LEGAL EAGLE

A Newsletter for the Criminal Justice Community

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Violating Witness Rights

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LEGAL EAGLE

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John Lincoln was diagnosed with bipolar disorder and was taking medication to manage it. John ran out of his medication and for reasons unknown was unable to refill his prescription. John had been dining with his father when he took one of his father's guns and left the house. John's father believed that he was headed to the home of his mother, Kathleen Lincoln, and that he was a threat to her life. Law enforcement was called. A large SWAT team arrived and surrounded Kathleen's house.

John's eighteen-year-old daughter, Erin Lincoln, who lived with her grandmother, was at home and let him into the house. A police dispatcher contacted Erin inside the house and asked if she was in harm's way. Erin replied that she was not and that her father would not harm her. She also told the dispatcher that she was talking to her father to try to calm him down and that the police presence was upsetting him. John then began to open the front door to the house to shout at the police, while holding his father's gun. Every time he opened the door, Erin was standing immediately next to him. The last time John opened the door, three officers opened fire, killing him and narrowly missing Erin, who was standing by his side.

Erin fell to the ground next to her father's body. She was then forcibly removed, placed in handcuffs, and put in the backseat of a police vehicle, she did not fight, struggle, or resist. An officer said that they would not release Erin because they needed to get a statement from her. After being held in the back of the patrol car for about two hours, Erin was transported to the police station. At the station, Erin was questioned for five hours by Officer Barnes and she was forced to write out a statement. After the officers obtained her statement, Erin was permitted to leave. Erin was never charged with any crime.

Erin filed a civil rights suit asserting that her Fourth Amendment right to be free from unreasonable seizure was violated when officers took her into custody without a warrant, probable cause, or justifiable reason and interrogated her against her will for many hours, refusing her access to her family. The trial court found Barnes's actions constituted a violation of the Fourth Amendment. The trial court further determined that Barnes should have been on notice that his conduct was illegal based on a Tenth Circuit decision, *Walker v. City of Orem*, (10th Cir. 2006), which held that an involuntary ninety-minute detention of witnesses to a

Officers should consult with their agency advisors to confirm the interpretation provided in this publication and to what extent it will affect their actions. **Past issues of the Legal Eagle are available at //SA15.org under "Resources."**

police shooting for the purpose of obtaining information from them, including their statements, was unreasonable. Barnes appealed. The lower court ruling was affirmed by the U.S. Court of Appeals.

Issue:

Did Officer Barnes violate Erin's Fourth Amendment right to be free from unreasonable seizure by taking her into custody without a warrant, probable cause, or justifiable reason, and interrogating her against her will for five hours, during which she was forced to write out a statement? **Yes**.

Right to Be Free from Unreasonable Seizure:

At the outset Officer Barnes did not contend that the officers involved in the incident had a reasonable suspicion that Erin was involved with any criminal wrongdoing or that there was probable cause to believe she had committed or was committing a crime. The rationale for her detention relied solely on her status as a witness to her father's shooting. The United States Supreme Court's ruling in *Dunaway v. New York*, (S.Ct.1979), involved several similar facts. In that case, officers were investigating a crime; they picked up Dunaway at a neighbor's house, drove him to police headquarters in a police car, placed him in an interrogation room, and questioned him regarding the crime. He was never "told he was under arrest, [but] he would have been physically restrained if he had attempted to leave." It was undisputed that officers lacked probable cause for the detention. The State argued that his detention at the police station for questioning was justified on the grounds that police believed he possessed "intimate knowledge about a serious and unsolved crime." In holding Dunaway's seizure illegal, the Supreme Court emphasized that "*detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest*." *Dunaway*, in fact, merely reaffirmed this principle, which the Court had made clear ten years earlier in *Davis v. Mississippi*, (S.Ct.1969)—namely, that an investigatory detention that, for all intents and purposes, was indistinguishable from custodial interrogation, required no less probable cause than a traditional arrest. ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "); see also *Hayes v. Florida*, (S.Ct.1985) ("None of our later cases have undercut the holding in *Davis* that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment."). Thus, and importantly, **police violate the Fourth Amendment when, absent probable cause or the individual's consent, they seize and transport a person to the police station and subject him or her to prolonged interrogation** whether as a suspect or a witness.

Court's Ruling:

Barnes argued that other prior Supreme Court cases governed witness detentions. One case involved a crime scene perimeter, hit-and run check-point. There the Court found the relevant public concern grave because police "were investigating a crime that had resulted in a human death.... *And the stop's objective was to help find the perpetrator*." Finally, the stop posed only a minimal interference with the motorists' liberty, requiring only a brief wait in line, and "provided little reason for anxiety or alarm." Such was not the case here. Erin's prolonged detention and, most significantly, her custodial interrogation, was not about an unsolved crime for which the perpetrator might still be at large; police knew very well who had caused John Lincoln's death. The Court of Appeals ruled:

"If there was any lingering doubt, however, we need only turn back to *Dunaway* to dispel the notion that custodial interrogation of the kind here is subject to a balancing inquiry. In *Dunaway*, the State, like Barnes, had urged the application of a *Terry*-style balancing test to assess the reasonableness of custodial interrogations for investigatory purposes. The State argued that such seizures could be justified by mere 'reasonable suspicion.' The Court flatly rejected this approach. It stated: '*Terry* and its progeny clearly do not support such a result. The narrow intrusions involved in those cases were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause, only because these intrusions fell far short of the kind of intrusion associated with an arrest.' The same reasoning controls the outcome of the case at bar."

"While 'the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime,' 'absent

special circumstances, the person approached may not be detained ... but may refuse to cooperate and go on his way,' *Terry v. Ohio*, (S.Ct.1968); see also *Florida v. Royer*, (S.Ct.1983). Any further detention of such individual constitutes a seizure under the Fourth Amendment, which must satisfy the Fourth Amendment's 'reasonableness' requirement. As a general matter, the detention of a witness that is indistinguishable from custodial interrogation requires no less probable cause than a traditional arrest. See, *Dunaway*; and *Davis*. AFFIRMED."

Lessons Learned:

"Justice, though due to the accused, is due to the accuser also." —

Justice Benjamin Cardozo

The Florida Constitution, Article I, § 16 – Rights of Accused and of Victims, at (b) "Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."

Obviously, the present case dealt with the rights of a witness rather than a victim. F.S. 960.001 – Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems, should be consulted. While Florida Law provides for the fair treatment of victims and witnesses in the criminal and juvenile justice systems most if not all the substantive rights are applicable to the victim as distinguished from the witness to the crime.

Lincoln v. Barnes
U.S. Court of Appeals – 5th Cir.
(April 20, 2017)

(Continued from page 9)

Pre-Miranda Statements

2:42 a.m., and the officers did not question him until after he executed a written waiver at 3:15 a.m. Accordingly, because officers did not engage in a deliberate two-step interrogation strategy and because Lebron knowingly, intelligently, and voluntarily waived his *Miranda* rights before making his second statement, his post-warning statement was admissible."

Lessons Learned:

Besides the obvious legal issues and lessons provided by this case it should be emphasized that the Florida Supreme Court specifically emphasized that agents did not refer to, in any manner, the pre-*Miranda* inculpatory statement made by Lebron as part of their initial and subsequent questioning. Importantly, they did not boot strap his unwarned admission as a way into the general interview.

In *Ross v. State*, (Fla.2010), the Florida Supreme Court reviewed the law governing the effectiveness of 'mid-stream' *Miranda* warnings, meaning those delayed until after the start of questioning. *Ross* reiterated the long-standing rule that places a 'heavy burden' on the State to show that an interviewee who confesses after *Miranda* warnings were given waived his or her rights knowingly and intelligently. Normally, this happens at the start of an interrogation. The court observed that *Miranda* warnings are not always sufficient when their administration is delayed until well into an interrogation.

In *Wright v. State*, (5DCA 2014), the court explained, "*Ross* also requires us to examine the other circumstances around the warned and unwarned statements. Specifically, we look at whether the two statements were made under circumstances sufficiently similar to indicate that the interrogation was, in actuality, one 'integrated and proximately conducted questioning' and not two separate events. Here, much like the two rounds of questioning in *Ross*, all the interviews were conducted in the same building, by the same officer within a short span of time, and covered almost exactly the same information. After receiving her waiver, Detective Stroup referred repeatedly to Wright's earlier statements, and urged her to reiterate her earlier statements and clarify inconsistencies in the earlier interviews. The only difference was the manner of questioning: intense, accusatory and confrontational in the second interview, but calm and patient in the third. The second and third interviews were separated by at most forty-five minutes (and perhaps as little as fifteen minutes), during which time Wright was arrested and handcuffed. Thus, we conclude that the second and third interviews constituted one 'integrated and proximately conducted questioning,' and not separate events as the State asserts."

See also, "Early Miranda," LEGAL EAGLE, May, 2017; and "Interrogation or Not?" LEGAL EAGLE, April, 2017.

Lebron v. State
Florida Supreme Court
(Dec. 21, 2017)

The Washington Post

Fatal Force

987

people have been shot and killed by police in 2017.

The rest of the story…..

Weapon:

Gun	**579**
Knife	156
Vehicle	85
Toy Weapon	26
Other	47
Unarmed	68
Unknown	26

Gender:

Male	940
Female	45
Unknown	2

Race:

White	457
Black	223
Hispanic	179
Other	44

The FBI reported total arrests in 2015: 10,797,088.
Using that number (although arrest numbers are lower the past two years) 987 shootings equates to .009% of all arrests.

Source: //www.washingtonpost.com/graphics/national/police-shootings-2017/

Recent Case Law

When is Probable Cause Probable?

D.C. police officers responded to a complaint about loud music and illegal activities in a vacant house. Inside, they found the house nearly barren and in disarray. The officers smelled marijuana and observed beer bottles and cups of liquor on the floor, which was filthy. They found a make-shift strip club in the living room, and "the officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, … The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out."

Upon the officers arrival many partygoers scattered and some hid. The officers questioned everyone and got inconsistent stories. "Peaches" was identified as the tenant that had given the partygoers permission to party. But Peaches was not there. When the officers spoke by phone to Peaches, she was nervous, agitated, and evasive. She eventually admitted that she did not have permission to use the house. The owner confirmed that he had not given anyone permission to be there. The officers then arrested the 21 partygoers for unlawful entry.

Sixteen partygoers sued for false arrest under the Fourth Amendment. The lower courts concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry because of Peaches' invitation. "In the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [the partygoers'] intent to enter against the will of the lawful owner."

On appeal to the United States Supreme Court this ruling was reversed and the arrests upheld.

Issue:

Reviewing the events leading up to the arrest, did these historical facts, viewed from the standpoint of an objectively reasonable police officer amount to probable cause? **Yes**.

Evaluating Probable Cause:

A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence. *Atwater v. Lago Vista,* (S.Ct.2001). To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, (S.Ct.2003). Because probable cause "deals with probabilities and depends on the totality of the circumstances," it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," *Illinois v. Gates*, (S.Ct.1983).

It *"requires only a probability or substantial chance of criminal activity, not an actual showing of such activity*." Probable cause "is not a high bar." *Kaley v. United States*, (S.Ct.2014).

"Probable cause" is a stronger standard of evidence than a reasonable suspicion, but weaker than "proof beyond a reasonable doubt" required for a criminal conviction. Even hearsay can supply probable cause if it is from a reliable source or supported by other evidence. In *Brinegar v. United States*, (S.Ct.1949), the Court defined probable cause as "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."

Of importance here to the Court's ruling was its holding in *United States v. Arvizu*, (S.Ct.2002). "In making reasonable-suspicion determinations, reviewing courts must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." This requires the reviewing court to evaluate the "totality of the circumstances," rather than assessing each underlying fact piecemeal. This standard "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative information* available to them that 'might well elude an untrained person.' "

In the present case the Supreme Court criticized the lower courts for viewing each fact, "in isolation, rather than as a factor in the totality of the circumstances. This was 'mistaken in light of our precedents.' The 'totality of the circumstances' requires courts to consider 'the whole picture.' Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. Instead of considering the facts as a whole, the [lower courts] took them one by one. For example, it dismissed the fact that the partygoers 'scattered or hid when the police entered the house' because that fact was 'not sufficient *standing alone* to create probable cause.' Similarly, it found 'nothing in the record suggesting that the condition of the house, *on its own,* should have alerted the [partygoers] that they were unwelcome.' The totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.' "

Court's Ruling:

"There is no dispute that the partygoers entered the house against the will of the owner. Nonetheless, the partygoers contend that the officers lacked probable cause to arrest them because the officers had no reason to believe that they 'knew or should have known' their 'entry was unwanted.' We disagree. Considering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party."

"Consider first the condition of the house. Multiple neighbors … informed the officers that the house had been vacant for several months. The house had no furniture… The house had a few signs of inhabitance—working electricity and plumbing, blinds on the windows, toiletries in the bathroom, and food in the refrigerator. But those facts are not necessarily inconsistent with the house being unoccupied. The owner could have paid the utilities and kept the blinds while he looked for a new tenant, and the partygoers could have brought the food. Although one woman told the officers that Peaches had recently moved in, the officers had reason to doubt that was true. There were no boxes or other moving supplies in the house; nor were there other possessions, such as clothes in the closet, suggesting someone lived there."

"In addition to the condition of the house, consider the partygoers' conduct. The party was still going strong when the officers arrived after 1a.m., with music so loud that it could be heard from outside. The living room had been converted into a makeshift strip club. Strippers in bras and thongs, with cash stuffed in their garter belts, were giving lap dances. Upstairs, the officers found a group of men with a single, naked woman on a bare mattress—the only bed in the house—along with multiple open condom wrappers and a used condom."

"Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several 'common-sense conclusions about human behavior.' Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized."

But probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."

"The partygoers' reaction to the officers gave them further reason to believe that the partygoers knew they lacked permission to be in the house. Many scattered at the sight of the uniformed officers. Two hid themselves, one in a closet and the other in a bathroom. 'Unprovoked flight upon noticing the police,' we have explained, 'is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior' that factors into the totality of the circumstances. *Illinois v. Wardlow,* (S.Ct.2000). In fact, 'deliberately furtive actions and flight at the approach of ... law officers are *strong* indicia of *mens rea.' Sibron v. New York,* (S.Ct.1968). A reasonable officer could infer that the partygoers' scattering and hiding was an indication that they knew they were not supposed to be there."

"The partygoers' answers to the officers' questions also suggested their guilty state of mind. When the officers asked who had given them permission to be there, the partygoers gave vague and implausible responses. They could not say who had invited them…. Additionally, some

of the partygoers claimed the event was a bachelor party, but no one could identify the bachelor. The officers could have disbelieved them, since people normally do not throw a bachelor party without a bachelor. Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind. Cf. *Devenpeck v. Alford,* (S.Ct.2004) (a suspect's 'untruthful and evasive' answers to police questioning could support probable cause)."

The Court also disputed the legal efficacy of the alleged permission to be on the premises provided by Peaches. "After initially insisting that she had permission to use the house, she ultimately confessed that this was a lie—a fact that the owner confirmed. Peaches' lying and evasive behavior gave the officers reason to discredit everything she had told them. For example, the officers could have inferred that Peaches lied to them when she said she had invited the others to the house, which was consistent with the fact that hardly anyone at the party knew her name. Or the officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it."

The Supreme Court summed up its analysis, "Viewing these circumstances as a whole, a reasonable officer could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house."

Of importance here as to whether the officers' determination of probable cause was reasonable, the Supreme Court ruled the lower court was mistaken in believing "that it could dismiss outright any circumstances that were 'susceptible of innocent explanation.' For example, the [lower court] brushed aside the drinking and the lap dances as 'consistent with' the partygoers' explanation that they were having a bachelor party. And it similarly dismissed the condition of the house as 'entirely consistent with' Peaches being a 'new tenant.' ***But probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts***. As we have explained, 'the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' Thus, the [lower court] should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.' "

Finally, the Supreme Court found that the officers interpretation of the totality of the circumstances suggesting criminal activity to be reasonable. "As explained, the officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police. The [lower court] identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper. A factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality. And here, the totality of the circumstances gave the officers plenty of reasons to doubt the partygoers' protestations of innocence. For all of these reasons, we reverse the [lower court's] holding that the officers lacked probable cause to arrest. Accordingly, the District and its officers are entitled to summary judgment on all of the partygoers' claims."

Lessons Learned:

If ever there was a case that demonstrated the importance of effective report writing this is it. The only way the Supreme Court was aware of the all the individual underlying facts supporting the officers' actions here was from their reports and testimony. Complainants have four years to file suit. The only way one can be prepared is to have a thorough and all-inclusive report to refresh one's recollection with the kind of details the Court relied upon here.

"These cases are always very fact specific. If you do not clearly articulate in your report the facts and circumstances surrounding the arrest, unlike this case, we will have difficulty defending the lawsuit that is typically filed years later when memories fade.

"In other words, take the time to carefully compose a detailed incident report at the time the incident occurs. We have lost cases in both state and federal court because of lack of documentation. Help us help you, by getting it right from day one. -- Col. Joe Bradshaw."

District of Columbia v. Wesby
United States Supreme Court
(Jan. 22, 2018)

Pre-Miranda Inculpatory Statements

Ana Maria Angel and Nelson Portobanco, both high school students, decided to go for a walk on the beach in Miami Beach after a dinner date. They were abducted at gun point by four males and forced into a extended cab truck. They were robbed of their money, wallets, cellphone, forced to withdraw money from an ATM, and finally Nelson was stabbed repeatedly in the face, neck, and back. He was also kicked repeatedly, and dumped on the side of I-95. Miraculously he survived his injuries, was able to walk back to the roadway and stop a passing motorist who reported the crime. Anna Maria was not as lucky, after being repeatedly raped by the four males she was forced out of the truck on the side of the road, ordered to kneel down, where Joel Lebron shot her in the head.

During the ensuing investigation agents discovered that Nelson's cellphone had been used to call a number that was linked to an apartment in Orlando. Officers, along with FBI agents, went to the leasing office of the apartment. The leasing agent gave officers permission to search the apartment and provided them with the keys. Once inside the apartment, the officers found Victor Caraballo as well as Angel's ATM card, driver's license, purse, cell phone, and wallet. Nelson's wallet was also discovered in the apartment. In searching the dumpster near the apartment, the police located Angel's shoes.

Subsequently, officers identified Joel Lebron as an additional suspect. Officers located Lebron at another apartment complex. Lebron was standing in a breezeway with a duffle bag later found to contain a pair of tan boots that had blood on them. These boots belonged to Lebron.

Lebron was arrested but was not *Mirandized*, officers collected his clothing and glasses to preserve trace evidence. An officer drove Lebron to the FDLE Regional Center in Orlando. There, he was placed un-handcuffed in a room with an agent while other officers went to locate a tape recorder for the interview. The agent initially said nothing to Lebron. After several minutes, Lebron's demeanor changed and he began to cry. The agent said, "I hope you know what kind of trouble you are in." Lebron replied, "Yes, I know. I killed her." He said that he told her to get down on her knees and that the gun did not go off until the third time he pulled the trigger. After Lebron said this, the agent left the room to report this information to other agents because up until that moment, the law enforcement agencies had hoped that Angel was still alive. Lebron said nothing further at that time and was not asked any questions. Then, after *Miranda* warnings were administered and after Lebron waived his *Miranda* rights, Lebron gave a detailed confession to the murder and sexual assault of Angel and the attempted murder of Nelson.

During the jury trial law enforcement officers testified regarding Lebron's post-*Miranda* confession, and the jury heard Nelson's testimony. The State presented overwhelming physical evidence, fingerprint, DNA, and rape kit results. Lebron was convicted of multiple violent felonies including murder and attempted murder. He was later sentenced to death. He appealed numerous issues (all to no avail) including an allegation that his pre-*Miranda* inculpatory statement rendered his subsequent post-*Miranda* statement involuntary and therefore inadmissible. The trial court denied that particular motion, and on appeal the Florida Supreme Court upheld that ruling.

Issue:

Did the pre-*Miranda* conversation between an agent and the defendant taint his post-*Miranda* confession?

Under the totality of the circumstances, **No**.

Custodial Interrogation and Miranda:

Both the United States and Florida Constitutions provide that a person may not be "compelled" to be a witness against himself or herself in any criminal matter. To protect the right against self-incrimination, the Supreme Court requires that any individual held for custodial interrogation must be clearly informed as to his or her rights, including the "right to remain silent, that any statement he does make may be used as evidence against him, and ... [the] right to the presence of an attorney, either retained or appointed." If the rights specified in *Miranda* are not respected, then no evidence obtained from the interrogation of a person in "custody or otherwise deprived of his freedom by the authorities in any significant way" may be used against that person. A defendant may waive these rights, but the waiver must be made voluntarily, knowingly, and intelligently." Therefore, "unless and until [the *Miranda*] warnings and

waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."

"A *Miranda* violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Oregon v. Elstad*, (S.Ct.1985).

"Absent deliberately coercive or improper tactics in obtaining the initial statement, *the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion*. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. See, *Davis v. State*, (Fla. 1997) ("Shortly after confessing in his holding cell, Davis gave a taped statement in which he voluntarily gave the same information contained in his prior statement.... This [second] statement was clearly admissible because Davis was fully informed of (and waived) his *Miranda* rights before the start of the taping session."

See also, *Ramirez v. State*, (Fla. 1999) (applying *Elstad* and explaining that whether a second, post-warning statement was voluntary requires a review of the totality of the circumstances).

Then, in *Missouri v. Seibert*, (S.Ct.2004), the United States Supreme Court held that a second, warned statement was inadmissible where law enforcement officers *intentionally and thoroughly* questioned the defendant without administering *Miranda* in order to elicit an unwarned statement that was then used to elicit the second, warned statement. In essence the Court stated that the 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. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?

The Court then listed the following relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their objective: "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 second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."

Court's Ruling:

The Florida Supreme Court in reviewing the pertinent facts found that the FDLE agent did not intentionally engage in a deliberate "question first warn later" tactic. "In this case, the evidence demonstrates that law enforcement did not employ a deliberate two-step interrogation strategy calculated to undermine the effectiveness of *Miranda* warnings. There was only a single statement of 'I hope you know what kind of trouble you are in' by the agent with Lebron responding that he had shot Angel and stabbed Nelson. There was no thorough pre-warning interrogation like the one described in *Seibert* that was then used to elicit a repeated confession after *Miranda* was administered."

"Once the agent informed others that Angel was in fact deceased, *Miranda* rights were administered, and Lebron knowingly, intelligently, and voluntarily waived his rights. Specifically, Agent Hidalgo presented Lebron with a *Miranda* waiver form and read each of the rights to Lebron. Lebron indicated to Agent Hidalgo that he understood his rights. Lebron then agreed to speak with the officers without an attorney, and Lebron signed the waiver form. Officers also testified that Lebron did not appear intoxicated and that he appeared to understand what was occurring. No threats or promises were made."

"Moreover, while Lebron's pre-warning statement indicated that he had killed Angel and attempted to kill Nelson, it did not include the details of his role in the kidnapping, robbery, and sexual battery that he included in his post-warning statement. There is no evidence that law enforcement minimized the significance of the *Miranda* warnings once they were given. **The first statement was not used by law enforcement in eliciting the post-warning statement**. Law enforcement did not refer to the first statement when conducting the post-*Miranda* interview. Instead, law enforcement began questioning Lebron about what had occurred beginning with when Lebron first met with the co-defendants. Also, Lebron's initial confession in response to the agent's single statement was made at approximately

(Continued on page 3)