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SUPREME COURT
GUAM

# IN THE SUPREME COURT OF GUAM

**PEOPLE OF GUAM,**
Plaintiff-Appellant,

**vs.**

**TERNES FARATA,**
Defendant-Appellee

Supreme Court Case No.: CRA06-002
Superior Court Case No.: CF0408-04

## OPINION

**Cite as: 2007 Guam 8**

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2007
Hagåtña, Guam

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

**CARBULLIDO, C.J.:**

[1] Defendant-Appellee Ternes Farata filed a motion to suppress oral and written statements he made during a police investigation of criminal sexual conduct allegations against him. The Superior Court suppressed Farata's statements, holding that they were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). The trial court held alternatively that the oral and written statements were inadmissible after discussing *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985). Plaintiff-Appellant People of Guam appealed the Superior Court's grant of Farata's motion, arguing that the trial court's bases for suppression were improper.

[2] We hold that the trial court properly suppressed, pursuant to *Miranda*, the oral statements Farata made in the patrol car and thus affirm in part its decision to grant the motion. We also hold that its suppression of a statement Farata wrote at the police precinct was erroneously based on *Miranda* because the trial court did not make an adequate finding on whether the police obtained a waiver of *Miranda* rights from him before or after the statement was written. We therefore reverse the suppression of the written statement and remand this case to the trial court to determine when Farata waived his rights at the precinct. We further hold that neither *Seibert* nor *Elstad* warranted suppression of Farata's statements because the trial court did not apply the analyses in those cases. We therefore reverse the suppression of Farata's statements based on *Seibert* or *Elstad* and additionally remand this case to the trial court to determine whether either case provides proper grounds for suppressing the statements.

**I.**

[3] On November 28, 2004, a criminal sexual conduct complaint was filed against Defendant-Appellee Ternes Farata.

[4] On November 29, 2004, Officer Scott M. Arceo and Officer Donny J. Tainatongo conducted a "suspect check" at the home of Farata's mother along Bing Blas Street in Ordot. Appellant's Excerpts of Record ("ER"), p. 88 (Arceo Report). Upon departing the home, Officer Arceo recognized and pulled over a vehicle driven by Farata, who was with his girlfriend Yolanda Arongaw. Officer Arceo informed Farata of the criminal sexual conduct allegations against Farata and requested Farata's presence at the Hagåtña precinct. Farata agreed to be transported to the precinct.

[5] The following events are in dispute. First, Officer Arceo testified that he and Officer Tainatongo were with Farata in the patrol car when Farata was transported to the precinct. However, Officer Tainatongo and Farata testified that Officer Tainatongo was not in the patrol car with Officer Arceo and Farata. Officer Arceo's report and Officer Tainatongo stated that Officer Tainatongo transported Farata's girlfriend to the precinct.

[6] Second, Officer Arceo and Officer Tainatongo testified that Farata had not been handcuffed prior to transport. Farata testified that he was handcuffed at that time.

[7] Third, Officer Arceo testified that he did not question or converse with Farata en route to the precinct. Farata, however, testified that while he was being transported, Officer Arceo asked Farata "is that true you rape" and Farata responded "no." Transcripts ("Tr."), p. 50 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006). Farata also stated that Officer Arceo "was saying I better tell him the - - everything, the truth," and that Farata proceeded to "tell him everything that I know." Tr., p. 58 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006).

**[8]** Fourth, Officer Arceo testified that he advised Farata of *Miranda* rights at the precinct by providing Farata with a form. Officer Arceo replied that he reviewed the rights with Farata before Farata waived the rights. Furthermore, he replied that he questioned and obtained a written statement from Farata only after Farata waived the rights. Officer Arceo's report stated that Farata was advised at the precinct of *Miranda* rights at 1:30 p.m. and interviewed at 1:35 p.m. The time indicated on the "Waiver of Rights" form is 1:30 p.m. Farata responded that he was interviewed in the patrol car but not at the precinct. Tr., p. 57 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006). Farata testified that he was told by Officer Arceo at the precinct "to write everything I tell him inside the car." Tr., p. 58 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006). Farata stated that he then made a written statement. Farata testified that he wrote his statement before he signed the waiver form, and that Officer Arceo did not explain the *Miranda* rights listed on the form.

**[9]** Fifth, certain times noted on Farata's written statement indicating when he completed a page were crossed out and replaced with different times. Officer Arceo stated that Farata wrote particular times, "scratched out" the times and then initialed the correction. Tr., pp 29, 31 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006). Officer Arceo testified that he did not know the reason for the changed times. Officer Arceo testified that the room where Farata wrote his statement did not have a clock. Officer Arceo guessed that Farata had a watch or possibly asked for the time. Officer Arceo stated that he was unsure about the accuracy of the substituted times. In contrast, Farata testified that Officer Arceo instructed Farata to cross out and change certain times. Farata replied that Officer Arceo provided Farata with the specific times noted on the written statement.

**[10]** Farata was then formally arrested.

[11] A grand jury returned an indictment charging Farata with two charges of Third Degree Criminal Sexual Conduct (As a 2nd Degree Felony). Farata filed a motion to suppress his statements, and the Superior Court held a pre-trial hearing on the motion. The Superior Court issued its decision and order granting Farata's motion and suppressing "all oral and written statements made by Farata on November 29, 2004, from 12:00 p.m. to 6:00 p.m." ER, p. 15 (Decision). The decision and order was entered on the docket and the People timely appealed.

**II.**

[12] Title 7 GCA § 3107(b) and 8 GCA § 130.20(a)(6) confer on the Supreme Court of Guam 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.**

[13] This court conducts *de novo* review of a motion to suppress. *People v. Sangalang*, 2001 Guam 18 ¶ 10.

[14] We review *de novo* a trial court's legal conclusions. *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 15. A trial court's factual findings are reviewed for clear error. *Pac. Rock v. Dep't of Educ.*, 2001 Guam 21 ¶ 13. "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*, Crim. No. 88-00068A, 1989 WL 265040 at *2 (D. Guam App. Div. Sept. 26, 1989). "The facts are . . . construed in a light most favorable to the party prevailing at the trial level." *People v. Johnson*, 1997 Guam 9 ¶ 3.

[15] We undertake *de novo* review of the voluntary nature of a waiver of *Miranda* rights, and review for clear error the knowing and intelligent nature of the waiver. *Sangalang*, 2001 Guam

18 ¶ 10. This court reviews *de novo* the legal question of whether *Miranda* warnings were adequate. *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). "In contrast, 'the factual findings underlying the adequacy challenge, such as what a defendant was told, are subject to clearly erroneous review.'" *Connell*, 869 F.2d at 1351 (quoting *United States v. Doe*, 819 F.2d 206, 210 n.1 (9th Cir. 1985)); *United States v. Caldwell*, 954 F.2d 496, 501 n.8 (8th Cir. 1992).

**IV.**

**[16]** The trial court purportedly applied *Miranda v. Arizona*, 384 U.S. 436 (1966), and, alternatively, *Missouri v. Seibert*, 542 U.S. 600 (2004), or *Oregon v. Elstad*, 470 U.S. 298 (1985), in its suppression of the oral and written statements made by Farata. This court will consider whether *Miranda* and either *Seibert* or *Elstad* provided proper grounds for the trial court to grant Farata's motion to suppress.

**A. *Miranda***

**[17]** The first issue this court must address is whether the trial court properly suppressed Farata's statements as violative of *Miranda*.

**[18]** The People contend that the trial court's finding that Farata must have been handcuffed was clearly erroneous because: 1) the trial court lacked an evidentiary basis for taking notice of an alleged police handcuffing practice; 2) it mischaracterized the officers' use of a police report at the hearing as heavy reliance; and 3) *Shorehaven Corp. v. Taitano*, 2001 Guam 16, reveals the inadequacy of Farata's testimony as support for the handcuffing finding. While Farata points out that the trial court did not apply the factors for determining custody discussed in *United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987), and *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001), the People maintain that such factors would not support a finding that

Farata was in custody. The People also contend that police testimony on whether Farata was "free to go" was irrelevant to determining custody. Appellant's Reply Brief, p. 3 (Dec. 19, 2006). They alternatively assert that even if Farata was handcuffed, the trial court did not expressly find that he was interrogated and could not have done so based on the record. The People also argue that the changed times on Farata's written statement did not support the trial court finding that he waived his *Miranda* rights after writing the statement.

**[19]** Farata maintains that his testimony and the handcuffing practice noted by the trial court sufficiently supported the custody finding. Even without the trial court's finding that he was handcuffed, Farata argues in the alternative that application of the *Beraun-Panez* and *Hayden* factors would establish custody. He asserts that the record supports the trial court's determination that his statements were obtained in violation of *Miranda* and thus no clear error was made.

**[20]** This court has stated:

> "To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination," the United States Supreme Court held in *Miranda* that "suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation."

*People v. Santos*, 2003 Guam 1 ¶ 45 (quoting *Thompson v. Keohane*, 516 U.S. 99, 107 (1995)). "Persons must be advised of their rights prior to a *custodial interrogation*." *People v. Palomo*, Nos. DCA 91-00061A, DCA 91-00062A, 1993 WL 129624 at *6 (D. Guam App. Div. April 8, 1993) (emphasis added). "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v. Manibusan*, Crim. No. 89-000136A, 1990

WL 320756 at *7 (D. Guam App. Div. Feb. 16, 1990) (quoting *Miranda*, 384 U.S. at 444) (internal quotation marks omitted). "Generally, statements elicited by law enforcement officials while a defendant is in custody must be preceded by *Miranda* warnings or they are inadmissible." *People v. Ulloa*, DCA No. 88-0016A, 1988 WL 242606 at *3 (D. Guam App. Div. Nov. 7, 1988).

**[21]** The trial court stated that the threshold issue was "at what point did a custodial interrogation take place, i.e., at what point should Farata have been advised of his Miranda rights." ER, p. 13 (Decision). It considered conflicting testimony on whether Farata was transported to the precinct by both officers, handcuffed and interrogated en route, and whether he waived his *Miranda* rights before or after making his written statement at the precinct, stating that "its analysis turns on the accepted credibility of the witnesses presented to it." ER, p. 13 (Decision). The trial court then observed that the officers did not recall details of the incident and heavily relied on the police report. The trial court stated that "overwhelming evidence" contradicted Officer Arceo's testimony that both officers transported Farata. ER, p. 14 (Decision). It also reiterated its statement at the pre-trial hearing that "if there is only one officer in a vehicle, general Guam Police practice requires the handcuffing of a suspect before transport." ER, p. 14 (Decision). The trial court then found that Farata "must have been handcuffed" prior to transport to the precinct and found that "Farata was not advised of his Miranda rights at that point, and no waiver of those rights was obtained." ER, p. 14 (Decision). It did not, however, expressly resolve the factual conflict on interrogation in its discussion of *Miranda*. The *Miranda* discussion also did not specifically address whether Farata waived his rights before or after making the written statement at the precinct. The trial court then granted

Farata's motion, holding that "any confession or admission subsequently obtained was in violation of Miranda and must be suppressed." ER, p. 14 (Decision).

**[22]** Again, "[p]ersons must be advised of their rights prior to a custodial interrogation." *Palomo*, 1993 WL 129624 at *6. "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Santos*, 2003 Guam 1 ¶ 45 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). However, "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). This court must determine whether Farata was "in custody" and whether he was "interrogated" such that police subjected him to "custodial interrogation" warranting advisement of *Miranda* rights prior to such custodial interrogation.

**1. Custody**

**[23]** "The issue of 'whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review.'" *Santos*, 2003 Guam 1 ¶ 50 (quoting *Thompson*, 516 U.S. at 102). "*Miranda* . . . holds that an individual is in custody when he or she is 'taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v. Muritok*, 2003 Guam 21 ¶ 12 (quoting *Miranda*, 384 U.S. at 444). "In *Thompson* [*v. Keohane*, 516 U.S. 99 (1995)], the United States Supreme Court set forth two discrete inquiries to ascertain whether a person is 'in custody'":

> The first inquiry is, "what were the circumstances surrounding the interrogation." The second inquiry is "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." After addressing the two inquiries, the court must then resolve "the ultimate inquiry," which is "[was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."

*Santos*, 2003 Guam 1 ¶ 51 (quoting *Thompson*, 516 U.S. at 102) (indentation not in original).

**[24]** The trial court stated that if it "accepts Farata's testimony that he was handcuffed before being placed in Officer Arceo's police vehicle for transport to the [Hagåtña] Precinct, then it is clear that Farata should have been advised of his Miranda rights when handcuffed." ER, p. 13 (Decision). It did not conduct the inquiries for determining custody established by the Supreme Court and recognized by this court in *People v. Santos*, 2003 Guam 1 ¶ 51. The trial court instead determined that Farata "must have been handcuffed" prior to transport to the precinct after apparently finding his testimony on being handcuffed to be more credible than the testimonies of Officer Arceo and Officer Tainatongo, and supposedly taking notice of a "general Guam police practice" purportedly requiring the handcuffing of a suspect prior to transport by a single officer. ER, p. 14 (Decision).

**a. Credibility Determinations**

**[25]** "A trial judge, based on his or her experience, is in the best position to weigh and determine the credibility of the evidence received at a suppression hearing." *People v. Santos*, 1999 Guam 1 ¶ 19. "The appellate court affords deference to the trial court regarding such credibility determinations . . . ." *State v. Irvin*, 210 S.W.3d 360, 363 n.3 (Mo. Ct. App. 2006); *see Commonwealth v. Myers*, 722 A.2d 649, 651-652 (Pa. 1998). Credibility determinations have been upheld under different standards of review. An appellate court may "accept the trial court's . . . evaluations of credibility, if supported by *substantial evidence*." *People v. Whitson*, 949 P.2d 18, 29 (Cal. 1998) (emphasis added). "[S]ubstantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6 ¶ 6 (quoting *Richardson v. Perales*, 402 U.S. 389, 401

(1971)). A reviewing court may "adopt the trial court's determinations on . . . credibility if there is *any evidence* to support them." *McFadden v. State*, 461 S.E.2d 542, 544 (Ga. Ct. App. 1995) (emphasis added). It may "scrutinize the court's factual findings, including credibility determinations, for *clear error*."[1] *United States v. Mendez-de Jesus*, 85 F.3d 1, 2 (1st Cir. 1996) (emphasis added); *see United States v. Chirinos*, 112 F.3d 1089, 1102 (11th Cir. 1997); *Valle v. State*, 638 S.E.2d 394, 395-396 (Ga. Ct. App. 2006). A reviewing court may uphold "witness credibility determinations of the trial court unless they are *against the manifest weight of the evidence*." *People v. Smith*, 803 N.E.2d 1074, 1080 (Ill. App. Ct. 2004) (emphasis added). "Manifest weight means the clearly evident, plain and indisputable weight of the evidence." *Gettemy v. Grgula*, 323 N.E.2d 628, 630 (Ill. App. Ct. 1975). These authorities indicate essentially that a trial court's determinations of witness credibility must have support in the record. We hold that credibility determinations of a trial court should be upheld if such determinations are not clearly erroneous. This standard of review affords the trial court the proper degree of deference with regard to assessing the credibility of witnesses.

**[26]** The trial court noted conflicting testimony on whether Farata was handcuffed prior to transport to the Hagåtña precinct. It deemed inaccurate Officer Arceo's testimony that Farata was taken to the precinct by both officers. The trial court also acknowledged the officers' admissions that they did not recall certain details about the incident and their heavy reliance on their reports. Focusing on the unreliability of the officers' testimony, the trial court apparently

[1] We have already stated that "[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*, 1998 Guam 9 ¶ 7.

found Farata's statements to be more dependable and thus seemingly accepted his testimony that he had been handcuffed.

**[27]** The People argue that the characterization of the officers as heavily relying on their reports was factually incorrect. The trial court's observations that the officers' testimonies were inaccurate and independently unreliable are supported by the statements they made at the pre-trial hearing. The record thus supports the trial court's determination of the officers' credibility. The People further assert that Farata's testimony was an insufficient basis for suppression and should have been "met with a certain degree of skepticism." Appellant's Opening Brief, p. 12 (Nov. 20, 2006). Again, this court is tasked with determining whether the credibility evaluations of the trial court are clearly erroneous, not whether the trial court assessed witness testimony with an adequate degree of skepticism. We cannot say that "the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9 ¶ 7.

**[28]** Finding the testimony of Officer Arceo and Officer Tainatongo to be inaccurate and unreliable, the trial court found Farata to be the more credible witness; that is, Farata's testimony that he was handcuffed before being placed in Officer Arceo's police car was deemed relatively dependable. The record in the present case indicates that the trial court's finding is not clearly erroneous. This court therefore defers to the trial court's credibility determinations.

**b. Judicial Notice**

**[29]** Section 201 of the Guam Rules of Evidence states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by

resort to sources whose accuracy cannot reasonably be questioned." 6 GCA § 201 (2005).[2] "The more critical an issue is to the ultimate disposition of the case, the less appropriate judicial notice becomes." *Pina v. Henderson*, 752 F.2d 47, 50 (2nd Cir. 1985). "A court should not go outside the record to supply a fact that is an essential part of a party's case unless the fact is clearly beyond dispute." *Id.*

**[30]** This court previously held in *People v. Santos*, 1999 Guam 1, that "the Guam Rules of Evidence do not apply to suppression hearings." *Santos*, 1999 Guam 1 ¶ 19. There, in considering the suppression of drug evidence found during a warrantless search, we stated that, "[t]he trial courts should be free to consider all evidence, including affidavits and other reliable hearsay, when making determinations of preliminary facts." *Id.* We also stated that "[w]hen material facts are disputed, conflicting assertions should be resolved by *evidence taken during the hearing*." *Id.* ¶ 21 (emphasis added). "Receiving evidence allows the trial court to use its judgment and experience to properly weigh that which has been placed before it." *Id.* We further stated that "all parties are placed at a severe disadvantage when information, not placed before the court during a hearing, is later considered in a decision." *Id.* ¶ 23. "Without proper notice or introduction of the information, neither party can properly address critical issues nor questions that may otherwise be explained, clarified, or confirmed by receiving the evidence during the hearing." *Id.*

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[2] "The Guam Rules of Evidence, 6 GCA § 101, et. seq., are essentially identical to their like-numbered counterparts in the Federal Rules of Evidence." *People v. Muna*, Crim. No. 94-00075A, 1996 WL 104532 at *2 (D. Guam App. Div. March 6, 1996) (unreported), *rev'd in part on other grounds*, No. 96-10121, 1997 WL 143782 (9th Cir. Mar. 27, 1997); *see People v. Viloria*, Crim. Nos. 90-00092A, 90-00094A, 90-00096A, 1991 WL 255858 at *4 n.2 (D. Guam App. Div. Nov. 18, 1991) (unreported), *vacated on other grounds*, Nos. 91-10612, 91-10624, 92-10002, 1992 WL 371316 (9th Cir. Dec. 16, 1992).

**[31]** The decision stated that the trial court had "noted at hearing that if there is only one officer in a vehicle, general Guam Police practice requires the handcuffing of a suspect before transport." ER, p. 14 (Decision). Specifically, the trial judge at the pre-trial hearing stated:

> The Court's going to reserve, but the Court is a little concerned and disappointed that *at the time of handcuffing, and I would assume that if it's one single officer in the vehicle, that the practice is that you handcuff that individual*; that at the time of the arrest, from Sinajana to the precinct, that Miranda wasn't provided, even at the initial arrest and handcuffing. It does leave open . . . for me to go back, to look at the interrogation times, providing Miranda times, and to determine, really, from the weight of the testimony of the officers, as well as the defendant, who is the Court more likely to believe has a greater recollection of what happened on November 29, 04.

Tr., p. 67 (Pre-Trial Conf. Mot. Hr'g, April 10, 2006) (emphasis added). The trial court then determined that Farata "must have been handcuffed before being placed in Officer Arceo's patrol car for transport." ER, p. 14 (Decision). The People argue that the trial court's supposed notice of a police handcuffing practice was unfounded.

**[32]** Notwithstanding the inapplicability of the Guam Rules of Evidence to suppression hearings, judicial notice of a police handcuffing practice would be improper under these circumstances since such practice was not presented as evidence or discussed by either party during the pre-trial hearing, but was instead discussed *sua sponte* by the trial court at the conclusion of the hearing. Consequently, neither party could "properly address critical issues [or] questions that may otherwise be explained, clarified, or confirmed by receiving the evidence during the hearing." *Santos*, 1999 Guam 1 ¶ 23. We therefore find that the trial judge's statements at the hearing and the discussion in the decision were erroneous to the extent that they can be construed as judicial notice of a handcuffing practice employed by the Guam Police Department.

**[33]** The record, however, indicates that resolution of the factual conflict over whether Farata was handcuffed hinged on the trial court's determination of the witnesses' credibility, not on judicial notice of a police handcuffing practice. The trial court recognized at the pre-trial hearing and in its decision that "its analysis turns on the accepted credibility of the witnesses presented to it." ER, p. 13 (Decision). As discussed previously, the trial court properly determined Farata's testimony that he was handcuffed to be more credible than that of the officers. Farata's testimony thus served as a proper basis for the trial court to find that Farata "must have been handcuffed" since in making such finding the trial court did "not go outside the record to supply a fact that is an essential part of a party's case." *Pina*, 752 F.2d at 50.

**c. *Thompson* Inquiries**

**[34]** Though Farata and the People argue that the factors listed in *United States v. Beraun-Panez* and *United States v. Hayden* are determinative of whether Farata was in custody, the proper custody analysis is that set forth by the United States Supreme Court in *Thompson v. Keohane* and recognized by this court in *People v. Santos*. The trial court did not apply the *Thompson* inquiries for determining custody. This court, however, may independently review whether the inquiries demonstrate that Farata was in custody. *Santos*, 2003 Guam 1 ¶ 50.

**1) Interrogation and Surrounding Circumstances**

**[35]** "The first inquiry is, 'what were the circumstances surrounding the interrogation.'" *Id.* ¶ 51 (quoting *Thompson*, 516 U.S. at 112). This inquiry is "distinctly factual." *Thompson*, 516 U.S. at 112. "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). Again, "the

special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Innis*, 446 U.S. at 300. Before considering the surrounding circumstances, the next issue this court must consider is whether Farata was interrogated.

**[36]** "'Interrogation' in the context of *Miranda*, means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v. Ichiyasu,* Crim. No. 8600001A, 1987 WL 109391 at *6 (D. Guam App. Div. April 24, 1987) (quoting *Innis*, 446 U.S. at 298). "An interrogation is said to occur when the defendant, in custody, is the target of questions or statements, which the police can expect will elicit incriminating responses." *People v. Quidachay*, Crim. No. 99997A, 1983 WL 29952 at *4 (D. Guam App. Div. Nov. 8, 1983). "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Innis*, 446 U.S. at 300-301. "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* An "incriminating response" is "any response – whether inculpatory or exculpatory – that the *prosecution* may seek to introduce at trial." *Id.* at 301 n.5 (emphasis in original). "It is clear that the concept of custodial interrogation extends beyond the confines of the police station." *Muritok*, 2003 Guam 21 ¶ 13.

**[37]** The trial court did not make express findings on the issue of whether Farata had been interrogated. It acknowledged conflicting testimony on whether Farata was questioned while

being transported to the Hagåtña precinct, and on whether Farata was later questioned at the precinct. But the trial court was silent on the issue of interrogation in its discussion of *Miranda*, and did not make specific findings on any questions asked by police or any responses given by Farata. In discussing its alternative basis for suppression, however, the trial court stated that, "[i]n our facts, Farata testified that he was questioned by Officer Arceo while being transported to the [Hagåtña] Precinct. Upon arrival, Farata was instructed to put his statement in writing, without any mention of the improperly obtained confession." ER, p. 15 (Decision). Again, the trial court stated that "its analysis turns upon the accepted credibility of the witnesses presented to it," and then held that Farata's statements were obtained in violation of *Miranda*. ER, pp. 13-14 (Decision).

**[38]** Based on the trial court's acknowledgment of the factual conflict on interrogation, its recognition that its credibility determinations informed its analysis, its discussion of the facts to which Farata testified, and its holding that Farata's statements were inadmissible under *Miranda*, the trial court seems to have determined that Farata's testimony on interrogation was more credible than that of the officers. That is, the trial court found by implication in the *Miranda* context that Farata was "questioned by Officer Arceo while being transported to the [Hagåtña] Precinct." ER, p. 15 (Decision). This implicit finding indicates that Farata was subjected to "express questioning" in the patrol car en route to the Hagåtña precinct. *See Innis*, 446 U.S. at 300-301. Farata was thus interrogated in the patrol car.

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**[39]** The foregoing bases also indicate that the trial court impliedly found that "[u]pon arrival [at the precinct] Farata was instructed to put his statement in writing."[3] ER, p. 15 (Decision). Such an instruction is not "normally attendant to arrest and custody" and qualifies as words that "the police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 300-301; *compare People v. Paulman*, 833 N.E.2d 239, 244 (N.Y. 2005) (stating that "circumstances support the inference that the handwritten statement was not spontaneous but was induced"). Farata was thus also interrogated at the police precinct.

**[40]** Having determined that Farata was interrogated in the patrol car and at the precinct, we apply the *Thompson* inquiries to determine whether he was in custody.

**[41]** Pursuant to the first *Thompson* inquiry on the circumstances surrounding interrogation, the trial court found that as Officer Arceo and Officer Tainatongo were leaving the residence of Farata's mother, the officers encountered Farata and his girlfriend. It found that "Farata was informed of the accusations against him, his presence was requested at the [Hagåtña] Precinct for questioning, and Farata agreed to be transported." ER, p. 11 (Decision). The trial court then determined that "Farata must have been handcuffed" prior to transport to the precinct by Officer

[3] Again, the trial court did not make express findings on any questions asked by police or any responses given by Farata. Consequently, it is unclear whether the statement that Farata was instructed to write at the precinct was a repetition of the statements he made in the patrol car or whether the written statement differed from his patrol car statements. The trial court in its decision acknowledged Farata's testimony that Officer Arceo en route to the Hagåtña precinct asked Farata "substantive questions about the charges against him, for example: 'if it's true that he raped . . .'" ER, p. 12 (Decision). The trial court's acknowledgment of Farata's testimony in its decision and Farata's testimony at the pre-trial hearing indicate the possibility of other patrol car exchanges. In light of the reversal and remand ordered by this court, the trial court has an opportunity to make express findings on Farata's patrol car statements to aid and clarify its *Miranda* analysis.

Furthermore, the trial court subsequently describes Farata's interaction with police at the Hagåtña precinct as an "interview." ER, p. 15 (Decision). This description is inconsistent with the trial court's implied finding that "Farata was instructed to put his statement in writing" and Farata's testimony that he was not interviewed at the precinct. ER, p. 15 (Decision). The trial court therefore has an opportunity, on remand, to reconcile this discrepancy.

Arceo in the patrol car. ER, p. 14 (Decision). It subsequently found that Farata was "questioned by Officer Arceo while being transported to the [Hagåtña] Precinct" and that he was "instructed to put his statement in writing" upon arrival at the precinct. ER, p. 15 (Decision).

**2) "Not at Liberty to Terminate the Interrogation and Leave"**

**[42]** "The second inquiry is 'given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" *Santos*, 2003 Guam 1 ¶ 51 (quoting *Thompson*, 516 U.S. at 112). "This ultimate determination . . . presents a 'mixed question of law and fact' qualifying for independent review." *Thompson*, 516 U.S. at 112-113. In the present case, the trial court expressly found that Farata was informed of the accusations against him, agreed to be transported to the precinct, and was handcuffed prior to transport. It impliedly found that he was questioned en route to the precinct and "instructed to put his statement in writing" after arriving at the precinct. ER, p. 15 (Decision). Though Farata initially consented to the transport to the Hagåtña precinct by police, we hold that a reasonable person who has been told by police of criminal sexual conduct allegations against him, asked by police to come to a police precinct, handcuffed by police before being seated in a patrol car, and then questioned by police in the patrol car while traveling to the precinct would not have felt he was "at liberty to terminate the interrogation and leave" under these circumstances in the patrol car. *Santos*, 2003 Guam 1 ¶ 51 (quoting *Thompson*, 516 U.S. at 112).

**[43]** The trial court found that Farata was "instructed to put his statement in writing" by police upon arrival at the precinct. ER, p. 15 (Decision). It acknowledged Farata's testimony that "Officer Arceo removed his handcuffs" prior to giving the instruction, and that "Officer Arceo walked in and out of the interview room during the approximately 25 minutes it took Farata to

complete his written statement." ER, pp. 12, 13 (Decision). Again, the trial court deemed Farata's testimony to be relatively more dependable. We therefore additionally hold that given these circumstances, together with the circumstances involved in the patrol car interrogation, a reasonable person at the precinct would not have felt free to end the interrogation and leave. *See Santos*, 2003 Guam 1 ¶ 51.

#### 3) Arrest or Comparable "Restraint on Freedom of Movement"

**[44]** "After addressing the two inquiries, the court must then resolve 'the ultimate inquiry,' which is '[was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Santos*, 2003 Guam 1 ¶ 51 (quoting *Thompson*, 516 U.S. at 112). "The use of handcuffs on the defendant, for example, is not determinative of custody." *Quidachay*, 1983 WL 29952 at *3 (D. Guam App. Div. Nov. 8, 1983). "[H]andcuffs do not automatically transform detention into custodial interrogation." *United States v. Touzel*, 409 F.Supp.2d 511, 522 (D. Vt. 2006). "Instead, courts consider 'all the circumstances presented' to determine whether the standard has been met." *Id.* (quoting *United States v. Newton*, 369 F.3d 659, 677 (2nd Cir. 2004).

**[45]** The trial court did not find that Farata was formally arrested when he was questioned in the patrol car or instructed to put his statements in writing at the police precinct. The trial court instead determined from the testimonies of Farata and the officers that Farata was handcuffed prior to transport to the precinct. The trial court's handcuffing finding is not dispositive of the custody issue. However, since we have already held, after considering "all the circumstances presented," that a reasonable person in Farata's situation would not have felt free to terminate the patrol car and precinct interrogations and leave, we therefore find that these circumstances

constituted a "restraint on freedom of movement of the degree associated with a formal arrest." *Santos*, 2003 Guam 1 ¶ 51; *Touzel*, 409 F.Supp.2d at 522.

**2. Waiver of *Miranda* Rights**

**[46]** "Testimonial evidence that is a product of custodial interrogation is inadmissible unless a defendant waived the privilege against self-incrimination." *Sangalang*, 2001 Guam 18 ¶ 12. "To be valid, the waiver must be voluntary, knowing and intelligent." *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.'" *People v. Angoco*, 2007 Guam 1 ¶ 37 (quoting *Sangalang*, 2001 Guam 18 ¶ 13). We have also held that the issue of whether a *Miranda* waiver is not coerced and therefore valid depends on consideration of "two distinct dimensions":

> 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.

*People v. Hualde*, 1999 Guam 3 ¶ 30 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). "Statements made by a defendant who was not advised of his *Miranda* rights are per se involuntary and therefore inadmissible." *Sangalang*, 2001 Guam 18 ¶ 12. "If properly administered warnings were given, the court must determine whether the defendant's waiver was voluntary before allowing the statements to be admitted into evidence." *Id.*

**[47]** The trial court considered the testimonies of Farata and Officer Arceo. The trial court then expressly found that "Farata was not advised of his Miranda rights" when he was

"handcuffed before being placed in Officer Arceo's patrol car for transport," and that "no waiver of those rights was obtained." ER, p. 14 (Decision). It ultimately concluded that "any confession or admission subsequently obtained was in violation of Miranda and must be suppressed." ER, p. 14 (Decision).

**[48]** The trial court's express finding that Farata was neither advised of nor waived his *Miranda* rights prior to transport is supported by Farata's testimony on waiver and the trial court's determination that the officers' pertinent testimony was unreliable. We therefore hold that any response by Farata to the questions asked in the patrol car was "per se involuntary and therefore inadmissible" because Officer Arceo did not obtain a waiver of *Miranda* rights from Farata before subjecting him to custodial interrogation. *Sangalang*, 2001 Guam 18 ¶ 12.

**[49]** The trial court did not make a similar express finding on waiver at the police precinct in its discussion of *Miranda* in its decision, even though it acknowledged the conflicting testimonies of Farata and Officer Arceo regarding a precinct waiver. Instead, the trial court in discussing its alternative basis for suppression stated that:

> Upon arrival, Farata was instructed to put his statement in writing, without any mention of the improperly obtained confession. Thereafter, Farata was admonished of his rights and a waiver was obtained.

ER, p. 15 (Decision). The trial court's statement seems to indicate that the trial court found that Farata waived his *Miranda* rights at some point after receiving the instruction from police, but does not specify whether the waiver was obtained before or after Farata made his written statement.

**[50]** Furthermore, the trial court in its decision stated that:

> Farata's testimony provides the only explanation for the scratches and changes to the times noted on his written statement. For what other reason would the time on

> Farata's written statement be so significantly pushed back, if not to suggest that a Miranda waiver was obtained *before* Farata's interview and written statement?

ER, p. 15 (Decision) (emphasis in original). Specifically, the trial court observed that "[t]he time indicated on almost every page of Farata's written statement has been crossed out and replaced," and it acknowledged Farata's testimony that "Officer Arceo instructed [Farata] as to the time, and that it was Officer Arceo who instructed him to scratch out the times stated on his written statement and replace them with later times." ER, p. 13 (Decision). The time indicated on the form signed by Farata waiving his *Miranda* rights was 1:30 p.m. All of the substituted times on Farata's written statement are later than 1:30 p.m. Consequently, the record cannot be reconciled with the trial court's statements to the extent that such statements suggest that Farata waived his *Miranda* rights *after* making his written statement, because the time on the waiver form precedes the substituted times on the written statement.

**[51]** These trial court statements thus do not resolve the issue of whether a waiver of *Miranda* rights was obtained from Farata before or after he made his writing. Since this court is unable to identify or infer a clear and consistent finding by the trial court on waiver at the police precinct, we find that the trial court erred in suppressing Farata's written statement based on the principles of *Miranda*. We therefore remand this case to the trial court to determine whether Farata waived his rights before or after writing his statement. If the trial court on remand finds that the waiver was obtained *after* the writing was made, then the written statement is inadmissible under *Miranda*. If the trial court instead finds that Farata waived his rights *before* making his written statement, then it must determine whether Farata validly waived his *Miranda* rights. If the trial court finds that the totality of the circumstances indicate that he waived his rights voluntarily,

knowingly and intelligently, then pursuant to *Miranda* the statement is admissible. If the trial court's findings are to the contrary, then the written statement is inadmissible.

[52] We therefore conclude that the trial court properly suppressed any statements Farata made in the patrol car based on *Miranda* since he was subjected to custodial interrogation without first being advised of his *Miranda* rights. We further hold that the trial court erred in applying *Miranda* to suppress the written statement made by Farata at the Hagåtña precinct, because the trial court did not make a clear and sufficient finding on whether the *Miranda* waiver was obtained before or after Farata wrote his statement. This court therefore affirms the trial court's suppression of the statements Farata made in the patrol car, reverses its suppression of his statements at the police precinct, and remands the case to the trial court to determine when the waiver was obtained at the precinct.

**B. *Seibert* and *Elstad***

[53] The next issue this court must address is whether the trial court properly suppressed Farata's statements after discussing *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985).

[54] The People assert that there was no express finding or inquiry on deliberate use of the question-first interrogation technique pursuant to the *Seibert* holding in Justice Kennedy's concurrence. The People thus maintain that *Seibert* was not applicable and Farata's statements were instead admissible pursuant to *Elstad* since they were made knowingly, intelligently and voluntarily. Alternatively, the People argue that even if the trial court found deliberate use of the question-first technique, advisement of *Miranda* rights by police constituted a sufficient curative measure that rendered Farata's statements admissible under *Seibert*.

**[55]** Farata argues that *Seibert* applies to the present case and supports suppression because the record contains "adequate indicia" of deliberate use of the question-first technique by police. Appellee's Brief, p. 13 (Dec. 4, 2006). Specifically, he asserts that his transport to the precinct and alterations to "time notations on the various documents . . . in what the court believed was an attempt to make sure the times conformed to the officer's version of the story" indicate deliberate use. Appellee's Brief, p. 13 (Dec. 4, 2006). Farata also maintains that *Shorehaven Corp. v. Taitano* is distinguishable and apparently does not weaken support for the trial court's suppression of Farata's statements.

**[56]** This court has recognized that the holding of *Missouri v. Seibert* lies in the concurrence authored by Justice Kennedy. *People v. Angoco*, 2007 Guam 1 ¶ 21. *Seibert* addressed "the question-first" interrogation technique whereby an officer would "question first, then give [*Miranda*] warnings, and then repeat the question 'until [the officer] get[s] the answer that [the suspect] already provided once.'" *Id.* ¶ 16 (quoting *Missouri v. Seibert*, 542 U.S. 600, 606 (2004)). "[T]he question-first technique involves unwarned questioning, followed by the advisement of *Miranda* rights after a confession has been made." *Id.* ¶ 22. The "concurrence held that the question-first technique should be scrutinized only when it has been deliberately used." *Id.* "[I]f the question-first technique was 'used in a calculated way to undermine the *Miranda* warning,' then post-*Miranda* statements[4] '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.* (quoting *Seibert*, 542 U.S. at 621-622).

[4] Post-*Miranda* statements are statements made *after* the advisement of *Miranda* rights.

**[57]** Two things must be considered in determining whether the question-first technique was deliberately used to undermine the *Miranda* warning:

> [First,] 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[5], the continuity of police personnel and the overlapping content of the warned and unwarned statements; and [second,] available subjective evidence, such as an officer's testimony.

*Id.* ¶ 27. Furthermore, "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*." *Id.* ¶ 28 (quoting *United States v. Ollie*, 442 F.3d 1135, 1142-1143 (8th Cir. 2006)).

**[58]** "If the objective evidence and available subjective evidence . . . demonstrate that the question-first technique was deliberately used to undermine *Miranda*, then . . . *Seibert* . . . requires suppression of post-*Miranda* statements related in substance to unwarned statements, unless curative measures were taken prior to procurement of the warned statements." *Id.* ¶ 30. Such curative steps include: "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.* "These curative steps 'must ensure that a

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[5] In *People v. Angoco*, 2007 Guam 1, we adopted the Ninth Circuit test in *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006), for "determining whether the interrogator deliberately withheld the *Miranda* warning." *Angoco*, 2007 Guam 1 ¶ 24. "[T]he timing and setting of the first and the second [rounds of interrogation]" was also adopted as additional objective evidence to provide clarity in applying the Ninth Circuit test to determine deliberate use of the question-first technique. *Id.* at ¶ 27. We recognized in *Angoco* that the Ninth Circuit deliberateness test was based on four of the five factors discussed in the *Seibert* plurality opinion. *Id.* at ¶ 25. The Ninth Circuit test in *Williams*, however, did not list as objective evidence to be considered in determining deliberateness the timing and setting of the second, post-*Miranda* phase of interrogation. *Id.* at ¶ 24. The additional objective evidence this court included in *Angoco* is simply the original *Seibert* plurality factor that addresses this omitted consideration.

reasonable person in the suspect's situation would understand the import and effect' of the warning and the waiver." *Id.* ¶ 22 (quoting *Seibert*, 542 U.S. at 622).

**[59]** "If the interrogator does not use 'this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview,'[*Seibert*] held that *Oregon v. Elstad* . . . governed the admissibility of post-*Miranda* statements." *Id.* (quoting *Seibert*, 542 U.S. at 621-622). "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." *Id.* ¶ 36 (quoting *Elstad*, 470 U.S. at 309). "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.* (quoting *Elstad*, 470 U.S. 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.* (quoting *Elstad*, 470 U.S. at 318) (internal quotation marks omitted).

**[60]** We recognize that "*Elstad* sets out the general rule that the existence of a pre-warning statement does not require suppression of a post-warning statement that was knowingly and voluntarily made, . . . while *Seibert* sets out an *exception* for situations where police employ a deliberate 'question first' strategy." *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006) (emphasis added). We therefore hold that "*Seibert* rather than overruling *Elstad*, carved out an exception to *Elstad* for cases in which a deliberate, two-step strategy was used by law enforcement to obtain the postwarning confession." *United States v. Carter*, 489 F.3d 528, 535

(2nd Cir. 2007); *see United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("exception to *Elstad* carved out in *Seibert*"); *Seibert*, 542 U.S. at 622.

**[61]** Thus, to determine the admissibility of post-*Miranda* statements pursuant to *Seibert*:

> 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.

*Angoco*, 2007 Guam 1 ¶ 39. Notably, "*Seibert* only addressed the admissibility of the second, warned statement." *United States v. Courtney*, 463 F.3d 333, 337 (5th Cir. 2006); *Seibert*, 542 U.S. at 622.

**[62]** The trial court stated that "[e]ven if the Court were to accept Officer Arceo's testimony that Farata was not handcuffed, Farata's statements must be suppressed for different reasons." ER, p. 14 (Decision). Pursuant to *Elstad*, it stated that although an "unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it was knowingly and voluntarily made." ER, p. 14 (Decision). The trial court observed that *Elstad* was distinguished by *Seibert*, which required "suppression of all pre and post Miranda statements when the police use a technique called 'question-first.'" ER, p. 14 (Decision). Under *Seibert*, it stated that "midstream recitation of warnings after interrogation had begun and an unwarned confession had been obtained could not effectively comply with Miranda's constitutional requirement, and thus, the postwarning statements were inadmissible." ER, pp. 14-15 (Decision) (quoting *Seibert*, 542 U.S. at 604). The trial court expressed that "its analysis turns upon the accepted credibility of the witnesses presented to it." ER, p. 13 (Decision). It acknowledged the officers' admissions that they did not recall details of the

incident and their heavy reliance on their reports during the pre-trial hearing. The trial court then held that the "weight of authority on this issue" supported suppression of Farata's oral and written statements, after stating that "[i]mproper interrogation techniques used to loosen a suspect's tongue by engaging in unwarned and casual questioning are an intentional departure from Miranda." ER, p. 15 (Decision).

**[63]** The trial court did not specify whether *Seibert* or *Elstad* served as its alternative basis for suppression. It also did not apply the requisite analysis pursuant to either case, and thus did not determine whether the question-first technique was deliberately used by the officers in the present case or whether Farata's post-*Miranda* statements were made knowingly and voluntarily. Absent these determinations, neither *Seibert* nor *Elstad* warranted suppression of Farata's post-*Miranda* statements. The trial court thus erred in justifying suppression of Farata's post-*Miranda* statements based on *Seibert* or *Elstad*.[6] We therefore reverse the trial court's suppression of Farata's statements based on *Seibert* or *Elstad* and remand this case to the trial court to apply the analyses therein and determine whether *Seibert* or *Elstad* provides a basis for suppression. As discussed above, the trial court failed to make a clear and sufficient finding on whether Farata waived his *Miranda* rights before or after making his written statement. Consequently, if upon remand the trial court finds that Farata waived his rights *after* making the statement, then *Seibert* and *Elstad* cannot support suppression since both address the

[6] The trial court stated that "[e]ven if the Court were to accept Officer Arceo's testimony that Farata was not handcuffed, Farata's statements must be suppressed for different reasons." ER, p. 14 (Decision). The handcuffing finding was part of the trial court's justification for suppressing Farata's statements pursuant to *Miranda*. A lower court is "required to determine whether *Miranda* warnings were required prior to [a defendant's pre-*Miranda* statements] before considering the applicability of *Seibert*." *Courtney*, 463 F.3d at 337. Thus, the trial court's statements are erroneous to the extent that they are construed to mean that suppression pursuant to *Seibert* is independent of the *Miranda* inquiry.

admissibility of post-*Miranda* statements. That is, if the trial court finds that Farata's written statement preceded his *Miranda* waiver then both *Seibert* and *Elstad* would be inapplicable, since no post-*Miranda* statement could be subjected to the analysis in either case.[7] *Courtney*, 463 F.3d at 337; *Seibert*, 542 U.S. at 622; *Elstad*, 470 U.S. at 309. If, however, the trial court on remand finds that Farata waived his rights *before* making the written statement, then the trial court must determine whether Officer Arceo deliberately used the question-first technique. To determine such deliberate use, the trial court must consider the objective and subjective evidence we recognized in *Angoco*, namely:

> objective evidence, including the timing, setting and completeness of the unwarned phase of questioning, the timing and setting of the first and 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

*Angoco*, 2007 Guam 1 ¶ 27. If upon consideration of this evidence the trial court finds that the question-first technique was deliberately used, then it must determine whether curative measures were employed by police before the post-*Miranda* statements were elicited. These curative measures include "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.* ¶ 30. If the trial court finds deliberate use of the question-first technique and an absence of curative measures, then it must suppress Farata's post-*Miranda* statements under *Seibert*. But if the trial court after considering the objective and subjective evidence finds that the question-first technique was not deliberately used, then it must determine

[7] The excerpts from *Elstad* and *Seibert* quoted by the trial court in its decision suggest that the trial court was aware of the applicability of both cases to post-*Miranda* statements. ER, pp. 14-15 (Decision).

whether Farata made his post-*Miranda* statements knowingly and voluntarily. If the trial court finds that the totality of the circumstances demonstrate that his warned statements were both knowing and voluntary, then the statements are admissible pursuant to *Elstad*.

**V.**

**[64]** We hold that the trial court correctly suppressed pursuant to *Miranda* any statements Farata made in the patrol car en route to the Hagåtña precinct because the trial court properly found that Farata was subjected to custodial interrogation without first being advised of his *Miranda* rights. We also hold that a trial court's credibility determinations should be upheld if not clearly erroneous. We further hold that the trial court erred in suppressing, based on *Miranda*, the written statement Farata made at the Hagåtña precinct because the trial court did not clearly and sufficiently find when the waiver of *Miranda* rights was obtained from Farata at the precinct; whether before or after the writing of his statement.

**[65]** We additionally hold that the trial court erroneously suppressed Farata's statements based on the analysis in *Seibert* or *Elstad* because it did not determine whether the question-first interrogation technique was deliberately used pursuant to *Seibert*, or whether Farata made knowing and voluntary statements after waiving his *Miranda* rights under *Elstad*.

**[66]** Accordingly, we **AFFIRM** the trial court's decision to suppress Farata's statements in the patrol car pursuant to *Miranda*. We **REVERSE** the trial court's suppression of the written statement Farata made at the precinct based on *Miranda*, and **REMAND** this case to the trial court to determine whether police obtained the *Miranda* waiver from Farata before or after he made his written statement. We additionally **REVERSE** the trial court's alternative suppression of Farata's statements based on *Seibert* or *Elstad*, and **REMAND** this case to the trial court to

determine whether the analyses therein are applicable and provide proper grounds for suppression.

**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