Seibert*.

[13] The People argue that the trial court erred in applying *Seibert* when it applied the multi-factor test laid out in the plurality opinion instead of the test articulated in Justice Kennedy's concurring opinion. The People thus assert that the trial court failed to make the requisite determination of whether the police deliberately used a "question-first" interrogation technique. Alternatively, the People maintain that even if the trial court found deliberate use of the question-first technique, the presence of Angoco's parents during the post-*Miranda* phase of questioning and the length of time between the pre-*Miranda* and post-*Miranda* statements constituted sufficient curative measures that justified admission of the post-*Miranda* statement. The People further assert that Angoco's waiver of *Miranda* rights and his statements thereafter were voluntary, knowing and intelligent.

[14] Angoco argues that the trial court properly employed *Seibert* since the trial court's review considered the factors discussed in both the plurality opinion and concurrence. Angoco asserts that the facts of the instant case are substantially similar to those the plurality noted in justifying suppression. Angoco maintains that the trial court found that the question-first technique was

deliberately used and that the record was devoid of evidence indicating curative measures taken by police. In addition, Angoco asserts that the trial court held that the waiver was neither knowing nor intelligent. Angoco further maintains that the failure to advise him of *Miranda* rights was neither accidental nor inadvertent.

A. The *Seibert* Plurality Opinion

[15] The first issue this court must determine is whether the trial court properly applied the *Seibert* analysis in suppressing Angoco's post-*Miranda* statement.

[16] In *Seibert*, the defendant was arrested and transported to a police station, where she was questioned by an officer for 30 to 40 minutes without being advised of her *Miranda* rights. *Seibert*, 542 U.S. at 604-605. The officer later testified that he made a "conscious decision" to withhold *Miranda* warnings and used the "question-first" interrogation technique he had been taught. *Id.* at 605-606. An officer utilizing the question-first technique would "question first, then give the warnings, and then repeat the question 'until [the officer] get[s] the answer that [the suspect] already provided once.'" *Id.* at 606. During the interrogation, the officer squeezed the defendant's arm and repeated statements suggesting the defendant's involvement in the crime. *Id.* at 604-605. After the defendant made incriminating statements, she was allowed to take a 20-minute break to smoke and drink coffee. *Id.* at 605. The officer then issued *Miranda* warnings to the defendant, obtained a signed waiver from her, and resumed questioning of the defendant, which he now recorded. *Id.* During this warned second phase of questioning, the officer mentioned that they had been talking about the incident and then confronted the defendant with her previous unwarned statements. *Id.* The officer "acknowledged that [the defendant's] ultimate statement was 'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 606.

[17] The United States Supreme Court in a plurality opinion denounced the question-first technique used by the officer, stating that "[b]y any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after [the] interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. "Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* at 613-614 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

[18] The Court stated that "[t]he 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." *Id.* at 611-612. The Court then considered five factors to be used in examining the effectiveness of *Miranda* warnings administered when suspects are so questioned first. The Court specifically considered:

> [1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second [rounds of interrogation], [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. Viewing the facts in light of these five factors, the Court noted that "[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment" and "the police did not advise [the defendant] that her prior statement could not be used." *Id.* at 616. The Court found that "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid." *Id.* The Court also found that "[t]he impression that the further

questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given," and concluded that "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Id.* at 616-617. The Court then held that the defendant's post-warning statements were inadmissible after concluding that "[t]hese circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 617.

[19] The trial court in the present case stated: "When faced with a *Miranda* challenge, the court is required to engage in a totality of the circumstances inquiry in order to determine if the waiver is made voluntarily, knowingly and intelligently." Appellant's Excerpts of Record ("ER") at 9 (Dec. & Ord. re Mot. to Supp.) (citing *Wyrick v. Fields*, 459 U.S. 42, 48-49 (1982)). The trial court then stated that the analysis in *Seibert* was applicable to a totality of the circumstances inquiry into the validity of a *Miranda* waiver. The trial court did not find the *Seibert* case to be independent grounds for suppression, separate from the *Miranda* inquiry. The trial court also did not assess the validity of the *Miranda* waiver according to the well-established principles previously recognized by this court. The trial court instead held that the *Seibert* analysis was controlling in determining the legitimacy of Angoco's waiver of *Miranda* rights. In doing so, the trial court found the *Seibert* facts to be substantially similar to those in the present case. The trial court also listed the same five factors above and analyzed the facts of the present case in accordance with the factors, ultimately determining that Angoco's post-*Miranda* written statement was inadmissible and must be suppressed.

B. The *Seibert* Concurring Opinion by Justice Kennedy

[20] Because *Seibert* was decided by a plurality of the United States Supreme Court, the People argue that the trial court in the present case erred in applying the *Seibert* holding enunciated by the four Justices to the present case.

[21] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Citing this decree from the Court, a majority of circuits have held that Justice Kennedy's concurrence represents the *Seibert* holding. *United States v. Williams*, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005); *see United States v. Stewart*, 388 F.3d 1079, 1086-1087, 1090 (7th Cir. 2004) and *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006). We agree with these circuits, and conclude that the trial court erred by analyzing the present case according to the holding of the *Seibert* plurality. We therefore hold that the concurrence of Justice Kennedy is the holding of *Seibert*, and the rules therein should have been applied by the trial court in determining whether Angoco's post-*Miranda* statement was admissible.

[22] Justice Kennedy's concurrence in *Seibert* stated that the question-first technique was "designed to circumvent *Miranda*," and "further[ed] no legitimate countervailing interest." *Seibert*, 542 U.S. at 618, 621. Again, the question-first technique involves unwarned questioning, followed by the advisement of *Miranda* rights after a confession has been made. *Id.* at 613. Departing from the plurality, Justice Kennedy's concurrence held that the question-first technique should be

scrutinized only when it has been deliberately used, stating that "a multifactor test that applies to every two-stage interrogation may serve to undermine [*Miranda*'s] clarity." *Id.* at 622. Under this narrower test, if the question-first technique was "used in a calculated way to undermine the *Miranda* warning," then post-*Miranda* statements "that are related to the substance of prewarning statements" must be suppressed, unless "specific, curative steps" were taken before the post-*Miranda* statements were made. *Id.* at 621-622. The concurrence stated that such curative steps included: a substantial break in time and circumstances between the unwarned statements and the *Miranda* warning; or, an additional warning regarding the inadmissibility of unwarned statements. *Id.* at 622. These curative steps must "ensure that a reasonable person in the suspect's situation would understand the import and effect" of the warning and the waiver. *Id.* If the interrogator does not use "this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview," the concurrence held that *Oregon v. Elstad*, 470 U.S. 298 (1985), governed the admissibility of post-*Miranda* statements. *Id.* at 621-622.

[23] Considering the *Seibert* facts, the concurrence found that "[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*." *Id.* at 620. The concurrence stated:

> The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them.... Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

Id. at 621. The concurrence then held that the defendant's post-*Miranda* statements were inadmissible because "[n]o curative steps were taken." *Id.* at 622.

1. Deliberate Use of Question-First Technique

[24] The *Seibert* concurrence[3] did not establish a test for determining whether the question-first technique was deliberately used. *Seibert*, 542 U.S. at 618-622. One circuit has offered guidance on the deliberateness inquiry. *Williams*, 435 F.3d at 1158; *compare Ollie*, 442 F.3d at 1141-1143; *Stewart*, 388 F.3d at 1089-1090; *Kiam*, 432 F.3d at 532. The Ninth Circuit, recognizing that such a test was lacking, held that "in determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Williams*, 435 F.3d at 1158. The Ninth Circuit stated that "[s]uch objective evidence would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Id.* at 1159.

[25] The objective evidence listed by the Ninth Circuit is similar to four of the factors listed in the *Seibert* plurality opinion: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, and the continuity of police personnel." *Seibert*, 542 U.S. at 615. The *Seibert* plurality, however, used the factors to determine whether mid-interrogation *Miranda* warnings were effective in informing the defendant of his rights and the consequences of waiving them. *Id.* at 614-617. The factors were not used to determine whether the question-first technique was deliberately used. Though the Ninth Circuit did not reconcile this difference in laying out its test, it stated that the objective inquiry into deliberateness "function[s] practically as an analysis of whether the facts of

[3] All references to the "*Seibert* concurrence" herein refer to the concurring opinion by Justice Kennedy.

a particular case more closely resemble those in *Seibert* or *Elstad*." *Williams*, 435 F.3d at 1162 n.16. Again, the officer in *Seibert* testified that he intentionally withheld warnings and used a technique he had been taught. *Seibert*, 542 U.S. at 604-606. In *Elstad*, the United States Supreme Court characterized the officer's failure to warn as an "oversight." *Elstad*, 470 U.S. at 315-316. In short, under the Ninth Circuit test, the objective evidence is relevant to the extent it demonstrates the facts of a case to be comparable to those in either *Seibert* or *Elstad*.

[26] The Ninth Circuit also stated that in determining whether the question-first technique was deliberately used, a court should also consider "available expressions of subjective intent suggesting that the officer acted deliberately to undermine and obscure the warning's meaning and effect." *Williams*, 435 F.3d at 1160. The Ninth Circuit reasoned that:

> By focusing on both "facts apart from intent that show the question-first tactic at work," . . . and any available subjective evidence of deliberateness, courts will better ensure that law enforcement officers do not circumvent the Fifth Amendment right against self-incrimination through the use of "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking.

Id. at 1159 (citations omitted).

[27] Because the *Seibert* concurrence is silent on a method for determining whether the question-first technique was deliberately used to undermine *Miranda*, we therefore adopt the Ninth Circuit test in *Williams* discussed above. In addition, to provide clarity, we hold that a trial court must evaluate "the timing and setting of the first and the second [rounds of interrogation]" as part of the objective evidence considered under the *Williams* test. *Seibert*, 542 U.S. at 615. Pursuant to the *Williams* test, this additional objective evidence, originally discussed in the *Seibert* plurality opinion, is relevant to the extent it demonstrates the facts of a case to be comparable to those in either *Seibert* or *Elstad*. *Williams*, 435 F.3d at 1162 n.16. Consequently, two things must be considered in determining such

deliberateness: objective evidence, including the timing, setting and completeness of the unwarned phase of questioning, the timing and setting of the first and the second rounds of interrogation, the continuity of police personnel and the overlapping content of the warned and unwarned statements; and, available subjective evidence, such as an officer's testimony.

[28] The *Seibert* concurrence also did not establish the burden of proof for establishing the deliberate use of the question-first technique, and thus which party bore such a burden. *Seibert*, 542 U.S. at 618-622; *Williams*, 435 F.3d at 1159 n.11; *Ollie*, 442 F.3d at 1142. Noticing this omission, the Eighth Circuit held that "when a defendant moves to suppress a post-warning statement that he contends was given as part of a question-first interrogation, the prosecution must prove, by a preponderance of the evidence, that the officer's failure to provide warnings at the outset of questioning was not part of a deliberate attempt to circumvent *Miranda*." *Ollie*, 442 F.3d at 1142-1143. The Eighth Circuit noted that its holding comported with Supreme Court precedent and other practical considerations. *Id.* at 1143.

[29] We therefore hold that the prosecution bears the burden of proof for establishing deliberateness, and thus must prove by a preponderance of the evidence that the failure to issue *Miranda* warnings was not pursuant to the deliberate use of the question-first technique.

2. Curative Measures

[30] If the objective evidence and available subjective evidence discussed above demonstrate that the question-first technique was deliberately used to undermine *Miranda*, then the *Seibert* concurrence requires suppression of post-*Miranda* statements related in substance to unwarned statements, unless curative measures were taken prior to procurement of the warned statements. *Seibert*, 542 U.S. at 621-622. Again, the curative measures discussed in the *Seibert* concurrence

were: a substantial break in time and circumstances between the unwarned statements and the *Miranda* warning; or, an additional warning regarding the inadmissibility of the unwarned statements. *Id.* at 622.

[31] Other circuits that have analyzed the *Seibert* concurrence agree that the presence of curative measures must be considered upon establishing that the question-first technique had been deliberately used. *Williams*, 435 F.3d at 1160-1161; *Ollie*, 442 F.3d at 1142; *Stewart*, 388 F.3d at 1089-1090; *Courtney*, 463 F.3d at 338; *Mashburn*, 406 F.3d at 309; *Kiam*, 432 F.3d at 532. The Ninth Circuit, however, stated that where deliberateness has been shown, the five factors discussed by the *Seibert* plurality must also be applied in determining the effectiveness of the later *Miranda* warnings. *Williams*, 435 F.3d at 1160-1161. This test for the effectiveness of the warning departs from other circuits' interpretation of the concurrence. *Ollie*, 442 F.3d at 1142; *Stewart*, 388 F.3d at 1089-1090; *Courtney*, 463 F.3d at 338; *Mashburn*, 406 F.3d at 309; *Kiam*, 432 F.3d at 532. Though the *Seibert* concurrence was silent on the method for determining deliberate use of the question-first technique, it explicitly discussed certain curative measures to be considered. *Seibert*, 542 U.S. at 621-622. We decline to adopt the Ninth Circuit's test for the effectiveness of mid-interrogation *Miranda* warnings, and conclude that upon a finding of deliberateness, only curative measures need be considered in determining whether post-*Miranda* statements should be suppressed.

3. Non-Deliberate Use of Question-First Technique (*Elstad* Test)

[32] If consideration of objective evidence and available subjective evidence pursuant to the test for deliberateness indicates that the question-first technique was not deliberately used to undermine *Miranda*, the *Seibert* concurrence states that *Elstad* governs the admissibility of post-*Miranda* statements. *Id.* at 622.

[33] In *Elstad*, police arrived at the defendant's home with a warrant for his arrest in connection with a criminal investigation. *Elstad*, 470 U.S. at 300-301. An officer questioned the defendant without issuing *Miranda* warnings in the living room, where the defendant confessed to being present at the crime scene. *Id.* at 301. "The arresting officers' testimony indicate[d] that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest." *Id.* at 315. The defendant was then transported to a sheriff's headquarters about an hour later, where he was advised of and subsequently waived his *Miranda* rights. *Id.* at 301. The defendant explained his involvement in the crime by giving a full statement, which he reviewed, and which was read back to him for correction. *Id.* The defendant and the two arresting officers signed the statement. *Id.*

[34] The United States Supreme Court stated that the failure to issue *Miranda* warnings "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or it may simply have reflected [the officer's] reluctance to initiate an alarming police procedure" before speaking with the defendant's mother. *Id.* at 315-316. The Court then characterized the failure to warn as an "oversight," and found that "the incident had none of the earmarks of coercion." *Id.* at 316. It held that "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." *Id.* at 318.

[35] The *Seibert* concurrence noted that the suspect in *Elstad* "had not received a *Miranda* warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time." *Seibert*, 542 U.S. at 619. The concurrence then distinguished *Elstad*, stating

that in *Seibert* the "*Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given." *Id.* at 620.

[36] The United States Supreme Court in *Elstad* recognized that a "simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" did not alone render a later warned statement inadmissible. *Elstad*, 470 U.S. at 309. "In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314. The Court stated that "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.* at 309. "As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Id.* at 318.

[37] "The voluntariness of a statement is an issue of fact that must be proven by the Government by a preponderance of the evidence." *Borja v. People*, Crim. No. 81-00049A, 1983 WL 29949 at *3 (D. Guam App. Div. May 26, 1983). "Whether a statement is voluntary or not depends on whether the [suspect] knowingly and intelligently waived his constitutional rights pursuant to *Miranda*...." *Id.* This court has stated that the voluntary, knowing and intelligent nature of a *Miranda* waiver is to be gleaned from the totality of the circumstances, which includes "the background, experience and conduct of the defendant." *Sangalang*, 2001 Guam 18 ¶ 13 (quoting *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998)). "Two distinct dimensions" must be considered in determining the validity of a waiver:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Hualde, 1999 Guam 3 ¶ 30 (quoting *Moran v. Burbine*, 475 U.S. 412, 421).

[38] In short, if deliberate use of the question-first technique is not found, then the admissibility of post-*Miranda* statements hinges on: whether the warned statements were given knowingly and voluntarily; and, whether the warned statements were made subsequent to unwarned statements that were neither coerced nor the product of "other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309.

[39] Thus, pursuant to the *Seibert* concurrence, the first issue is whether the question-first technique was deliberately used to undermine *Miranda*. If it was so used, the next issue is whether certain curative measures were employed. If such deliberate use of the question-first technique is not found, then *Elstad* governs, and the inquiry shifts to an examination of the knowing and voluntary nature of the warned and unwarned statements, based on the totality of the circumstances.

[40] In the present case, the trial court essentially found that the question-first technique was utilized by Officer Guzman. The trial court did not, however, make a specific factual finding as to whether the technique was deliberately used.

[41] "This court undertakes de novo review of the trial court's legal conclusion[s] . . . . " *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 15 (quoting *People v. Johnson*, 1997 Guam 9 ¶ 3.) "We review a trial court's findings of fact for clear error." *Pac. Rock Corp. v. Dep't of Educ.*, 2001 Guam 21 ¶ 13. "The facts are . . . construed in a light most favorable

to the party prevailing at the trial level." *People v. Johnson*, 1997 Guam 9 ¶ 3. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang v. Hong*, 1998 Guam 9 ¶ 7 (quoting *People v. Chargualaf*, Civ. No. 88-00068A, 1989 WL 265040 at *2 (D. Guam App. Div. Sept. 26, 1989)).

[42] Again, the trial court failed to make a factual finding on deliberate use of the question-first technique. Thus, this court cannot conduct a review for clear error since there is no factual finding by the trial court which can be subjected to such review.

[43] The record also contains testimony with regard to the use of the question-first technique that may or may not support a finding of deliberateness. Officer Guzman described the officers' questioning of Angoco, including the questions Officer Guzman asked before *Miranda* warnings were issued, as an "interview." Transcripts ("Tr."), Vol. III at 81-82 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman stated that an unwarned interview was permissible as part of the "crash investigation process." Tr., Vol. III at 129 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman said that unwarned interviews were "not a specific technique" he was taught, and that "[i]t's more or less common sense too that you first have to ask what's going on before you get in detail as to the investigation itself." Tr., Vol. III at 163 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman replied that an interview differed from an interrogation. Tr., Vol. III at 169 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman responded that he believed the unwarned interviews complied with *Miranda*. Tr., Vol. III at 170 (Cont'd. Mot. to Supp., Nov. 16, 2005). Officer Guzman also replied that the unwarned interviews were part of the training he received. Tr., Vol. III at 171 (Cont'd. Mot. to Supp., Nov. 16, 2005).

[44] Without a factual finding by the trial court of deliberate use, this court cannot determine the appropriate analysis pursuant to the *Seibert* concurrence. This is so because an inquiry into the use of curative measures or application of the *Elstad* test hinges on a finding of deliberateness. Under these circumstances, we decline to make a determination of whether the question-first technique was deliberately used. We therefore reverse the trial court's decision to suppress Angoco's post-*Miranda* written statement and remand this case to determine whether Officer Guzman deliberately used the question-first technique to undermine *Miranda*.

[45] The trial court, pursuant to this remand, must weigh the objective evidence and available subjective evidence previously discussed to determine whether the question-first technique was deliberately used by Officer Guzman to undermine *Miranda*. If the trial court finds that Officer Guzman so deliberately used the technique, it must suppress Angoco's post-*Miranda* statement, unless the curative steps discussed in the *Seibert* concurrence were employed. Otherwise, if such deliberate use is not found, the admissibility of the post-*Miranda* statement hinges on whether the totality of the circumstances indicates the warned and unwarned statements were made knowingly and voluntarily.

C. Parental Notification Pursuant to 19 GCA § 5111

[46] The People argue that the trial court erred by suppressing Angoco's statements based on 19 GCA § 5111 (2005). The People assert that the police did not know Angoco was a minor for some time and therefore the statute supplied no basis for suppression. The People maintain that the police complied with the statute's mandate to contact the parents as soon as possible. Furthermore, the People assert that the statute did not mandate automatic suppression upon violation of the law.

[47] Angoco argues that section 5111 was a proper basis for suppression because the trial court found that Angoco was a minor and that the police did not contact the parents as soon as possible pursuant to the statute. Angoco asserts that the violation of the statute was prejudicial to him and caused him to make his post-*Miranda* statements. Angoco maintains that the behavior of the police undermined the purpose of the statute.

[48] The notification provision of section 5111, described by the trial court as the "Parental Notification Act," states:

> (a) *When any child violating any law or any rule or regulation with the force and effect of law*, or whose surroundings are such as to endanger his welfare, *is taken into custody, such taking into custody shall not be termed an arrest. The jurisdiction of the court shall attach from the time of such taking into custody. When a child is so taken into custody, such officer shall cause the parent, guardian or custodian of the child to be notified as soon as possible.* Whenever possible, unless otherwise ordered by the court, such child shall be released to the custody of his parent or other responsible adult upon the written promise, signed by such person, to bring the child to the court at a stated time or at such time as the court may direct. Such written promise, accompanied by a written report by the officer, shall be submitted to the court as soon as possible. If such person shall fail to produce the child as agreed or upon notice from the court, a summons or warrant may be issued for the apprehension of such person or of the child.

19 GCA § 5111(a) (2005) (emphases added).

[49] This court conducts de novo review of statutory interpretation issues. *People v. Flores*, 2004 Guam 18 ¶ 8 (citations omitted). "[O]ur duty is to interpret statutes in light of their terms and legislative intent." *Id.* The plain meaning of the statute "prevails," where there is no "clear legislative intent to the contrary." *Id.* "[Q]uestions of statutory interpretation may be aided by reference to the prevailing interpretation of other statutes that share the same language and either have the same general purpose or deal with the same general subject as the statute under

consideration." *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 11 (quoting *Santos v. Immigration & Naturalization Serv.*, 525 F.Supp. 655, 666 (S.D.N.Y. 1981)).

[50] The trial court stated that section 5111 required officers to contact Angoco's parents as soon as possible after taking Angoco into custody since it was undisputed that Angoco was a minor. The trial court also adopted the Guam Superior Court's reasoning and holding in *People v. Mendiola*, CF0118-01 (Super. Ct. Guam Aug. 17, 2001), "[t]o provide meaningful protection to the notification requirements" in section 5111. ER at 12 (Dec. & Ord. re Mot. to Supp.). The trial court then found that the police failed to contact Angoco's parents as soon as possible and allowed him to make incriminating statements in the absence of his parents. The trial court held that "with respect to the written statement[,] . . . the Parental Notification Act and the dangers set out in *Seibert*[,] combined[,] provided a set of circumstances such that the minor, once the confessions or statements were made, even despite the presence of his parents[,] could not effectively avail himself of his rights to *Miranda*." ER at 11 (Dec. & Ord. re Mot. to Supp.).

[51] The next issue this court must decide is whether the trial court properly held that section 5111 provided a basis for suppressing Angoco's post-*Miranda* statements. We thus look to the statute's legislative intent, plain language as well as relevant case law interpreting similar statutes to determine the propriety of the trial court's holding.

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1. Legislative Intent

[52] Section 5111 was based on section 260 of the Guam Code of Civil Procedure, which was enacted in 1953 and supposedly adapted from the California code of the same name.[4] 19 GCA § 5111; Guam Code Civ. Proc. § 260 (1970) (codified at 19 GCA § 5111 (2005)) ("Foreword (1953)" at iv-v); *see also Torres v. Torres*, 2005 Guam 22 ¶ 33, n.6. Section 260 of the California Code of Civil Procedure was added by statute in 1951, but later repealed by statute in 1953. Cal. Civ. Proc. Code § 260 (West, Westlaw through Ch. 1 of 2007 Reg. Sess. urgency legislation). Section 260 of the California Civil Procedure code was "related to grades and compensation of court commissioners." Cal. Civ. Proc. Code § 260 (West 1954). It did not address parental notification.[5]

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[4] The "Foreword (1953)" of the Code of Civil Procedure of the Territory of Guam states:

> "This book and its accompanying volume contain the revised and amended Civil, Civil Procedure, Penal and Probate Codes of Guam. . . . The original codes published under the Naval Government were adapted from the California codes of the same name. Although subsequent changes in the California statutes have resulted in many major differences between the two sets of codes today, they are still identical or comparable as to many of their sections. Consequently, there is a large body of court decisions and other legal literature available to aid in the interpretation of the various sections. . . . The result is that these present volumes constitute revised and amended editions of the previously printed codes rather than entirely new compilations[.]"

Guam Code Civ. Proc. § 260 (1970) (codified at 19 GCA § 5111 (2005)) ("Foreword (1953)" at iv-v).

[5] Section 260 of the California Code of Civil Procedure stated:

> In any county or city and county where court commissioners may be appointed pursuant to Section 258, except where provision is made elsewhere in the law for their salaries, such commissioners when appointed shall receive a salary as provided in this section. Such commissioners are of two grades, grade 1 and grade 2. Commissioners, grade 1, shall receive an annual salary of six thousand dollars ($6,000) a year. Commissioners, grade 2, shall receive an annual salary of five thousand one hundred dollars ($5,100). The superior court at the time of appointment shall designate the grade of the commissioner. Commissioners, grade 1, are those commissioners who have performed the duties of a court commissioner or of a clerk of superior court judges or have had equivalent experience for a period of at least five years, and who have been approved by the court for appointment to grade 1. All other commissioners are grade 2. The salary of a commissioner shall be paid in monthly installments out of the salary fund of the county, or city and county, or if there is no salary fund, then out of such fund as other salary demands against the county or city and county are paid, and shall be allowed and audited in the same manner as other salary demands against the county or city and county are required by law to be allowed and audited.

1951 Cal. Stat. 2862-2863.

The Guam and California Civil Procedure codes thus offered no guidance on assessing whether section 5111 justified suppression of Angoco's post-*Miranda* statement, because the relevant sections were silent on the repercussions of a statutory violation.

2. Plain Language

[53] The plain language of section 5111 does not specifically address the admissibility of a minor's confession given when parents are not notified as soon as possible.[6] 19 GCA § 5111. Consequently, the statute's plain language is also silent on the consequences of an officer's failure to cause parents to be so notified. The statute's plain language thus does not support the trial court's

[6] The remaining subsections of section 5111 state:

> (b) If the child is not released hereinabove provided, such child shall be taken without unnecessary delay to the court or to the place of detention designated by the court, and as soon as possible thereafter the fact of such detention shall be reported to the court, accompanied by a written report by the officer taking the child into custody stating:
>
> (1) The facts of the offense; and
>
> (2) The reason why the child is not released to the parent.
>
> Pending further disposition of the case, the court may release such child to the custody of the parent or other person or may detain the child in such place as the court shall designate; subject to further order, but no child shall be held in a detention longer than two (2) days, excluding Sundays and holidays, unless an order for such detention is signed by the judge.
>
> (c) No child shall be transported in any police vehicle which also contains adults under arrest, unless the child is alleged to have been involved with the adult also being transported in the same illegal activity or course of conduct; provided, also, that a child may be transported in the same police vehicle if, under the circumstances, other transportation is not available. No child shall at any time be detained in any police station, lockup, jail or prison; except, that by order of the judge in which reason therefore shall be specified, a child sixteen (16) years of age, but under eighteen (18) years of age whose conduct or condition is such as to endanger his safety or welfare or that of others in the detention facility for children, may be placed in a jail or other place of detention for adults, but in a room or ward entirely separate from adults confined thereon; provided that this section shall not prohibit the interrogation of a child with respect to any felonious activity.
>
> (d) provisions regarding bail shall not be applicable to children detained in accordance with the provisions of this Chapter.

19 GCA § 5111.

suppression of Angoco's post-*Miranda* statement because the plain language does not explicitly require suppression of the warned statement based on a failure to contact Angoco's parents as mandated.

3. Similar Statutes and Related Case Law

[54] Section 211.131 of Title XII of the Missouri Statutes states:

> 1. When any child found violating any law or ordinance or whose behavior, environment or associations are injurious to his welfare or to the welfare of others or who is without proper care, custody or support is taken into custody, the taking into custody is not considered an arrest.
>
> 2. When a child is taken into custody, the parent, legal custodian or guardian of the child shall be notified as soon as possible.
>
> 3. The jurisdiction of the court attaches from the time the child is taken into custody.

Mo. Ann. Stat. § 211.131 (West, Westlaw through 2006 2nd Reg. Sess. of 93rd Gen. Assembly). Section 211.131 thus contains language that is substantially similar to the notification provision of section 5111.

[55] The Eighth Circuit considered the effect of violating this Missouri statute on the validity of a juvenile's *Miranda* waiver. *Rone v. Wyrick*, 764 F.2d 532 (8th Cir. 1985). The Eighth Circuit held that violation of the notification provision of section 211.131 "alone does not render the confession involuntary .... [and] also does not render [the defendant's] confession a product of ignorance." *Id.* at 535 (citation omitted). The Eighth Circuit instead examined the totality of the circumstances and found that the minor's waiver of *Miranda* rights was made knowingly and voluntarily. *Id.*

[56] We agree with the Eighth Circuit's assessment. Section 5111 does not provide an independent basis for suppressing Angoco's post-*Miranda* statement. The validity of Angoco's

Miranda waiver would still be subject to a totality of the circumstances inquiry into whether the waiver was made voluntarily, knowingly and intelligently.

[57] The trial court did not hold the notification provision of section 5111 to be a sole basis for suppressing Angoco's warned statement. Instead, the trial court held that the notification provision, together with the concerns expressed in *Seibert*, deprived Angoco of the effective exercise of his *Miranda* rights. We therefore hold that the trial court properly considered violation of section 5111 as part of the totality of circumstances in determining whether to suppress Angoco's post-*Miranda* statement. The plain language of the statute's notification provision does not require suppression of a statement made after an officer fails to cause a minor's parents to be contacted as soon as possible. The Eighth Circuit's interpretation of a substantially similar statute also does not support suppression of the post-*Miranda* statement based solely on a violation of section 5111. *Rone*, 764 F.2d 532. We also note that the Guam Superior Court case referenced by the trial court is irrelevant to the issue of the admissibility of the "post"-*Miranda* statement.[7] We thus further hold that violation of section 5111 is only one circumstance among the totality of circumstances to be considered in assessing the admissibility of the warned statement. However, because the trial court's ruling with regard to section 5111 merely supplemented its application of *Seibert*, which we have already held to be erroneous, we therefore reverse the trial court's decision to suppress Angoco's post-*Miranda* statement and remand this case to the trial court to determine whether Officer Guzman deliberately used the question-first technique to undermine *Miranda*.

[7] *People v. Mendiola*, CF0118-01 (Super. Ct. Guam Aug. 17, 2001).

V.

[58] We hold that the trial court erroneously applied the *Seibert* plurality opinion in determining the admissibility of Angoco's post-*Miranda* statement. We further hold that the concurring opinion of Justice Kennedy is the holding of *Seibert*, and pursuant to the test therein, the trial court should have first determined whether Officer Guzman deliberately used a question-first interrogation technique in purposeful contravention of *Miranda*. We also adopt the Ninth Circuit's test, as articulated in *United States v. Williams*, 435 F.3d 1148 (2006), for determining whether the question-first technique was so deliberately used, because the concurrence has no such test for deliberateness. In addition, we adopt one of the *Seibert* plurality factors as additional objective evidence to be considered under the Ninth Circuit test. If the trial court finds that the question-first technique was so deliberately used based on the objective evidence and available subjective evidence, the concurrence dictates suppression of the post-*Miranda* statement, unless curative measures are found to be employed. If the trial court finds that the question-first technique was not deliberately used in violation of *Miranda*, then under the *Elstad* test, the trial court must consider two issues in deciding whether to suppress the post-*Miranda* statement: whether the warned statement was given knowingly and voluntarily; and, whether the warned statement was made subsequent to unwarned statements that were neither coerced nor the product of circumstances intended to undermine a suspect's free will.

[59] We also hold that violating the notification provision of 19 GCA § 5111, by failing to cause parents to be notified as soon as possible that their child has been taken into custody, does not alone warrant suppression of the statements made by the child subsequent to the failure to so notify. The plain language of the statute and the Eighth Circuit's interpretation of a substantially similar statute

do not support suppression based solely on a violation of 19 GCA § 5111. We further hold that violation of 19 GCA § 5111 is one circumstance among the totality of circumstances to be considered in assessing the admissibility of the post-*Miranda* statement.

[60] Accordingly, we **REVERSE** the trial court's decision to suppress the written statement Angoco gave after *Miranda* warnings were issued, and **REMAND** this case to the trial court to determine whether the question-first technique was deliberately used to undermine *Miranda*, consistent with the rules set forth in this opinion.

Richard H. Benson

RICHARD H. BENSON
Justice *Pro Tempore*

Robert J. Torres

ROBERT J. TORRES, JR.
Associate Justice

F. Philip Carbullido

F. PHILIP CARBULLIDO
Chief Justice