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**Topic:
Attacking Confessions**

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ATTACKING CONFESSIONS

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I. INTRODUCTION

When Gerry Morris asked me to speak on the topic of "attacking confessions," we discussed the appropriate scope of this paper. Rather than making it a general paper about the admissibility of confessions, Gerry authorized me to focus upon two areas that I have particular interest in and which are causing problems for us criminal defense attorneys. The first of these areas is the "two step" interrogation technique, and the second is the "knock and talk" procedure. Both of these bothersome and troubling investigative techniques have been and are currently being utilized by state and federal law enforcement agents and we need to be aware of them and prepared to attack them and the fruits that are often generated for prosecutors by their utilization. Given the thirty minutes I have to speak, the complexity of these two areas will occupy my allotted time. There are a host of websites available on the internet for investigating and learning about false confessions and why our clients sometimes falsely confess. I leave these topics to your investigative juices.

II. TWO STEP INTERROGATION

The essence of this interrogation technique is to question the suspect first, without the benefit of *Miranda* warnings, and then administer *Miranda* warnings and resume questioning designed to have the suspect repeat the answers previously given. This is a purposeful interrogation technique designed to circumvent *Miranda* and is quite insidious. As discussed below, the Supreme Court has, by the narrowest of margins, condemned this type of interrogation tactic, finding that this "deliberate two-step strategy" (*id.* at 2616 (Kennedy, J., concurring)) is designed solely "to get a confession the suspect would not make if he understood his rights at the outset."

In order to fully explain this interrogation technique, I have utilized a case which is still pending in federal court: Ethridge Hill. What follows is the text of CLAIM FOR RELIEF NO. 2 from Hill's federal court writ under 28 U.S.C. Section 2254, which was a slight modification of Hill's state court writ (which the Court of Criminal Appeals denied via "white card" postcard). Hill's trial actually predated the Supreme Court's opinion in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), although it was decided during the direct appeal and hence fully applicable to Hill both in his state and federal writs of habeas corpus. What follows is an expansive discussion of Hill's case, and why the Court of Criminal Appeals' rejection of the 11.07 writ was contrary to clearly established Supreme Court precedent. I believe it will benefit in your attacks against confessions obtained utilizing the "two step" interrogation technique.

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CLAIM FOR RELIEF NO. 2

ADMISSION OF PETITIONER HILL'S WRITTEN STATEMENT VIOLATED HIS RIGHT AGAINST SELF-INCRIMINATION, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Hill's case concerns the admissibility of a written statement obtained after a belated administration of *Miranda* warnings. The written statement largely confirms statements obtained from Hill through unwarned custodial interrogation in violation of *Miranda*. The circumstances of the taking of Hill's written statement are essentially indistinguishable from those in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004). Indeed, it is impossible to reconcile the Texas Court of Appeals' decisions declining to find that the admission of Hill's written statement violated his Fifth Amendment right to avoid self-incrimination with *Seibert*. The erroneous admission of Hill's written statement more likely than not contributed to the jury's decision to convict him of murder and arson and, therefore, his convictions for both offenses should be reversed.

Moreover, even under the Supreme Court's decision in *Oregon v. Elstad*, 470 U.S. 298 (1985), Hill's written statement should have been excluded because the police in Hill's case failed to engage in the "careful and thorough administration" of *Miranda* rights that *Elstad* requires before Hill's written statement can be said to cure the inadmissibility circumstances surrounding his initial oral statement. See *Elstad* at 311.

In *Elstad*, the Court noted that, "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." *Elstad*, 470 U.S. at 307. And in *Miranda*, the Court noted that the State carries a "heavy burden" of "demonstrate[ing] that the defendant knowingly and intelligently waived his privilege against self-incrimination..." *Miranda*, 384 U.S. at 475. When the State takes an unwarned statement and then fails to cure the presumption of coercion by "careful and thoroughly" administering *Miranda* rights prior to taking another statement, the presumption of coercion continues unrebutted by the State.

Underlining the Texas Court of Criminal Appeals' implied¹ unreasonable application of Supreme Court authority to the Fifth Amendment claim, that same court, on facts identical to those in Hill's case, held that "to apply *Elstad*...[and thereby to permit admission of the post-warning statement] would undermine the spirit and intent of *Miranda*." *Jones v. State*, 119 S.W.3d 766, 773-75 (Tex. Crim. App. 2003) (emphasis added).

A. The Appropriate Legal Standards

In *Miranda*, the United States Supreme Court conditioned the admissibility of confessions obtained through custodial interrogation on the accused having been "adequately and effectively apprised of his rights," and having chosen to waive those rights. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The Supreme Court has repeatedly held that warning the accused of the right to remain silent, the right to counsel, and that any statement can be used against him in later proceedings are all critical to dispel the coercion inherent in custodial interrogation and to ensure that confessions are voluntary. *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *Moran v. Burbine*, 475 U.S. 412, 420 (1986); *New York v. Quarles*, 467 U.S. 649, 654 (1984).

In *Oregon v. Elstad*, the Supreme Court addressed a case in which the police, after obtaining

¹ Although urged to do so, the Court never considers the facts in light of *Seibert* or *Elstad*, thus ignoring the controlling Supreme Court rules, using another rule instead that was contrary to the rules that should have governed the state court decisions.

an unwarned and therefore inadmissible custodial statement in violation of *Miranda*, belatedly administered *Miranda* warnings and obtained a second, warned statement. In *Elstad*, the police went to a suspect's house to arrest him. While one officer spoke to the suspect's mother, another briefly told the suspect that he "felt" that the suspect had been involved in a burglary, at which point the suspect acknowledged having been at the crime scene. He then was transported to the police station. Before being questioned there, the suspect was given the *Miranda* warnings. He made a full confession. The Supreme Court declined to hold that the later confession should be suppressed as the "fruit" of the earlier, unwarned admission made in the suspect's living room. *Elstad*, 470 U.S. at 305-09. The Court also rejected the theory that, once an unwarned statement "let's the cat out of the bag," any later statement is inevitably the psychological product of the earlier statement. *Id.* at 311-12. On the facts before it, the Court found that "the causal connection between any psychological disadvantage created by [the suspect's earlier, unwarned] admission and his ultimate decision is speculative and attenuated at best." *Id.* at 313-14. The Court also found that the particular unwarned statement in that case — which occurred "at midday, in the living room area of respondent's own home, with his mother . . . a few steps away" — was clearly voluntary, since "[n]either the environment nor the manner of either 'interrogation' was coercive." *Id.* at 315. "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement," the Court concluded, 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." *Id.* at 314. The Court noted, that the "subsequent administration" had to be a "careful and thorough administration" to cure inadmissibility. *Id.* at 311.

In *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), the Supreme Court revisited *Elstad* and significantly limited the admissibility of warned confessions that are obtained following earlier unwarned statements. *Seibert*, 124 S. Ct. at 2601 (plurality); *id.* at 2614 (Kennedy, J., concurring). In *Seibert*, the murder suspect was interrogated using a two-step technique. The suspect was arrested, taken to the police station, and questioned without *Miranda* warnings "for 30 or 40 minutes." *Id.* at 2606. After the suspect admitted her involvement in the murder, the interrogator allowed her about a 20 minute coffee and cigarette break. The officer then "turned on a tape recorder, gave [her] the *Miranda* warnings, and obtained a signed waiver of rights from her." *Id.* The officer resumed questioning by referring to the suspect's pre-warning statements, repeating their substance. *Id.* The officer testified that he had purposefully withheld *Miranda* warnings pursuant to an "interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id.*

The Supreme Court found that this "deliberate two-step strategy" (*id.* at 2616 (Kennedy, J., concurring)) is designed solely "to get a confession the suspect would not make if he understood his rights at the outset." *Id.* at 2611 (plurality). "[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). Illustrating the confusion likely to flow from the administration of mid-interrogation warnings, the Court noted that "telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given [earlier], could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail." *Id.* See also *id.* at 2615 (Kennedy, J., concurring) (belated warning of right to remain silent "permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made"). Such confusion undermines *Miranda*'s goal of allowing suspects a "free and rational choice" about whether to speak. *Miranda*, 384 U.S. 454-65. Thus, the Court found that it is "ordinarily unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Seibert*, 124 S. Ct. at 2611. Instead, such warnings will render a later confession admissible only if they "function 'effectively' as *Miranda* requires." *Id.* at 2610 (plurality).

The *Seibert* plurality concluded that the belated *Miranda* warnings given the suspect in that case were not sufficient to apprise her of her rights. In deciding that question, the plurality looked at:

- “the completeness and detail of the questions and answers in the first round of interrogation”
- “the overlapping content of the two statements”
- “the timing and setting of the first and the second”
- “the continuity of police personnel”
- “the degree to which the interrogator’s questions treated the second round as continuous with the first”

Seibert, 124 S. Ct. at 2612 (plurality opinion by Souter, J., joined by Stevens, Ginsberg, and Breyer, J.J.). In *Seibert*, the same officer who conducted the first phase recited the *Miranda* warnings and “said nothing to counter the probable impression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited.” *Id.* “In particular, the police did not advise her that her prior statement could not be used. . . . The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.” *Id.* When the police finished the first phase of interrogation of Seibert, there was little of incriminating nature left to be said. Only about 15-20 minutes passed between the unwarned and the warned argument. *Id.*

Justice Kennedy focused in his concurrence on the “general goal of deterring improper police conduct.” *Id.* at 2614 (quoting *Elstad*, 470 U.S. at 308). He proposed a “narrower test” when a two-step technique was used to undermine the *Miranda* warnings, stating that *Elstad* should govern the admissibility of postwarning statements “unless the deliberate two-step strategy was employed.” *Id.* at 2616. Justice Kennedy asserted that, when the two-step strategy is used, “postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.” *Id.* Justice Kennedy listed two examples of curative measures: “a substantial break in time and circumstances between the prewarning statement and the *Miranda* waiver,” and “an additional warning that explains the likely inadmissibility of the prewarning custodial statement.” *Id.*

The *Seibert* dissent rejected Justice Kennedy’s approach and agreed with the lead plurality that the focus should not be on the “subjective intent of the interrogating officer.” *Id.* at 124 S. Ct. at 2616, 2617, 2619 (O’Connor, J., joined by Rehnquist, Scalia, and Thomas, J.J., dissenting). Justice O’Connor proposed to analyze confessions elicited by the two-step interrogation procedure using the voluntariness standard of *Elstad*. *Seibert*, 124 S. Ct. at 2619. Significantly, however, Justice O’Connor stated that, “simply withholding information is `relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to understanding the nature of his rights and the consequences of abandoning them.”” *Seibert*, 124 S.Ct. at 2620 (quoting from *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986)).

A majority of Justices in *Seibert* agreed that the *Miranda* warnings recited after Seibert’s unwarned confession were not effective or curative and, therefore, her subsequent confession was inadmissible. They agreed that *Seibert* carved out an exception to *Elstad*. *United States v. Williams*, 435 F.3d 1148, 1157, 1161 (9th Cir. Jan. 30, 2006). “*Seibert* diminishes *Elstad* but does not destroy it.” *Id.* at 1161. When “no single rationale explaining the result [of a Supreme Court case] enjoys the assent of five Justices, ‘the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation omitted). Most courts of appeals, including those of the Fifth

Circuit, have found that the *Marks* rule applies and makes Justice Kennedy's concurring opinion the effective holding of the case.² Justice Kennedy finds his position to be the narrowest. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring) (noting that the plurality test "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations," which "cuts too broadly").

The Ninth Circuit synthesizes the following rule: "[B]oth the plurality and Justice Kennedy agree that where law enforcement officers *deliberately* employ a two-step interrogation to obtain a confession and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a *reasonable person* in the suspect's shoes of his rights, the trial court should suppress the confession." *Williams*, 435 F.3d at 1158 (emphasis added). According to this synthesis, there should be an at least partly subjective test for *deliberate* two-step process, and an objective "reasonable person" test to determine if the warnings given cure the attempt to undermine *Miranda* rights. The Ninth Circuit holds that "in determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony,³ support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Id.* To determine whether the warnings ultimately given had a curative effect, a court must determine "based on objective evidence, whether the midstream warning adequately and effectively apprised the suspect that he had a 'genuine choice whether to follow up on [his] earlier admission.'" *Id.* at 1159.

Through the time of Hill's trial and direct appeal (until discretionary review), the *Seibert* two-step analysis was not available to Hill. The state courts refused to apply it in post-conviction and to expand the record to fairly afford Hill the opportunity to demonstrate the objective and/or subjective intents of the law enforcement officers required by the plurality and concurring *Seibert* opinions. The state courts did not challenge the cognizability of the *Seibert* claim in habeas corpus, as such challenge would have been without basis. *Ex Parte Brown*, 158 S.W.3d 449, 453-54 (Tex.

² See e.g., *United States v. Hernandez*, 2006 WL 2602078 at footnote 1 (5th Cir. Sept. 12, 2006)(200 Fed. Appx. 283), where the Court stated the following:

We held in *United States v. Courtney*, No. 05-30156 (5th Cir. Aug. 28, 2006) that the holding of *Seibert* is found in Judge Kennedy's concurrence. See also *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed. 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds."). **Most other circuits that have considered this issue have come to the same conclusion.** See *United States v. Ollie*, 442 F.3d 1135, 1142 (9th Cir. 2006); *United States v. Williams*, 435 F.3d 1147, 1158 (5th Cir. 2006); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3rd Cir. 2005); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005); *United States v. Stewart*, 388 F.3d 1079, 1086-87 (7th Cir. 2004). *But see United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006)(considering but not deciding that *Marks* might not be applicable to *Seibert* because "the plurality and concurring opinions take distinct approaches...") (Emphasis added).

³ The pretrial and trial testimony of the officers in Hill's case, of course, was taken before *Seibert* was decided, when inquiry into the intent of the officers was not relevant. Therefore, the record is in need of expansion with further testimony from the officers regarding, inter alia, their intent. See, e.g., *Williams*, 435 F.3d at 1161 (remanding for a new suppression hearing in the district court, because the district court did not have the benefit of *Seibert* and could not make the requisite factual inquiries).

Crim. App. 2005) (allowing due process claim on habeas review when relevant information supporting the claim could not be provided without going outside the trial record). They merely refused to address it, even though under *Seibert* the intent of the law enforcement officers who retrieved, interrogated, and arrested Hill is a previously unresolved fact that is material to Hill's conviction. See Tex. Code Crim. Proc. art. 11.07 § 3(d).

B. Reasonable Application of the Appropriate Legal Standards to the Facts.

Hill was interrogated at length before he was given any warnings whatsoever. See *United States v. Aguilar*, 384 F.3d 520, 526 (8th Cir. 2004) (upholding suppression of statement under *Seibert* where there was more than 90 minutes of questioning before *Miranda* warnings were given; there were 45 minutes in Hill's case). When he finally was given warnings, the warnings were deficient, leaving out the critical aspect that what he told the officers could be used against him in a court of law. Subsequently, prior to being shown a complete set of warnings before signing the disputed written statement, Hill was told, incorrectly, that the complete set corresponded to the incomplete set he had previously been given. This would have led any reasonable person in Hill's shoes to believe that there was no reason not to sign the written statement, because everything else he had previously said would have been admissible:

- a. Hill was not given proper *Miranda* warnings when the officers began to interrogate him.
- b. No proper *Miranda* warnings were given when, three hours into "heavy duty" interrogation, 5/16/00 Hearing Tr. 189, Hill was told he was being placed under arrest. 5/16/00 Hearing Def. Exh. 2 at 164-65.
- c. No proper *Miranda* warnings were given when Hill — after still more interrogation in the police station — first made inculpatory statements. 5/16/00 Hearing Def. Exh. 2 at 168.
- d. Hill was warned of certain of his rights about 45 minutes into the five hour interrogation and hours before he made the statements at issue. These warnings left out the warning that his statements could be used against him in a court of law. *Id.* at 48-49. Warnings that omit that factor are the equivalent of no *Miranda* warning at all. *Miranda*, 384 U.S. at 469 ("It is only through an awareness of [the adversarial consequences] that there can be any assurance of real understanding and intelligent exercise of the privilege.")⁴

⁴ See, e.g., *United States v. Tillman*, 963 F.2d 137, 141 (6th Cir. 1992), wherein the Court explains the significance of omitting to inform a suspect of the potential use of his statements against him:

The case at bar poses a much more troublesome deviation from the traditional warnings which most police read from a prepared card. Defendant was never told any statements that he would make could be used against him. Of all of the elements provided for in *Miranda*, this element is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. The underlying rationale for the *Miranda* warnings is to protect people from being coerced or forced into making self-incriminating statements by the government. By omitting this essential element from the *Miranda* warnings a person may not realize why the right to remain silent is so critical. Although we as judges and lawyers may be aware of the link between these elements we can not be so presumptuous as to think that it would be common knowledge to laymen. It would clearly be unreasonable to say defendant was somehow informed of this right. He was informed he did not have to say anything to the police, but, was never told that any statements he might make

e. From approximately 8:30 PM to 10:45 PM, when Hill orally admitted to having been at the scene of the fire and having an altercation with the victim, while the officers repeatedly committed him to that story and one typed it, Hill had not been warned that his statements could be used against him in court. 5/16/00 Hearing Def. Exh. 2 at 168-234. He was warned of that consequence only by being asked to read the resulting written statement and to sign it.

The Supreme Court stated in *Miranda* that the adversarial consequences warning is “an absolute prerequisite to interrogation.” *Miranda*, 384 U.S. at 471. “It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.” *Id.* at 469. The adversarial consequences warning lets the individual know he is “not in the presence of persons acting solely in his interest.” *Id.* Gilchrest and the other officers did everything they could to prevent Hill from understanding the adversarial consequences:

1. They hid the taping so Hill would not “worry” or “be concerned” that the tape “might be used against [him] in some court proceeding.” 5/16/00 Hearing Tr. 26-27, 182 (emphasis added).
2. They told Hill the focus of the investigation was on accidental death. 5/16/00 Hearing Tr. 152.
3. They repeatedly expressed sympathy for Hill, urging him to help himself. 5/16/00 Hearing Def. Exh. 2 at 142, 162-63, 207.

These methods alone establish “intentional, calculated conduct” by the officers to deprive Hill of his 5th Amendment rights. *See United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (holding that method, standing alone, objectively proves officers’ intent).

The *Seibert* plurality asks whether the provision of written *Miranda* warnings at the time Hill was provided with the written statement for signature “could function ‘effectively’ as *Miranda* requires.” *Seibert*, 124 S. Ct. at 2610. The answer in Hill’s case is “no.”

Seibert maintains that the delivery of a belated administration of the warning of adverse consequences is particularly misleading, ordinarily causing the suspect to draw the “entirely reasonable inference that what [the suspect had] just said” before reading the warning “will be used” against him, making further silence futile. *Seibert*, 124 S. Ct. at 2612.⁵ Officer Gilchrest compounded the misleading nature of the written warnings by telling Hill, falsely, that the written warnings (containing the adverse consequences warning) were “[t]he same thing I told you before,” even though Gilchrest previously had omitted the adverse consequences warning. 5/16/00 Hearing Def. Exh. 2 at 48-49, 234.⁶ This critical error by Gilchrest alone renders Hill’s written statement

could be used against him. This is a dangerous omission because a person under arrest would feel more compelled to answer questions of police officers.

⁵ *Seibert* elaborated that the absence of a “formal addendum warning that a previous statement could not be used,” while not dispositive, is “clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation.” *Seibert*, 124 S. Ct. at 2612 n.7; *id.* at 2616 (Kennedy, J., concurring) (stating that “an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient” to cure use of the deliberate two-step interrogation technique).

⁶ Of course, Agent Roach’s “reminder” to Hill of the rights Gilchrest had given him, which also did not correct Gilchrest’s prior, incomplete *Miranda* warnings, further buttresses the arguments supporting the legal inadmissibility of Hill’s written statement.

inadmissible.⁷

Hill's written statement also meets all of the *Seibert* plurality's factors supporting inadmissibility:

a. Hill's interrogation was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 124 S. Ct. at 2612. He was interrogated for approximately five hours under conditions that Gilchrest described as "stressful." 5/16/00 Hearing Tr. 195.

i. The officers employed the interrogation techniques described by the Supreme Court in *Miranda*: repeated accusations, suggestions of different versions as to how Allen's death occurred, lying about the evidence they had, and expressing sympathy. 4 S.F. 64-65, 73-74; 5/16/00 Hearing Tr. 208-09.⁸

ii. When, at one point, Hill attempted to tell officers he no longer wished to be questioned, Gilchrest interrupted him and pressed on. 5/16/00 Hearing Def. Exh. 2 at 133.

iii. When it was clear that Hill was not going to confess under ordinary interrogation pressures, the officers arrested him for credit card abuse and suggested that he might be able to avoid spending the night in jail (playing on his concern for his elderly mother at home) if he confessed regarding what happened to Allen. 5/16/00 Hearing Def. Exh. 2 at 164, 168; 5/16/00 Hearing Tr. at 189-90. Within

⁷ The State argued in its Brief in Opposition to the United States Supreme Court in Hill's case that the fact that Hill spent some time reviewing his written statement somehow cured the deceptive implication of Gilchrest's comment, which Hill argues would have led any reasonable person to believe that the prior statements inevitably were admissible. The State concluded:

Hill's argument must necessarily be confined to the proposition that the inadvertent omission of the warning of adversarial consequences during a prior admonishment, before incriminating evidence surfaced, so contaminated the interview process that the subsequent complete administration of written admonishments could not effectively convey to him that he had a real choice whether to exercise his right not to incriminate himself. The fact that Hill was actively engaged in the process of revising his written statement, indicating a desire on his part to make his version of events known, combined with the formality of signing the statement, i.e., that it be witnessed by two non-police personnel and that strict Texas rules governed its legitimacy, all lead to the conclusion that Hill consciously and freely gave up his right to remain silent.

Brief in Opposition at 23. Any alleged care on the part of Hill going over the written statement details before signature would have been much more consistent with a mistaken belief, reasonably based on Gilchrest's false assurance about the prior warnings, that *all* statements were admissible. A reasonable person in Hill's place would then have been concerned about the State impeaching him with inconsistencies.

⁸ The use of these coercive techniques also brings the interrogation within the purview and scrutiny of *Elstad*. *Elstad*, 470 U.S. at 314, 318 (holding that use of deliberately coercive tactics in obtaining an original statement may warrant concern about compulsion as to a subsequent, post-warning statement and that the relevant inquiry becomes whether the second statement was also voluntarily made).

minutes, Hill stated that he had gone to Allen's house on the morning of October 2nd. 5/16/00 Hearing Def. Exh. 2 at 168.

b. Hill's interrogation manifested the same "completeness and detail of the questions and answers" in the first and second rounds as in *Seibert*. As in *Seibert*, there was "the overlapping content of the two statements." When the officers finished interrogating Hill without the proper *Miranda* warnings — having pinned him down on details and reduced his statement to writing — there "was little, if anything, of incriminating potential left unsaid." 124 S. Ct. at 2612.

c. The same police personnel interrogated Hill throughout the entire ordeal. *Id.*

d. The setting of Hill's first and second statements was the same: the police station. *Id.*

e. The timing of Hill's first and second statements was very tight. In *Seibert*, the "warned phase of questioning" began "after a pause of only 15 to 20 minutes." *Id.* In Hill's case, there was a more minimal break (long enough for the printing of his statement) between his unwarned (and therefore inadmissible) statement and his being presented with the written version of that statement for his signature. 5/16/00 Hearing Def. Exh. 2 at 233; *see, e.g., United States v. Renken*, 2004 WL 2005833 (N.D. Ill. 2004) (suppressing defendant's second confession where confessions were made similarly very close in time, the interrogation was in the same setting, the same interrogators were involved, and they used the same sort of methodical means).

f. Hill's second statement was virtually continuous with the first. Contrary to *Miranda*, in fact, the substance of Hill's post-warning written statement consisted of nothing more than Hill's signature. *Miranda*, 384 U.S. at 479; *Seibert*, 124 S. Ct. at 2608 ("*Miranda* warnings are customarily given under circumstances allowing for a real choice between *talking* and remaining silent.") (emphasis added). Instead of being given a "genuine choice whether to follow up on the earlier admission," *Seibert*, 124 S. Ct. at 2612, Hill was asked only to acknowledge through signature that the written statement reflected the un-warned statement that he'd already given. *Jones v. State*, 119 S.W.3d 766, 774 n.16 (Tex. Crim. App. 2003) ("*Miranda* 'undisputably requires a law enforcement agent to give the appropriate warnings before any questioning . . . , not merely prior to signing a written statement after all the custodial interrogation is complete.'")⁹ Gilchrest, in fact, deceived Hill into believing that he had no constitutional objection to the use of his prior oral statement by telling him that the written statement's *Miranda* warnings were the "same thing" he had been given before. As to the written statement, Gilchrest's reference to the prior warnings was an "implicit suggestion that the mere repetition of the earlier [oral] statement [in the written statement] was not independently incriminating. [That] implicit suggestion was false." *Seibert*, 124 S. Ct. at 2615.

Indeed, the State admitted, in its Brief in Opposition to the United States Supreme Court that applying the factors identified by the plurality in *Seibert* to Hill's interrogation "[w]ould indeed lead one to conclude that the belated *Miranda* warnings were ineffective." Brief in Op. 5.

Moreover, Gilchrest's omission of a timely "adversarial consequences" warning was in direct violation of the requirements of Article 38.22, Section 2, of the Texas Code of Criminal Procedure,

⁹ It would be irrelevant for the State to argue that the formality of the written statement somehow distinguished it from the prior statements, when the *content* otherwise is identical and no further interrogation was needed or undertaken to secure the written statement.

which in two provisions requires an adversarial consequences warning before any written statement made by an accused as a result of custodial interrogation can be admitted in evidence in a criminal case.

Hill's written statement, as well, was inadmissible under *Oregon v. Elstad*, because the presentation by the officers to Hill of his written statement, with warnings attached, was no more than a continuation of the previous unwarned custodial statement.¹⁰ *Elstad* requires "a careful and thorough administration of *Miranda* warnings" to cure a prior failure to properly give the warnings. *Elstad*, 470 U.S. at 311.¹¹ The circumstances of Hill's statement are contrary to those found to have been sufficient to render *Elstad*'s statement admissible:

1. In *Elstad*, a police officer different from the one who took the unwarned statement read the rights to the suspect. The same officers were involved in Hill's case.
2. In *Elstad*, the new officer read the rights to the suspect in a different location. The location was exactly the same in Hill's case.
3. In *Elstad*, the new officer *orally read* the rights to the suspect. In Hill's case, the rights not only were not read, but the officer falsely told Hill that the written rights were the same as the (incomplete) rights he had given Hill before he had made his unwarned oral statements.
4. In *Elstad*, the new officer had the suspect sign the waiver card, prior to further interrogation. In Hill's case, Hill merely was asked to sign a written statement memorializing the officer's summation of what he had said during his unwarned interrogation.
5. In *Elstad*, after securing waiver with the *Miranda* card, the officer secured a detailed statement of the suspect's participation in the crime, which included details that had not been supplied to the police before the properly secured waiver. In Hill's case, the police first obtained all the details for the statement and then had Hill sign a type-written version with all the same facts, only this time with printed *Miranda* warnings at the beginning.

Thus, even when tested under the requirements of *Elstad*, the failure in Hill's case to "carefully and thoroughly" administer *Miranda* warnings means that the presumption of coercion continued to apply to the written statement taken from Hill. Therefore, the State cannot meet its burden of showing a "knowing and voluntary waiver" of Hill's *Miranda* rights in connection with his written statement.

The facts of Hill's case hew much more closely to the concern raised by *Seibert* about deliberate use of a two-step approach to undermine *Miranda* rights than to the *Elstad* scenario where the facts do not support such an inference of purpose on the part of the interrogator. *Elstad*, 470

¹⁰ *Elstad* would be the proper rule of decision for Hill's case only if *Seibert* were not. *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) ("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."). The evidence is strong, however, that *Seibert* controls, given the strategies employed by the police (even admittedly by them in regard to the videotaping) to prevent Hill from contemplating that his statements could be used against him in court.

¹¹ "*Elstad* commands that if [the defendant's] first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances." *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting).

U.S. at 311-14 (based upon innocent neglect of *Miranda* in a short, earlier admission); *see, e.g., United States v. Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2005) (comparing facts to *Elstad* and *Seibert*); *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005) (finding the record insufficient to distinguish *Seibert* and *Elstad*, when district court did not have *Seibert*, and suggesting that, even though the court did have *Elstad*, the facts relevant to *Elstad* have to be looked at anew in light of *Seibert*);¹² *Jones v. State*, 119 S.W.3d 766, 773-75 (2003) (holding that, on facts identical to those in Hill's case, "[t]o apply *Elstad* . . . would undermine the spirit and intent of *Miranda*").¹³

Perhaps the most startling departure from *Elstad* is that, far from informing Hill that his oral statement (and the written statement) were likely inadmissible, Officer Gilchrest incorrectly told Hill

¹² The Third Circuit remanded the case to the district court for further factfinding on facts much less egregious than Hill's. *Naranjo*, 426 F.3d at 232. *Naranjo* similarly involves incomplete early warnings and suppression of the oral statements. The unwarned interrogation, however, is brief, unlike the sustained interrogation in Hill's case. An inexperienced officer solicits the original, unwarned incriminating statements. The suspect — unlike Hill who manifested at one point that he wished to stop the interrogation — seems eager throughout to talk to the police. The continuity elements are similar: the interrogations occurred in the same place, with the same officers, and with little time break between them. *Id.* at 232 n.12.

¹³ The Court of Criminal Appeals held in *Jones* that *Elstad* should not apply on the facts in *Jones* (which facts in *Jones* are identical to the facts in Hill's case) on the following basis:

Examining “the surrounding circumstances and the entire course of police conduct with respect to [appellant] in evaluating the voluntariness” of appellant's written statement, we cannot place the Akin statement in the same category as the written statement at issue in *Elstad*. In *Elstad*, the unwarned oral statement was elicited almost inadvertently. The Supreme Court noted that the brief stop in the living room was not for the purpose of interrogating the suspect, but was to notify the suspect's mother of the reason for the arrest. The Court also suggested that the failure to give the *Miranda* warnings may have been either the result of confusion about whether the suspect was yet in custody or a desire to avoid what would appear to be an alarming police procedure before the officers had informed the suspect's mother about his arrest.

By contrast, the circumstances in the instant case reflect, at the very least, a serious misunderstanding by law enforcement, not about whether appellant was in custody, but of the dictates of *Miranda*. Further, in contrast to *Elstad* where the initial unwarned statement took place at the defendant's home and the warned statement was given after transporting the defendant to the police station, the unwarned and warned statements in this case were given during a nearly undifferentiated single event, taking place in the same room as an uninterrupted and continuous process. The written Akin statement was literally a transcription of appellant's unwarned oral statements. Appellant did not make a second statement after he finally received his *Miranda* warnings; he simply signed the written statement that he had dictated to Akin before he was warned. To apply *Elstad* here and declare the Akin statement admissible by virtue of the late admonishment of the required warnings would undermine the spirit and intent of *Miranda*. The waiver of rights given in connection with the Akin statement was not constitutionally valid in light of the circumstances and entire course of police conduct.

Jones, 119 S.W.3d at 773-75. Notably, this approach in *Jones*, which preceded *Seibert*, essentially encompasses the factors used by the *Seibert* plurality to determine efficacy of belated *Miranda* warnings. *Jones*, furthermore, does not appear to require any *intentional* effort to subvert *Miranda*.

that the written warnings were the “same thing” given him four hours earlier:¹⁴

Q. (Gilchrest): Did you start from the top?

A. Uh-huh.

Q. Okay. You read all these warnings?

A. Uh-huh.

Q. The same thing I told you before?

A. Uh-huh.

5/16/00 Hearing Def. Exh. 2 at 234. Officer Gilchrest misled Hill into believing that “it would have been unnatural to refuse to repeat at the second stage what had been said before.” *Seibert*, 124 S. Ct. at 2613. Hill’s response, *supra*, indicates that he trusted Gilchrest’s representation, thereby confirming the very danger described in *Seibert*. 124 S. Ct. at 2611 (“What is worse, telling a suspect ‘anything you say can and will be used against you,’ without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.”). Indeed, as noted above, Gilchrest did not have Hill “initial each individual warning,” as he often did when administering warnings “on the face” of a written statement. 5/16/00 Hearing Tr. 186-87. In sum, rather than advise Hill as to whether he still had a “real choice” whether to participate by signing the written statement, Gilchrest gave what were, at best, misleading written *Miranda* warnings. *Seibert*, 124 S. Ct. at 2610-11; *cf.* 124 S. Ct. at 2616 (Kennedy, J., concurring) (“Curative measures should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.”). On this record, the State cannot show that Hill knowingly and voluntarily waived his constitutionally protected Fifth Amendment rights by signing the written statement. *See also Moran v. Burbine*, 475 U.S. 412 (1985) (“[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”).

C. The Texas Courts’ Decision is Contrary to *Seibert* and an unreasonable application of *Miranda* and *Elstad*.

On direct appeal of Hill’s case, the Court of Appeals did not have *Seibert*, which had not yet been released. Interpreting *Elstad*, the Court of Appeals denied the *Miranda* claim because of the “absence of specific evidence that the oral statement played an actual role in [Hill’s] decision to sign a [subsequent] written statement.” *Hill v. State*, 2002 WL 1997915 (Tex. App.—Austin 2002), at *3-4. This legal standard does not survive *Seibert*, which recognizes that it is “ordinarily . . . unrealistic to treat two spates of integrated and proximately conducted questioning” — and *a fortiori* questioning followed by a mere signature — “as independent” simply “because *Miranda* warnings formally punctuate them in the middle.” *Seibert*, 124 S. Ct. at 2611. In addition, the Court of Appeals’ “specific evidence” standard is inconsistent with *Miranda*’s requirement that the State carries a “heavy burden” of “demonstrat[ing] that the defendant knowingly and intelligently waived his privilege against self-incrimination.” *Miranda*, 384 U.S. at 475. Finally, that standard is incompatible with the *Elstad* requirement that an initial failure to give *Miranda* warnings be cured

¹⁴ This appears deliberately coercive, *Elstad*, 470 U.S. at 314, especially in light of the officers’ stated intent to collude in preventing Hill from thinking about the fact that his statements could be used against him by hiding the filming of the interrogation. The officers also displayed coercive intent by playing on Hill’s desire to see his mother, telling him that his mother would want him to tell the truth. *See e.g.*, 5/16/00 Hearing Def. Exh. 2 at 139-142.

by a “careful and thorough administration of *Miranda* warnings.” *Elstad*, 470 U.S. at 311 (emphasis added). The Court of Appeals “specific evidence” standard, placing a burden on the *defendant* to differentiate pre- and post-warning statements, therefore, is diametrically contrary to *Miranda* and *Elstad*, respectively, and the Court’s resolution of Hill’s claim seemed to totally ignore both.

The plurality and dissents in *Seibert* take an objective approach to determining the admissibility of statements like Hill’s written statement. Justice Kennedy, concurring in *Seibert*, would have required a more exacting standard, allowing application of the *Elstad* case to test admissibility of the statement, unless it could be shown that the officers’ strategy in first taking an unwarned statement and then curing it with the second was “deliberate” or “calculated.” *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring). Intent could be inferred from the record evidence. *Seibert*, 124 S. Ct. at 2618 (O’Connor, J., dissenting) (“Even in the simple case of a single officer who claims that a failure to give *Miranda* warnings was inadvertent, the likelihood of error will be high.”). There is plenty of evidence of the officers’ subjective intent to deceive Hill into confessing:

1. Even before the interrogation began, Gilchrest hid in a parked car down the street from Hill’s mother’s house and did not alert Hill as to his presence in Maryland, because he feared that Hill would not talk to him. 5/16/00 Hearing Tr. at 74, 170-71, 174.

2. Proper *Miranda* warnings were notably absent at critical junctures where they normally would be expected. Officers Gilchrest and Roach both testified that they considered Hill to be a suspect at the time he was brought to the police station. *Id.* at 87, 153. But they did not give Hill *Miranda* warnings at that time. Neither did they give *Miranda* warnings when they arrested Hill. 5/16/00 Hearing Def. Exh. 2 at 164-65.

3. The officers worked together to prevent Hill from knowing that he was being videotaped. 5/16/00 Hearing Tr. at 24-26. Gilchrest actually testified that he did not tell Hill he was being videotaped because he was afraid Hill “might worry that it might be used against him later on in some court proceeding or trial.” *Id.* at 182. Montgomery County police officer James Drewry, who did the taping from the adjacent hidden room, concurred that informing Hill of the taping would have put him “on the defensive” and made him “concerned that that tape might be used against [him] in some courtroom proceeding or at some trial.” *Id.* at 26-27.

4. Throughout the interrogation, the officers did not warn Hill that his statements could be used against him. This omission, which *Miranda* treats as fatal to the admission of such custodial statements, had to have been obvious to three officers with 60 years of law enforcement experience¹⁵ between them, who admitted to intentionally hiding the taping in order to prevent Hill from thinking about the potential future court use of his statements. *Id.* at 9, 83, 131. The officers frequently subverted Hill’s ability to comprehend the consequences of his interrogation by downplaying their investigation as an inquiry into an accidental death and an opportunity for Hill to “help himself.” 5/16/00 Hearing Def. Exh. 2 at 115 (describing need for a “complete impartial fair investigation”); 115 (asserting that “accidents happen”); 134 (this is an opportunity for Hill to “explain [him]self”); 134 (“I want to be able to help you by letting you tell me the truth about what happened.”); 140 (“I didn’t find anybody that has anything really against you. . . . [Y]ou seem like a decent guy So I really believe in my heart that you never had

¹⁵ There is no question in this case of “rookie mistake.” See *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005) (refusing to assume agent made “rookie mistake” without finding by district court).

an intention to harm Bill.”); 142 (“[T]his was an accident and, you know, something happened in there A lot of what I’m going to be able to do from this point on, almost everything to help you out, depends on what you tell me right now.”); 155 (“I hate to leave here knowing that you blew this chance.”); 162 (“If I had walked into this room and you had said, Okay, I’m going to tell you the truth; this is what happened: It was a terrible accident, I didn’t mean for it to happen, I got panicked, left, you know, by God, we can work with that. . . .”); 207 (“You know, he’s got the case made, and now we’re just trying to get you to help yourself. . . .”); 217 (“You know, if he [Allen] was a sober responsible person, it wouldn’t have even happened, but he was not.”).

None of the kinds of evidence Justice Kennedy offered that would excuse police conduct is present in Hill’s case. Kennedy observed:

1. “An officer may not realize that a suspect is in custody and warnings are required.” 124 S. Ct. at 2615. In Hill’s case, the officers clearly strategized and prepared to keep Hill in custody once they had picked him up.
2. “The officer may not plan to question the suspect or may be waiting for a more appropriate time.” *Id.* Not in the instant case.
3. “Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection.” *Id.* In Hill’s case, there was mere memorializing of the continuous (not really prior) statement, and Hill was never advised in a clear manner that his statements could be used against him in court. Even at the time Hill finally was given a written warning to that effect to read, any real choice he had in relation to the warning was obfuscated and destroyed by Officer Gilcrest’s assurance to him that he’d *already received the warning*, misleading him into believing that refusal to sign the written statement in order to prevent its admissibility would have been futile.

Applying Justice Kennedy’s approach leads to the same conclusion as applying the plurality opinion: the admission of Hill’s written statement was inconsistent with *Miranda*. Kennedy’s balancing approach requires the courts to determine whether the “central concerns of *Miranda* are . . . implicated.” *Seibert*, 124 S. Ct. at 2614. The central concerns are implicated, because the police fully used the same interrogation tactics found inherently coercive in *Miranda*. See also the testimony of expert Dr. Richard Leo; 6/14/2000 Transcript at pages 67-68 (describing coercive the interrogation techniques employed in Hill’s case). The case is a far cry from *Elstad*, where neither “the environment nor the manner of either ‘interrogation’ was coercive.” *Elstad*, 470 U.S. at 315.

Nothing in Justice Kennedy’s decision states that he would be willing to sacrifice a citizen’s constitutionally protected *Miranda* rights on a record where there is no basis for finding the police misconduct in question was defensible on good faith or excusable neglect grounds.¹⁶ The police misconduct in Hill’s case cannot be excused as “reasonable.” Thus, since the Supreme Court adopted the *Miranda* requirements, most police departments have adopted the standard warning card for police officers to use prior to interrogating a suspect to ensure that they accurately relate the *Miranda* warnings, and that the suspect truly intended to voluntarily and knowingly waive his right

¹⁶ Justice Breyer, in concurring in the *Seibert* plurality opinion, also expresses agreement with Justice Kennedy’s opinion, “insofar as it . . . makes clear that a good-faith exception applies.” 124 S.Ct. 2614. To explain what he means by a “good-faith exception, Justice Breyer cites *United States v. Leon*, 468 U.S. 897 (1984). *Leon* in turn requires, in the Fourth Amendment context, that the police conduct be “objectively reasonable” to qualify for the “good faith” defense. *Leon*, at 922. The conduct of the police in Hill’s case cannot possibly qualify as “objectively reasonable.”

to have counsel present. Gilchrest's testimony demonstrates that the Austin Police Department adopted and employed those type of cards. *See also*, F. Inbau, J. Reid, J. Buckley, and B. Jayne, *Criminal Interrogation And Confessions*, Fourth Edition, at p. 491.¹⁷ No emergency justified Gilchrest's departure from this standardized and well-known police procedure. Nor can legitimate law enforcement practice be served by judicial tolerance of this type of police departure from established procedures, particularly when the "defective and incomplete" *Miranda* warning are given in the presence of a Special Agent of the Federal Bureau of Investigation and also witnessed by two Maryland Police Department Officers (via video).

D. Harm.

The error in admitting Hill's written statement clearly contributed to his conviction, causing substantial and injurious harm. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Indeed, the State's only arson expert, Mr. Crabill, testified that Hill's statement in particular led him to conclude that the cause of the fire was arson. 2 S.F. 174. Additionally, the claim uncovers *deliberate error* affecting the integrity of Hill's trial. *Id.* at 637 n.9 (recognizing that such error might entitle an applicant to relief even if it could not be shown to affect the jury's verdict).

Especially in light of the State's weak circumstantial evidence case, the erroneous admission of Hill's written statement clearly did contribute to his conviction. Most importantly, without Hill's written statement, there was no evidence (other than the exceedingly weak circumstantial evidence that Hill *might* have been present) that Hill had entered the residence and had an altercation with Allen on the night of the fire, that Hill had engaged in check theft, or that Hill had moved Allen's vehicle. The prosecution focused on the written statement's contributions during the guilt/innocence closing argument. The State began with a summary of the jury's task:

What this case comes down . . . to is this. If you don't believe that he started that fire you should find him not guilty. . . . Because if he didn't start the fire, the fire was started accidentally by Bill Allen. Simple as that. And even though he was there under these extremely suspicious circumstances you have decided that his statement to the police is accurate and it has to be based on his statement, was accurate and truthful, then you should find him not guilty. Because if he didn't start the fire, then there was no action of his that could have caused the death of Bill Allen.

6 S.F. 72 (Mr. Cobb; State's opening argument).

The State's summary fairly accurately portrayed the jury's evidentiary task. If the fire was not started by someone with intent to burn the house or kill Allen, *there was no crime*. The circumstantial evidence suggested that Hill had the opportunity because testimony independent of Hill's statements put him in the area of the house. It did not exclude others, but made participation by persons other than Hill and Allen less likely. Additional evidence regarding the check thefts and Allen's plan to file charges against Hill for them provided weak circumstantial evidence of motive.¹⁸ The police allegedly found two stove burners in the "on" position. They found Allen's car parked down the street, not in his driveway, containing material addressed to Allen from his bank regarding the forged checks. So, there were "suspicious circumstances."

¹⁷ This standard text, an earlier edition of which was heavily relied upon by the Supreme Court in *Miranda*, *see* 384 U.S. at 450-453, states at p. 491: "Most police departments rely upon the oral issuance of the warnings. Their officers are supplied with printed plastic cards -- on one side are the warnings to be read; on the other side are the waiver questions to be asked. Usually, the phraseology on the cards is prepared or at least approved by the local prosecuting attorney or other legal advisor."

¹⁸ This was weak circumstantial evidence, certainly, because covering up a few bad checks is an unusual motive for murder.

On the other hand, Allen was legally drunk. He had facial injuries that could be explained by an accidental fall onto the table top. No one testified that Hill knew Allen planned to bring charges against him. No one actually saw Hill move Allen's vehicle. There was no fire evidence normally found in arson cases. There was no independent evidence¹⁹ that Hill had been in Allen's vehicle, and could have seen the letters from the bank. There was no independent evidence of a physical altercation between Hill and Allen. Thus, absent Hill's written statement, the State had no direct evidence of Hill's agency or intent. These were suggested by Hill's written account of the altercation causing Allen to fall and hit his head and by Hill's written account of moving Allen's truck. The written statement conveyed to the jury that Hill was willing to leave Allen alone (with Allen yelling at him to leave) in the middle of the night, drunk, bleeding from a head injury that he had caused with a "body block." Additionally, Hill's statement enhanced motive by providing the only direct evidence that he was *in the truck* with an opportunity to see the bank materials and, therefore, know of Allen's prosecution plans, apart from possibly being told by Allen (about which the jury otherwise could only speculate).

The written statement did not include any admission of acts constituting murder or arson. Therefore, in order to prove that *Hill* burned down the house with the proper intents, the State selectively attacked the credibility of two parts of the written statement: Hill's description of his push and shove encounter with Allen, particularly his description of Allen's injuries; and Hill's account of moving Allen's truck. The State used these elements to suggest that Hill's experts' opinions were unreliable or biased:

And also I was somewhat bothered by him [Dr. DeHaan] with all of his experience of investigating saying that he wasn't disturbed by the fact that the car was parked so far away by his client. And, you know, Dr. Krouse also he kind of laughed about that and said, well, you know, I park in some strange places here in Austin. Well, why would his client park all the way down the street? Did Dr. DeHaan explain that? That's not in the book. But Dr. DeHaan explained that having the car away makes easier to put the fire out. So it's almost like his client, anticipating that the Fire Department might come there that night, moved the car so the Fire Department could come there. Yeah. What else? He's doing a service by moving the car. It has nothing to do with the fact that everybody in that neighborhood knew that if Bill Allen was home his car's in the driveway. . . . There's a lot of things you're going to do if that car's not in the driveway. Dr. DeHaan doesn't see that. Because it doesn't fit his theory does it? Because his theory relied totally upon the word of the defendant. And Dr. Krause says you can rely upon the word of the defendant. . . . I talked to him about the injuries to the top of the head. And they kind of want to play some magic with that. In his statement the defendant says he's bleeding from the top of his head, described him striking the table and getting up. . . . I said, well, the blow of the injuries are right here. Why would he be bleeding from the top of his head. But you can't get it both ways. You can't rely upon what the defendant says and then not recognize that he's lying. Dr. DeHaan said, well, I'm just relying on what the Medical Examiner (Krouse) said. . . . You remember he said, well, he could have been injured here and blood up here. I've seen blood in some strange places. Yeah, but I don't think he has ever seen blood go against the law of gravity. . . . Why are they trying so hard to fit the facts of this case in with what he says . . . ?

6 S.F. 86-88. The written statement allowed the State to vigorously assault Hill's credibility:

Now, Mr. Minton got up here and read to you the defendant's version of that little altercation. . . . Take a look at it again. This is where your common sense really comes into play because when he read it just a minute ago it still didn't make any

¹⁹ The blood stain was not tied to anyone.

more sense than it did the first time I read it. It's just not probable. That's not how it happened. And what I find even more interesting is that Detective Gilcrest and Agent Roach basically give him the story. . . . The evidence does not support this happened this way. A self-protective body block. That's just unbelievable. It's an insult to your common sense. And, finally, the last thing I think that's so unbelievable in this statement is the fact that he moved the truck. You know, how unbelievable is that, that he's going to get into that truck because he cares so much about Cato that he doesn't want him to drive in that intoxicated state. That is absolutely absurd. He sure didn't want him to drive. He didn't want him to drive to get help, and he sure didn't want anyone to know he was home so they could come rescue him. And that's exactly what happened. Every neighbor got up there. The Fire Department . . . told you they would have acted differently. The neighbors told you, "We just assumed no one was home . . ."

6 S.F. 156-57.

The prosecutors prepared Hill's jury during voir dire to focus on his written statement as the key to its assessment of his guilt:

[Y]ou look at what the defendant has told you in his statement. Each of you talked to us about how you've known when someone had [lied] to you before; things you'll look for; inconsistencies in a story; demeanor; if the story makes sense and adds up. These are things we all covered on voir dire. And that's what you're going to be here today, is to sit there and look at State's Exhibit 30 [Hill's written statement] and ask yourself does this add up? Does this make sense? Because not only did he talk, and talk, and talk to you, but I would submit to you he lied, and lied, and lied to you.

6 S.F. 150-51.

The altercation account in the written statement forced defense counsel to be "defensive" and almost apologetic. In the first place, apart from the statement, there was significantly less evidence suggesting that Hill caused Allen's facial injuries. The fact related by Hill that he caused Allen to fall and strike the table with his head is a matter (no matter how excusable by virtue of Hill's "body block" explanation) that gave a major boost to the effectiveness of the State's argument. Defense counsel was obligated to shrug:

[H]e's on the floor. And when he gets up he says he sees blood from the top of his head. I'm not going to argue about that. That's what the man says. Where he's talking about blood up here, down here, coming out of here. I don't know. But that's what he told them and they put it down and he signed it.

6 S.F. 133. Defense counsel argued that the State's theory about intent being illustrated by Hill moving the truck was "goofy." 6 S.F. 134. But the cat was out of the bag. Without Hill's written statement, there was no direct evidence that he moved the truck and, therefore, there would have been no implications, one way or the other, to cause the jury to be concerned about that act.

In sum, although Hill's statement did not confess guilt, it served as a lightning rod around which the State could create controversy sufficient to convince the jury that it had presented proof beyond a reasonable doubt with its weak circumstantial evidence case. Unquestionably, the error of its admission caused substantial and injurious harm. Thus, this Court should find the state courts' resolution of the issue contrary to *Seibert* and/or an unreasonable application of *Elstad* and *Miranda*, and reverse Hill's convictions on both state court cause numbers.

III. KNOCK AND TALK

A "knock and talk" is a "reasonable investigative tool when the officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity." *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001). It is allegedly a consensual encounter whereby law enforcement officers knock on the door and engage the occupant in conversation, eliciting statements, admissions and, potentially, consent and/or probable cause to enter.

In order to fully explore the knock and talk area, I am also going to use an actual case: Jason Fernandes, which is currently pending oral argument before the Fifth Circuit. First I will explain the facts of the case -- including the actual tape recording of Fernandes by Austin Police Department Detectives. Then, the legal arguments are set forth showing how to attack this type of insidious investigative tool.

Factual Summary

At undetermined dates prior to January 31, 2007, Detective Walker of the Austin Police Department learned from a confidential informant (hereinafter CI, although labeled a "concerned citizen" by Walker), that Jason Fernandes, a University of Texas student, lived in a garage apartment at a house on a north-south street north of 33rd street that often had a maroon Saturn parked outside. 1TR16. According to the CI, Fernandes sold marijuana and psychedelic mushrooms, 1TR16, and "was in possession of a .45 caliber, semi-automatic handgun." 1TR30, 40.²⁰ Because Walker did not trust the motivations of the CI, he attempted to corroborate the information. 1TR18. Walker was able locate a garage apartment at 3309 Helms Street and verified that the utility records for that location were listed to Fernandes. 1TR17. Walker also verified, from the utility records, Fernandes' phone number supplied by the CI. 1TR17. However, Walker did not conduct any "trash hits,"²¹ despite the existence of trash cans outside of the residence, to attempt to verify the CI's information regarding Fernandes' alleged drug dealings. 1TR43.

Because Walker had been unable to corroborate any aspect of the CI's information regarding the distribution of illegal narcotics, 1TR17, 1ER90, Walker did not have probable cause to obtain a search warrant. 1TR17. Walker also admitted that he did not have "reasonable suspicion" to believe Fernandes was dealing drugs, 1TR42, 49.²²

Walker decided to go to 3309 Helms Street in the early afternoon of January 31, 2007, and conduct what he termed a "consensual" "knock and talk." 1TR20. Accompanied by Detective Bryant (Walker's partner), Walker arrived at the address at around 12:30 p.m. 1TR20. Walker and Bryant

²⁰ The district court concluded that the CI had informed the detectives that Fernandes "habitually" kept a gun in the residence. 1ER102.

²¹ Walker testified a "trash hit" was a tactic used by the Austin Police to ascertain if someone is dealing in illegal substances because of baggies, debris etc. being thrown away by the resident. 1TR43. Walker admitted he could have done this, although he added it was much less pleasant than simply asking a resident.

²² The district court's conclusion that Walker did not admit that he did not have "reasonable suspicion" as of the commencement of the "knock and talk," 2ER271, **RETAB#5**, is clearly erroneous as flatly contradicted by Walker's testimony at 1TR42 and 49. It is also contradicted by the Government's "response" to Fernandes' motion to suppress where the Government conceded that the detectives, "unable to corroborate the concerned citizen's information with respect to the distribution of illegal narcotics and not knowing the concerned citizen's true motivation in supply this information," 1ER90, "decided to conduct a knock and talk of the Defendant's residence." *Id.*

were in plain clothes, 1TR20-21. Although both had weapons, they were not visible. 1TR21-22. Walker had a digital tape recorder which he activated and recorded approximately 43 minutes of dialogue by and between the detectives, Fernandes, Fernandes' girlfriend (Jackie) and a friend of Fernandes who walked up to the residence on two separate occasions. *See* Def. Ex. 18,²³ Court Exhibit 1 (audio recording on CD).

Walker went up the steps to the second story garage apartment and knocked on the door.²⁴ The transcript of the audio recording (and the audio recording itself) reflects the following (with all footnotes added for explanation based on the suppression hearing testimony) during the critical first ten minutes of the conversation.²⁵

(KNOCKING ON DOOR):

FERNANDES: May I help you?

WALKER: Yea. Are you Jason?

FERNANDES: YEA. Who is it?

WALKER: Jason, I'm Jon Walker. I'm with the police department. Hoping I could talk with you outside for a minute.

FERNANDES: (complies).

WALKER: This is my partner, Detective Bryant. *Could we talk to you downstairs for a minute?*

FERNANDES: Sure.

WALKER: *After you.*²⁶ Anybody else home right now, Jason?

²³ Def. Ex. 18 is a transcription of the entire 43 minute audio recording.

²⁴ There was disputed testimony whether Bryant also went up the steps at that time. Walker and Bryant both testified that Bryant stayed at the bottom of the stairs, but Fernandes testified that they were both at the top of the stairs and/or on the landing at the top of the stairs. The audio tape reflects the sounds of people walking up the stairs and of course, the audio tape also reflects that Walker introduced Fernandes to Bryant as soon as he came out of the residence and before anyone can be heard on the audio tape as walking down the stairs. Fernandes claimed he was "sandwiched" by Walker and Bryant after he came out of the apartment and was marshalled down the stairs to the ground for questioning. *See also* Def. Ex. 1-6 (photos). The district court made no express or implicit fact finding on this disputed area.

²⁵ The testimony at the hearing reflected that the police could not see inside the apartment from the front door, as there was a screen door and a glass entry door covered with fabric. Fernandes opened the interior door and spoke with Walker through the closed screen door, as Walker identified himself and showed Fernandes his "badge." 1TR22.

²⁶ At this juncture, Walker asked Fernandes to walk downstairs in front of him, as indicated by the words "after you." Walker explained that this was for Walker's safety. 1TR23. According to Fernandes, Walker put his arm on and/or around Fernandes' shoulder at this point. 1TR141-42. Walker testified that he did not remember giving Fernandes a "reassuring pat on his shoulder," but admitted it was possible that he had done so. 1TR57.

FERNANDES: My girlfriend.

WALKER: I'm sorry?

FERNANDES: My girlfriend.

WALKER: What's her name?

FERNANDES: Jackie.

WALKER: I'm sorry?

FERNANDES: Jackie.

BRYANT: Jackie.

WALKER: *Okay, Let me explain why we stopped by. Somebody called in and complained that you-all are smoking a little weed here. They could smell it coming out the vents or something, okay.*

FERNANDES: All right.

WALKER: *This is campus.*

FERNANDES: I'm sorry.

WALKER: *Okay. People smoke weed over here. I'm aware of that. But when you call in and make a complaint, I've got to respond to and do something about it.*

FERNANDES: I'm sorry.

WALKER: *So I figured I would just stop by and talk to you and say, If you're smoking a little weed, you need to stop, okay.*

FERNANDES: I'm sorry.

WALKER: *And if you've got any bongs in the house, you need to get rid of them.*

FERNANDES: Okay.

WALKER: Do you have any bongs in the house?

FERNANDES: I have some downstairs.

WALKER: Downstairs where?

FERNANDES: Oh, it's just in my garage. *I will get rid of them.*

WALKER: *Do you have any of up there?*²⁷

FERNANDES: No.

²⁷ Walker was referring to the upstairs garage apartment at this point in time.

WALKER: Okay. Is your girlfriend in there right now?

FERNANDES: Yes.

WALKER: And what's her name again?

FERNANDES: Jackie.

WALKER: Jackie. So there's no - -

FERNANDES: I don't want to get her in any trouble.

WALKER: *Well, I don't want you to get in any trouble. That's not why I'm here. I'm here to respond to a complaint.*

FERNANDES: Yes, sir.

WALKER: *And if I can respond to this complaint and say I've spoke to Jason, and he gave me the bong, and I went away, then we're over with it, okay.*

FERNANDES: Yes, sir.

WALKER: Do you want to go *up* and get the bong out of your - -²⁸

FERNANDES: It's out here (indicating), sir.²⁹

WALKER: Okay.

FERNANDES: I'm sorry, man.

WALKER: Is this your garage?

FERNANDES: (Inaudible). Whoa. Your cars parked here. There's actually a couple. (Inaudible).

WALKER: Okay.

FERNANDES: I'll just give them all to you.

(ALARM GOING OFF)

WALKER: What's that?

FERNANDES: It's a hookah bong.

WALKER: No. I mean that sound.

FERNANDES: Oh, it's an alarm.

²⁸ At this juncture, Walker was again referring to the upstairs garage apartment.

²⁹ Fernandes was indicating that the bongs were in his garage, which was on the ground level around the corner from where the officers were talking to him. See Def. Ex. 1-6.

WALKER: Jason, have you ever been in any trouble before?

FERNANDES: No, sir.

WALKER: *This is a pretty minor deal. But what I'm concerned with is that we might be leaving anything illegal up in your apartment. Is there no other bongs up there because --*

FERNANDES: No. There's no -- there's -- there's -- all my bongs are down here because my brother was down here for a week, and we --

WALKER: Uh-huh.

FERNANDES: -- and we took everything -- everything down here. There's actually -- actually a pipe -- everything is back here. That's why it's here.

WALKER: Okay.

BRYANT: *Where is your marijuana at? I know you've got at least a dime bag somewhere.*

FERNANDES: We have some.³⁰

WALKER: Is that upstairs?

FERNANDES: Yeah.

WALKER: *I'm just here to take it away and get it out of your*

FERNANDES: I need - - I need to go get it for you real quick.

WALKER: Okay. *Well, I'll follow you. You don't have any guns or knives or torpedoes in your apartment that are going to hurt me, right?*

FERNANDES: No, sir. Can I - -³¹

WALKER: Is your girlfriend going to attack me when I get inside?

FERNANDES: Can I - - can I just - - *can I just go inside on my own like? My girl -*

WALKER: Well, I would prefer that we did this all kind of consensually as opposed to me *having to invoke any kind of authority. But if you want, we can just have your girlfriend come out, and we can all wait outside.*

FERNANDES: Al right. Jackie. Jackie. Can you come here for a second?

WALKER: Jackie, you two are the only ones home?

³⁰ Fernandes claimed that he initially denied having any marijuana, a proposition supported by the reports prepared by Walker and Bryant, to wit: Def. Ex. 22 and 23, respectively, which reflect that Fernandes "eventually admitted" having marijuana. *See* Def. Ex. No. 22.

³¹ Def. Ex. 22 reflects that "Fernandes was uncomfortable with us following him" upstairs.

JACKIE: Yes, sir.

FERNANDES: I'll be - - I'll be out shortly.

WALKER: Why don't you come out now, Jason.

BRYANT: *Jason. Yeah, don't - - don't go in there without him.*

WALKER: Go ahead. Downstairs.

JACKIE: Could I get some shoes on?

WALKER: Where are you shoes at?

JACKIE: Just right there (indicating).

WALKER: Tell you what.

BRYANT: Can you get your shoes without leaving our sight?

JACKIE: Probably. I'll just sit on the bottom of the stairs.

BRYANT: That's fine.

WALKER: After you.

BRYANT: *Here's our dilemma. We can't allow you to go in and retrieve illegal narcotics without us going with you. And the reason for that is because that would put you in a situation where you would have to try and destroy them.*

FERNANDES: Oh, no. I was just saying (Are you there?). Go in, Tony.³²

BRYANT: Yeah. I could smell it when I came in.³³

FERNANDES: I'm sorry man. I smoke and I'll stop. I'll give you - - I'll give you everything.

WALKER: Okay. Well, here's the deal.

BRYANT: How can we be sure that it's everything? How much is there really? How much is there really?

FERNANDES: I have a little jar right here (indicating). It's on the floor.

BRYANT: Like how much? Are we talking about hydro? You said it was in a jar?

FERNANDES: Yeah.

BRYANT: Are you talking about hydro?

³² Tony is Fernandes' cat.

³³ Bryant testified that the words "when I came in" were not correct, and that the words were "when he came out. 1TR167-68.

FERNANDES: Yeah.

BRYANT: What, like half a pound?

FERNANDES: No. No. It's like a couple of ounces.

BRYANT: A few ounces.

FERNANDES: Just whatever is in this jar right here. I'll go --³⁴

WALKER: Can I follow you in just to grab it, Jason?³⁵

WALKER: Watch her.

WALKER: Okay. Is that -- is that it in here?

FERNANDES: Yes, sir.

WALKER: *There's nothing else in here?*

FERNANDES: No.

WALKER: *Because we heard that there could be. And all I want is to take it from you voluntarily.*

FERNANDES: No, sir. That's all I have.

WALKER: Okay. So there's another hookah right there (indicating).

BRYANT TO SEAN CLARK: You live here?³⁶

SEAN CLARK: Well, that's not really anything that has something to do with it.

FERNANDES: Oh shit, I thought you meant bong.

UNIDENTIFIED SPEAKER: (Inaudible).

UNIDENTIFIED SPEAKER: (Inaudible).

³⁴ At this juncture, Fernandes walked into the residence from the front door a couple of feet and turned right into his bedroom to get the jar of marijuana. Walker followed Fernandes into the residence a few feet to the point where he could see into the bedroom, which is depicted on Govt. Ex. 1 and Def. Ex. 14 (diagrams); see also Def. Ex. 10 and 11 (photographs).

³⁵ There was a dispute about whether, at this point in time, Fernandes said "sure" because there was an inaudible sound on the tape. 1TR11, 34-35. Forensic testing of that portion of the tape, completed after the date of the evidentiary hearing, reflected that the inaudible sound could not be determined and that it could not be attributed to Fernandes. *See* 2EF185. This expert report was attached as an exhibit to the motion for reconsideration of the denial of the suppression motion.

³⁶ Sean Clark is an individual who came by Fernandes' residence. Bryant's exchange with Clark, downstairs where he was standing with Jackie when Clark came by, was captured on the recorder even though Walker and his recorder were upstairs in the apartment at this time (as reflected by Walker's statement "lets go downstairs").

WALKER: All right. *Let's go downstairs.* After you.

BRYANT: As in you, gotta go upstairs?

WALKER: Why don't you pull up those chairs right there and have a seat for a sec. Jackie, why don't you have a seat over here. Jackie, do you live here?

JACKIE: Yeah. I've been staying here.

WALKER: Okay. Have a seat.

JACKIE: I work right up the street.

WALKER: Jason, why don't you have a seat too. You've never been in trouble before?

FERNANDES: No, sir.

WALKER: Are you a student?

FERNANDES: Yes, sir.

WALKER: Okay. *Here's the deal. You could be in trouble today.* Have a seat. Jason, have a seat. And here's why. They'll figure out a (Inaudible). Here's why. *When I walked in here to get that little bit of weed, I saw a money counter, I saw a digital scale, I saw baggies, I saw everything somebody needs to sell weed. Okay. So here's your choices right now. You can cooperate with us and let us get everything illegal out of your house, and then we can - and the we can see what we can do next to try to help you out.*

FERNANDES: I do have -- I do have the money counter and I do (inaudible). The money counter is not -- is not for anything illegal. I have a -- I have a business with my brother, and we sell -- and -- and every now and then we're sending money, and I have to send money to school. I mean, like we have --

WALKER: Where do you work at, Jason?

FERNANDES: We -- I work with my brother at -- we do this thing. It's like an Internet recording TV thing, and we sell advertising. And I give money, and I send it to my brother and -- and -- and then I pay money to school, and that's -- and that's what that is. And then there's -- yeah, there's a scale, but, I mean, we -- I mean, I smoke and I buy stuff, and I need to know that the stuff weighs out right. And that's -- I mean, that's all that there is to it. (8:13)

BRYANT: That is way more than smoking weed.

FERNANDES: (Inaudible). I mean, I smoke.

BRYANT: Nobody smokes that much pot (inaudible).

FERNANDES: I have -- I have a -- I have a -- I have a humidor and I smoke and we -- I mean roll blunts.

WALKER: *Here's what I would like to do before I leave. I would like to go through your entire apartment and take anything illegal out of it. And you can either let me*

do that or tell me that you don't want me to. And that's up to you. But your decision is going to affect how this investigation goes. I want you to know that. And right now, so far we've been cooperative with each other, and we're doing everything to try to help each other out, and everything is on friendly terms.

FERNANDES: *Can I have some time to talk to a lawyer or something?*

WALKER: If you want to talk to a lawyer, I have to stop talking to you.

FERNANDES: *I mean, I would like to get back with you-all.*

WALKER: Okay. Getting back with us won't -- won't change what we're going to do here today. Because we're not leaving until we're done with our little *investigation* here.

FERNANDES: *I mean, I don't -- I wouldn't like my apartment searched.*

WALKER: Okay. Well, that's your *right*.

FERNANDES: At this point. I mean, really, like it's just -- I mean...

WALKER: Jackie, do you have any pockets besides the ones in front?

JACKIE: No, sir.

WALKER: Can you stand up for me and take your hands out of your pockets? Do you have anything in these pockets?

JACKIE: No.

WALKER: Do you have anything in the other pockets?

JACKIE: No, sir.

WALKER: Okay. When you sit back down I need to be able to see your hands.

JACKIE: Okay. I'm just cold.

WALKER: All right. Do you have any pockets?

FERNANDES: No, sir.

WALKER: *You're not going to let me look through your apartment?*

FERNANDES: *I don't -- no. I would rather not.*

WALKER: Okay. Well, that's your right.

See Def.Ex. 18 at pages 1 to 13.

After 43 minutes of recording the conversations, Walker left and obtained a search warrant based upon an affidavit he prepared. However, well before he left to obtain the warrant, Walker went back upstairs and into the apartment to take photographs of what he had seen when he followed Fernandes into the apartment. After Walker returned (along with other officers), Fernandes' apartment and garage were searched and additional photographs were taken. LSD and a gun, which formed the basis of Fernandes' two count federal indictment, were found in the upstairs apartment.

Summary Of Legal Argument

Fernandes' Fourth and Fifth Amendment rights were violated, mandating suppression of the evidence. This was not a "consensual" encounter. Rather, Fernandes was "seized" by his submission to lawful authority when, in response to Detective Walker's request for him to step outside of his residence and speak with him, he complied. This "knock and talk" orchestrated by the detectives was "unreasonable" under the Fourth Amendment because they had no "reasonable suspicion" to believe Fernandes was engaged in drug dealing **and** had reason to believe Fernandes possessed a weapon. They also misled and deceived Fernandes. Given the totality of the circumstances, the detectives' actions were unreasonable and violative of the Fourth Amendment. Fernandes' statements were therefore the fruit of that initial illegality, as was Walker's initial warrantless entry into Fernandes' residence. Furthermore, Fernandes did not voluntarily consent to Walker's warrantless entry. The probable cause upon which the warrant was ultimately obtained -- based upon Fernandes' statements and what Walker saw in the residence -- was therefore the fruit of that prior illegality. Additionally, a totality of the circumstances supports the conclusion that Fernandes' statements were involuntary: they were induced by affirmative misrepresentations and promises by the detectives. If people can not trust the representations of government officials who knock on the door of their "castle," the phrase "I'm from the government and I'm here to help" will become even more terrifying.

Overview Of Assertions

The search warrant executed by the Austin Police Department at Fernandes' garage apartment on January 31, 2007, yielded the LSD and gun which formed the basis of the two count indictment against Fernandes. Fernandes' suppression motions in the district court asserted the following (in summary):

1. Detectives Walker and Bryant conducted an unconstitutional and unreasonable "knock and talk" which was not supported by "reasonable suspicion" and which, under this Circuit's precedent, should not have been conducted because they had previously received information from a concerned citizen/confidential informant that Fernandes possessed a weapon; thus Fernandes was illegally seized, detained and questioned without "reasonable suspicion" and in violation of his Fourth Amendment rights;³⁷
2. Detectives Walker and Bryant elicited statements from Fernandes by lying to and deceiving Fernandes about their purpose and by making promises to Fernandes, thus rendering Fernandes' oral statements involuntary;
3. Detectives Walker and Bryant elicited statements from Fernandes, who was detained and in custody once Walker physically put his arm around Fernandes, without supplying Fernandes with *Miranda* warnings;
4. Detectives Walker and Bryant orchestrated a scenario whereby Walker gained access to Fernandes' apartment as a result of the unlawful "knock and talk" and Fernandes' involuntary statements, thus viewing items in "plain view" when in fact

³⁷ Stated differently, Fernandes asserted that the officers did not have "reasonable suspicion" to effectuate an investigatory detention of him by directing him to come out of his residence and speak with them, let alone to subject him to custodial interrogation. *See e.g., United States v. Gonzalez*, 190 F.3d 668, 672 (5th Cir. 1999); *United States v. Perkins*, 353 F.3d 198, 199 (5th Cir. 2003).

there was no "consent,"³⁸ no exigent circumstances (other than those created by the Detective themselves), and no legal right to enter the residence with a warrant, thus rendering Walker's observations illegally obtained;

5. The probable cause upon which the search warrant was obtained was itself a fruit of unlawful police conduct³⁹ because of the actions described in paragraphs 1 to 4 above; and

6. Detective Walker's affidavit for the search warrant failed to supply probable cause due to stale information and contained deliberate and/or reckless misstatements.

What follows is a portion of Fernandes brief on appeal to the Fifth Circuit.

³⁸ Fernandes expressly refused "consent" to a search of his residence when asked. However, the district court found that Fernandes' action in going into the residence after being told repeatedly not to do so, with Walker following him into the apartment (based on Walker's belief that Fernandes' inaudible response was an affirmative response), operated as an express and implied "consent" to Walker's entry, and that therefore, Walker was in a location he was entitled to be when he observed items in plain view. 1EF112-115; 2EF277, 292.

³⁹ Fernandes' statements, the bongs produced by Fernandes from the garage, the marijuana retrieved by Fernandes, Walker's observations inside the apartment (as he followed Fernandes inside the apartment), as well as warrant and all evidence seized as a result of its execution should be subject to suppression as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

PORTION OF FERNANDES APPELLATE BRIEF

D. Fernandes's Fourth And Fifth Amendment Rights Were Violated.

1. This Was Not A "Consensual Encounter," But Rather An Unreasonable "Knock And Talk" Violative Of The Fourth Amendment; Fernandes Was Illegally Seized, Detained And Subjected To Custodial Interrogation, In Violation Of His Fourth Amendment Rights.

The district court concluded that what occurred in this case was a "consensual encounter," a legitimate "knock and talk" for which no "reasonable suspicion"⁴⁰ was required, and that Fernandes had not been seized, detained or subjected to custodial interrogation. 1ER106-110; 2ER278-79, 289-292. Fernandes respectfully disagrees with the district court legal conclusions.

a. Deception And Misrepresentations By The Detectives.

Before discussing the legal issues identified above, a brief diversion into the deception and misrepresentations by the detectives merits consideration.

The "knock and talk" procedure employed herein was tainted with affirmative misrepresentations by the detectives regarding why they wanted to talk to Fernandes, what they wanted to talk to him about, and what they wanted him to do. *See* subsection 2, *infra* (**Fernandes' Statements Were Not Voluntary**). As reflected by the audio recording and the transcript thereof, the detectives were not knocking on his door, contrary to their representations to Fernandes, to investigate a "complaint" that someone had smelled marijuana smoke. In fact, the detectives were not interested in resolving their fictitious "complaint," but rather Fernandes' alleged distribution of narcotics. Instead of telling Fernandes the truth -- that they were there to investigate allegations made by a CI that he was selling marijuana and psychedelic mushrooms (and possessing a .45 caliber semiautomatic pistol) -- the detectives **affirmatively misrepresented the nature, scope and purpose of visit and lulled Fernandes into believing that the "complaint" could be resolved and they would go away if he simply agreed to stop smoking marijuana and then, subsequently, to get rid of any "bongs."** Because of these affirmative misrepresentations, this can not be deemed a "consensual" encounter because "consent" obtained by deception is not lawful consent. Indeed, just as consent to enter can be tainted by affirmative representations, an encounter initiated by law enforcement that is affirmatively misrepresented to the individual approached (in his residence, no less) by law enforcement is not consensual and violates the Fourth Amendment. Fernandes asserts (in combination with the discussion in subsections **b** and **c**, *infra*) that since Walker admitted he had no "reasonable suspicion" that Fernandes was dealing drugs before he went to the residence on January 31, 2007, the approach to Fernandes' residence and the request to speak with Fernandes violated the essential premise of the Fourth Amendment that "[t]he right of the people to be secure in their persons, houses ... against unreasonable searches and seizures..." There was no warning to Fernandes that he did not have to speak with the detectives, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (warning not required, but lack of it is a factor), or that he could send them on their way. The vast majority of citizens have no earthly idea that when the police knock on your front door, you have the right to tell them to go away, and in fact, undersigned

⁴⁰ The district court's conclusion that Detective Walker did not admit that he did not have "reasonable suspicion" to believe that Fernandes was engaged in drug dealing, 2ER271, is clearly contradicted by the record. *See* 1TR42 (admitting that without corroboration of the CI, there was no "reasonable suspicion"); 1TR49 (admitting that he had no "reasonable suspicion" to believe Fernandes was selling marijuana and psychedelic mushrooms before he went to residence on January 31, 2007); 1EF90 (Government's response to suppression motion, admitting no corroboration of the CI's information regarding drug dealing).

counsel has found not one Supreme Court opinion, Fifth Circuit opinion, or opinion from Texas' state courts that holds that a citizen has that unfettered right! While that right is implicit under *Florida v. Bostick*, 501 U.S. 429 (1991),⁴¹ it has never been articulated in any published opinion that undersigned counsel has been able to find and it is certainly not common knowledge to our citizens, let alone to someone born and raised in India who has entered the United States to attend college. The misrepresentations and deceit orchestrated upon Fernandes must be considered in conjunction with subsections **b and c**, *infra*.

b. Seizure, Detention & An Unreasonable "Knock And Talk."

Independent of (but also in conjunction with) subsection **a**, *supra*, Fernandes asserts that as opposed to a "consensual" encounter, the detectives actually seized Fernandes⁴² and detained him for an investigation, along the lines of a *Terry* stop, albeit without "reasonable suspicion," which is the constitutionally mandated minimum justification for a seizure. As reflected by the cases in footnote 26, *supra*, there can be no question that Fernandes was "seized" within the meaning of the Fourth Amendment when he submitted to Detective Walker's show of authority and opened the door and stepped outside his residence. Additionally, Fernandes asserts that this was an "unreasonable"⁴³

⁴¹ In *Berkemer v. McCarty*, 468 U.S. 420 at 439 (1984), the Court noted, without any citation of authority, that persons stopped under *Terry v. Ohio* on the basis of "reasonable suspicion" are not obligated to answer questions posed to them by the police. Of course, in a post 9/11 world, most citizens are afraid not to answer questions posed to them by police and, given Fernandes' immigration status (student visa), that fear would be greater than that of the typical citizen.

⁴² A seizure occurs when a person submits to a "show of authority." *See California v. Hodari D.*, 499 U.S. 621, 628 (1991) (A "show of authority" exists when "the officer's words and actions would have convey[ed] the message [to a reasonable person] that he was not free to disregard the police and go about his business.") **Fernandes asserts that his action in opening the door and going outside, at the request of Detective Walker, was a submission to a "show of authority."** *See Brower v. County of Inyo*, 489 U.S. 593, 597-98 (1989); *United States v. Kohler*, 836 F.2d 885, 888 (5th Cir. 1988) ("[T]he stop occurred when the agent dressed in plain clothes knocked on the door (of the motor home) and identified himself as a border patrol officer.")(explanation added); *United States v. Almand*, 565 F.2d 927, 929 (5th Cir.)(seizure occurred when Almand opened the door of the camper and stepped out in response to officer's knocking on door), *cert. denied*, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978).

Certainly, the actions of Detective Walker in obtaining Fernandes' presence outside his residence was a "stop" within the meaning of *Terry v. Ohio* based on less than "reasonable suspicion." *See United States v. Kohler, supra; United States v. Almand, supra; Kaupp v. Texas*, 538 U.S. 626 (2003). In *Kaupp*, officers woke the defendant up in his bed, told him "we need to go and talk," to which the defendant stated "okay," and then transported him to the police station. *Id.* at 631-632. The Court held that the officer's "we need to go and talk" statement presented no option but "to go" and that the defendant's "okay" was nothing but a "mere submission to a claim of lawful authority." *Id.* at 631 (citing *Florida v. Royer*, 460 U.S. 491 at 497 (1983), and *Schneckloth v. Bustamonte*, 412 U.S. 218 at 226 (1973)).

Finally, under *California v. Hodari D.*, 409 U.S. 621, 625 (1991), Walker's action in putting his arm around Fernandes before Fernandes went down the stairs -- which is uncontradicted testimony -- constitutes a "constructive detention."

⁴³ The Supreme Court has long held that the "touchstone of the Fourth Amendment is reasonableness." *Ohio v. Robinette, supra* at 39 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). Reasonableness is measured in objective terms by examining the totality of the

"knock and talk" and the detectives in fact had no right to approach Fernandes' residence and misrepresent the scope, nature and purpose of why they wanted to speak with him, particularly where the detectives had information, even though not corroborated, that Fernandes had a gun in the residence.

A "knock and talk" is a "reasonable investigative tool when the officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity." *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001). Absent "reasonable suspicion," the "knock and talk" could not be "reasonable" within the meaning of the Fourth Amendment, contrary to the district court's conclusion. 2ER289-292.

The lead "knock and talk" case in the Fifth Circuit -- *Jones*, 239 F.3d at 721 -- also supports the conclusion that this "knock and talk" was "unreasonable" because the detectives had information that Fernandes "**habitually kept a gun in the residence**," (as found by the district court, 1ER102). Indeed, *Jones*, 239 F.3d at 721, as interpreted by Senior United States District Judge Buchmeyer in *United States v. Hall*, 2005 WL 2233584 (N.D. Tex. 2005), clearly supports the conclusion that because the detectives had a reason to believe that Fernandes possessed a weapon, the "knock and talk" was "unreasonable." See *Hall*, *supra* 2005 WL 2233584 at footnote 14, citing *Jones*, 239 F.3d at 721 ("Because the officers....**did not have any reason to believe that the occupants were armed**, the 'knock and talk' procedure was a reasonable investigatory tactic under the circumstances.") (emphasis added). The district court concluded otherwise. 2ER290-291.

The legitimacy of the "knock and talk" procedure has been questioned by this Court. See *United States v. Gould*, 364 F.3d 578, 595 (5th Cir. 2004) (*en banc*) (Smith, J., Dissenting) ("The majority puffs this court's assessment of the 'knock and talk' strategy, taking what was once 'not inherently unreasonable,' *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001), and making it something that has 'clearly been recognized as legitimate.' Slip op. at 590 (citing only *Jones* as authority). That is quite a transformation in only three years time."). See also Judge DeMoss' dissenting opinion in *Gould*, *supra* at 599. Given the deception orchestrated upon Fernandes by the detectives, the absence of "reasonable suspicion," and a reason to believe that Fernandes possessed a weapon, this was an unreasonable "knock and talk," violative of the Fourth Amendment.

Moreover, the "knock and talk" procedure is also at odds with Supreme Court authority -- *Florida v. Bostick*, *supra*, and its progeny -- because the Supreme Court has never sanctioned such action and, by inference, has only allowed "consensual encounters" in **public places**; not the extraction of a citizen from his "castle" **based upon misrepresentations, let alone in the absence of "reasonable suspicion."**

In *Florida v. Bostick*, the Court was confronted with whether a police encounter on a bus constituted a "seizure" within the meaning of the Fourth Amendment when the officers who approached the passenger on the bus lacked the reasonable suspicion required to justify a seizure. 501 U.S. at 433-434. The Court stated the following:

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547, 1552, 113 L.Ed.2d 690 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature... **Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has**

circumstances. *Id.*

occurred.”

Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion), for example, we explained that “law enforcement officers do not violate the Fourth Amendment **by merely approaching an individual on the street or in another public place**, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” *Id.*, at 497, 103 S.Ct., at 1324; see *id.*, at 523, n. 3, 103 S.Ct., at 1338 n. 3 (REHNQUIST, J., dissenting).

There is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure. The Court has dealt with similar encounters in airports and has found them to be “the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest.” *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 105 S.Ct. 308, 310-311, 83 L.Ed.2d 165 (1984). We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, see *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *Rodriguez*, *supra*, 469 U.S., at 5-6, 105 S.Ct., at 310-311; ask to examine the individual's identification, see *Delgado*, *supra*, 466 U.S., at 216, 104 S.Ct., at 1762; *Royer*, *supra*, 460 U.S., at 501, 103 S.Ct., at 1326 (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 557-558, 100 S.Ct. 1870, 1878-1879, 64 L.Ed.2d 497 (1980); and request consent to search his or her luggage, see *Royer*, *supra*, 460 U.S., at 501, 103 S.Ct., at 1326 (plurality opinion) **as long as the police do not convey a message that compliance with their requests is required.**

501 U.S. 434-435 (emphasis added).

The *Bostick* Court, relying upon *INS v. Delgado*, 466 U.S. 210 (1984), noted:

Like the workers in that case [*Delgado*], Bostick's freedom of movement was restricted by a factor independent of police conduct - i.e., by his being a passenger on a bus. Accordingly, the “free to leave” analysis on which Bostick relies is inapplicable. **In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter...We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would “have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.** *Chesternut*, *supra*, 486 U.S. at 569, 108 S.Ct. at 1977. See also *Hodari D.*, 499 U.S., at 638, 111 S.Ct., at 1552.

501 U.S., at 436-437 (emphasis added).

The *Bostick* Court also went on to state the obvious:

Clearly, a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant *only* if the cooperation is voluntary. **“Consent” that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.**

* * *

Our Fourth Amendment inquiry in this case - **whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter - applies equally to police encounters that take place on trains, planes, and city streets.**

501 U.S., at 438.

Finally, the *Bostick* Court stated:

We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine **whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.**

501 U.S. at 440.

Application of *Bostick*, *Jones*, *Gould*, and *Hall* to Fernandes' situation reflects the following regarding whether this was "unreasonable" police action violative of the Fourth Amendment and/or a seizure (issues independent from the voluntariness of Fernandes' statements, but nevertheless inextricably intertwined thereto):

1. The Supreme Court has never sanctioned, as reasonable, whether police can approach a man's "castle" and seek to ask him questions when there is no "reasonable suspicion," as opposed to approaching a person **in a public place** and asking him or her questions, for identification etc.;
2. The detectives conducted no investigation (such as "trash hits") other than to verify the location of the residence, the identity of Fernandes, and Fernandes' phone number as being associated with the utility records;
3. The detectives conducted a "knock and talk" despite the absence of "reasonable suspicion;"
4. Under *Jones* and *Hall*, the "knock and talk" was not a reasonable investigative tactic because the detectives had information that Fernandes had a **weapon** in the residence;
5. The detectives did not inform Fernandes at the beginning of the "knock and talk" that he could refuse to speak with them or tell them to leave his property and there was no evidence that he was aware he could do so;⁴⁴

⁴⁴ In *United States v. Drayton*, 536 U.S. 194 (2002), the Court, relying upon its then eleven year old opinion in *Florida v. Bostick*, *supra*, held that the Fourth Amendment does not require police officers to advise passengers on a **bus** of their right not to cooperate and their right to refuse consent to search. **Whether this same rule applies when the police engage in an "unreasonable" "knock and talk" and misrepresent the scope, nature and purpose of their intended visit with the citizen is an issue of first impression. Based on all of the cases cited above, Fernandes asserts that officers must inform the resident upon whose door they knock that there is no obligation**

6. Fernandes was "seized" by his submission to the detectives show of authority when he stepped outside his residence and under the totality of the circumstances, a reasonable person in Fernandes' position would not have felt free to decline the detectives' requests or otherwise terminate the encounter (particularly after Walker put his arm around Fernandes at the top step and directed him to downstairs, and therefore blocked his ability to return to the apartment;⁴⁵

to speak with them, and that upon request, they will leave the premises. Such a rule is the only manner by which the presence of the police knocking on the door of the "castle" can be viewed as not inherently coercive and is necessary to ensure that the police conduct communicates to the reasonable person that he was in fact at liberty to ignore the police presence and go about his business.

While the district court found Fernandes' claim that he did not know he could "cut off the interview" credible (for purposes of the district court's *Miranda* analysis), *see* 1ER111, 2ER281, the district court never expressly made a credibility finding regarding Fernandes' testimony that he was not aware that he could have refused to speak with the detectives, told them to leave his property, or refused to go outside when Walker first identified himself and asked Fernandes to step outside. Given the district court's clearly erroneous factual finding addressed in section C, *supra*, it is **contra-intuitive to conclude that Fernandes would have stepped outside at Walker's request while marijuana was being smoked inside the apartment if in fact Fernandes knew he did not have to speak with the detectives and could have directed them to leave his front door.**

⁴⁵ In *Brendlin v. California*, ___ U.S. ___, 127 S.Ct. 2400, 2007 WL 1730143 (No. 06-8120), the Court held that a passenger in a vehicle stopped at the direction of the police (in that case, without any reasonable suspicion or probable cause for the stop) is seized within the meaning of the Fourth Amendment because:

An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, **and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.** Cf. *Drayton, supra*, at 197-199, 203-204 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414-415; cf. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*) (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Wilson, supra*, at 414 (quoting *Michigan v. Summers*, 452 U.S. 692, 702-703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)). **What we have said in these opinions probably reflects a societal expectation of "unquestioned [police] command" at odds**

7. The detectives' misrepresentations to Fernandes regarding their purpose in wanting to speak with him negates any conclusion that this was a "consensual encounter," as their deception negates "consent";

8. Even if the initial encounter was consensual (a point not conceded by Fernandes), once Fernandes informed the detectives he would get rid of his bongs, Def. Ex. 18, L. 24, in accordance with their directive to do so (Def. Ex. 18, L. 16-17), **their failure to leave and instructions to obtain the bongs for them clearly "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business," thus subjecting him to a seizure.**⁴⁶

9. Fernandes' residence was not a public place, unlike the office building in *INS v. Delgado*, the airport in *Florida v. Rodriguez*, or the bus in *Florida v. Bostick* and *United States v. Drayton*.

Based on the foregoing, Fernandes asserts that he was illegally "detained" and "seized," and that his statements were the fruit of that illegal seizure/detention, *see* footnote 42, *supra*, (including the "unreasonable" "knock and talk"), even if not the product of custodial interrogation without the benefit of *Miranda* warnings (a point not conceded by Fernandes).⁴⁷

c. Consent To Search Was Not Voluntarily Given.

As noted above in footnote 22, *supra*, the district court found that Fernandes had voluntarily consented to Walker's entry into the apartment (when Walker followed Fernandes into the apartment when he went to retrieve the jar of marijuana). Although Fernandes believes that subsections **a and b**, *supra*, demonstrates the illegality of detectives' conduct, Fernandes also asserts that this factual finding is clearly erroneous.

with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson, supra*, at 414.

2007 WL 1730143 at *6 (footnotes omitted) (emphasis added).

Brendlin supports the conclusion that any reasonable person in Fernandes' position would not have felt that he could have initially stayed inside his residence or could have terminated the encounter with the detectives. In fact, despite Fernandes' efforts to terminate the encounter and resolve their "complaint" by agreeing to stop smoking marijuana and then agreeing to get rid of his bongs, the detectives would not allow him to do so on his own as they had previously indicated would be acceptable. Instead, they reversed their position and insisted he produce the bongs and then requested his marijuana. Fernandes efforts to go back into his apartment alone, as he requested, were rebutted. Fernandes was clearly seized and detained throughout this entire process.

⁴⁶ Fernandes has previously attempted to clarify his belief that he was "seized" when he came out of the door and the detectives directed him downstairs (with Detective Walker putting his arm around his shoulders), which also adds to the conclusion that he was "seized" and in "custody."

⁴⁷ *Miranda* warnings were not given until pages 16 to 18 of Def. Ex. 18, and at page 20 Bryant tells Sean Clark that Fernandes was under arrest. Because the district court concluded that this was a "consensual" "knock and talk" and therefore that Fernandes was not seized, the district court also concluded there was no "custodial interrogation" and that *Miranda* therefore was not violated. 1ER108-110. Of course, Fernandes asserts otherwise.

"Voluntariness is a question of fact to be determined from all of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). "[T]he question whether a consent to search was in fact 'voluntary' or was the produce of duress or coercion, express or implied, is a question of fact to be determined from the totality of all of the circumstances." *Schneckloth*, 412 U.S. at 227. The government must prove, by a preponderance of the evidence, **that consent was freely and voluntarily given.** *United States v. Tompkins*, *supra* at 121. The following relevant factors are considered: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *United States v. Tompkins*, *supra* at 121 (citing *United States v. Olivier-Becerril*, 861 F.2d 434, 426 (5th Cir. 1988)). The government's burden of proving voluntariness of consent "cannot be discharged by showing no more than acquiescence to a claim of lawsuit authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *United States v. Tompkins*, *supra* at 122.⁴⁸

In the district court, Fernandes asserted that he did not consent and that, given the entire sequence of events up to the point in time that he went into the apartment, he was relying upon promises from Walker and doing nothing more than, at most, acquiescing to lawful authority. When directly asked by Walker whether he could search the apartment, Fernandes told Walker that he would not like his apartment searched. As noted above in subsections **a and b**, Fernandes maintains that he had been seized and that he did not know that he could have refused to communicate with the detectives or send them away when Walker first identified himself. Fernandes, born and raised in India, was in the United States on a student visa, which obviously would impact upon his belief/knowledge that he could not direct the detectives to "go away" from his front door. *See* Def. Ex. 18 at 23. As addressed above (and as more fully explained below), Fernandes' statements were not voluntary but rather were induced by deceptions and promises from Walker and his cooperation with the officers was similarly induced. Fernandes obviously knew that contraband would be found if the detectives searched his apartment. While Fernandes entered the apartment to retrieve the jar of marijuana he had admitted to having (only as a result of the officers first insisting he produce the bongs for them, after he agreed to get rid of them, which was not sufficient for the detectives, despite their assurances that he merely needed to get rid of them), he clearly did not want the officers going upstairs with him and wanted to retrieve the marijuana without the officers going into his apartment (even after they followed him upstairs). While intelligent, Fernandes no knowledge that he could refuse to speak with the detectives or tell them to leave his property: Fernandes had no prior arrests and his only prior contact with law enforcement was when he had been robbed. Given the heavy presumption against waivers of constitutional rights, *Glasser v. United States*, 315 U.S.60, 70-71 (1942); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Moran v. Burdine*, 475 U.S. 412, 454 (1986), which requires "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), it cannot be said that Fernandes **freely and voluntarily gave consent**, express or implied, for Walker to follow him into his apartment. Despite the district court's credibility choice in favor of Walker regarding Fernandes' alleged affirmative statement to Walker at the time he entered the residence, 1ER112-113, 2ER277, the forensic report referenced in footnote 18, *supra*, supports the conclusion that the district court's factual finding is clearly erroneous.

⁴⁸ In *Bumper, supra*, the Court found acquiescence to a claim of lawful authority where "consent" to search was given only after the investigating officer falsely asserted that he had a warrant.

2. Fernandes' Statements Were Not Voluntary.

a. Fernandes' Statements Must Be Viewed From His Perspective And The Detectives' Subjective Intentions Should Not Be Considered.

The district court concluded that Fernandes' statements were voluntary. 1ER106-108; 2ER281-287. In doing so, the district court viewed the statements made by Walker and Bryant to Fernandes from the perspective of the detectives and their subjective intent as stated during the suppression hearing, not from the perspective of how Fernandes (or a reasonable person in his position) would have interpreted them.

First, the intentions of the detectives should not be considered.⁴⁹ Second, in considering the voluntariness of a confession and looking at the "totality of the circumstances", the "**characteristics of the individual defendant**" are to be considered. *See Stein v. New York*, 346 U.S. 156, 185-186 (1953) (emphasis added).⁵⁰ In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court observed, "as interrogators have turned to more subtle forms of psychological persuasion, **courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus.** *Id.* at 164 (emphasis added).

b. The Proper Standard Is The "Totality Of The Circumstances."

The district court's original order holding Fernandes' statements to be "voluntary" focused primarily upon whether Fernandes' statements were induced by promises. 1ER106 *et seq.* In its order denying Fernandes' motion for reconsideration regarding the voluntariness of his statements, the district court incorrectly relied upon the factors this Court uses to determine the **voluntariness of consent to a search**,⁵¹ 2ER281-282, while also citing the totality of the circumstances test. 2ER285.

The proper test is whether the Government has proven that given the "totality of the circumstances," the statements are the product of the accused's free and rational choice. *United States v. Bell*, *supra* at 461. According to *Bell*, "[t]his Circuit has held that **trickery or deceit is only prohibited to the extent that it deprives the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.** *Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir.2002)(en banc); *see also Self v. Collins*, 973 F.2d 1198, 1205

⁴⁹ The subjective intentions of the officers play no role in the assessment of the legality of the actions undertaken, so long as the circumstances, viewed objectively, justify the action. *Ohio v. Robinette*, *supra* at 420-21; *Whren v. United States*, 517 U.S. 806, 813 (1996); *Scott v. United States*, 436 U.S. 128, 138 (1978).

⁵⁰ According to the *Stein* Court, "[t]he limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." *Id.* at 185. The Court also stated "[t]hese men were not young, soft, ignorant or timid. They were not inexperienced in the ways of crime or its detection, nor were they dumb as to their rights." *Stein v. New York*, *supra* at 185-186.

⁵¹ While the standard quoted by the district court is correct when dealing with the **voluntariness of a consent to search**, that standard is not appropriate for determining the **voluntariness of a confession**. *See United States v. Tompkins*, *supra* at n. 10 ("Care should be taken not to confuse voluntariness of consent to search in the Fourth Amendment context with voluntariness of criminal confessions in the Fifth or Fourteenth contexts, which ultimate issue is uniformly held to be *de novo* review," citing cases).

(5th Cir.1992) (finding that mere trickery alone will not necessarily invalidate a confession).

c. A Promise Or A Prediction Of A Future Event?

Fernandes' amended motion to suppress, 1ER61 at 72-75, stated the following:

In *Bram v. United States*, 168 U.S. 532, 542, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897), the Supreme Court held:

[A] confession, in order to be admissible, must be free and voluntary: That is, must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight*, nor by the execution of any improper influence. (Emphasis added).

As the court in *United States v. Pinto*, 671 F.Supp. 41, 56-57 (D. ME. 1987), observed with respect to the *Bram* opinion,

the Supreme Court recognized the inherent difficulty of calibrating the effect of an unconstitutional inducement, when it observed, ‘ * * the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if * any degree of influence has been exerted.’*

An inculpatory statement is rendered *involuntary* if it is obtained as a result of a promise and “[i]n this context, a ‘promise’ is an offer to perform or withhold some future action within the control of the promisor, in circumstances where the resulting action or inaction will have an impact on the promisee.” *United States v. Fraction*, 795 F.2d 12, 15 (3rd Cir. 1986). Or, stated another way, “whether from the perspective of the defendant [the police officers’] statements included a promise of the benefit which, *in the defendant’s understanding*, the [police officer] could either grant or withhold.” (*Id.*) “[T]he defendant’s perception of what government agents have promised is an important factor in determining voluntariness.” *United States v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985). The voluntariness of a confession is determined by the totality of the circumstances. *Arizona v. Furminante*, 499 U.S. 279, 284-85, 111 S.Ct. 1246, 1251, 113 L.Ed.2d 302 (1991).⁵²

The Fifth Circuit has held that “certain promises, if not kept, are so attractive that they render a resulting confession involuntary.” *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987), citing *United States v. Shears, supra* (“[a] promise of immediate release . . .”). Moreover, the lack of providing a defendant a *Miranda*⁵³

⁵² The defendant submits that he was subjected to custodial interrogation when the incriminating responses were elicited by Detectives Walker and Bryant. But even if, *arguendo*, he was not in custody when the incriminating admissions were made, his statements are still suppressible due to the fact that “the totality of the circumstances” establish “the defendant’s will was overborne” by the police conduct in question. *United States v. McNaughton*, 848 F.Supp. 1195, 1200 (E.D.Penn. 1994), quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 20470-48, 36 L.Ed.2d 854 (1973). Actions germane to the inquiry include “the nature of the promise,” “the context in which the promise is made,” “the characteristics of the individual defendant,” “whether the defendant was informed of his rights,” and “whether counsel was present.” See *United States v. Pinto*, 671 F.Supp. 41, 57 (D.ME. 1987).

⁵³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

warning prior to eliciting incriminating admissions although not fatal, in and of itself, is a “significant factor” in determining whether the complained of statements were voluntarily made. *Davis v. North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966).

As the above-quoted colloquy clearly establishes, Detective Walker and Bryant repeatedly lied to and deceived the Defendant and engaged in “trickery” to cajole him to “fork over” elicit contraband. While trickery and deceit is not *per se* prohibited, law-enforcement officers cross the line when they procure incriminating statements by the use of threats or promises. *United States v. Charles*, 476 F.3d 492, 497 (7th Cir. 2007). Promises made to defendants by law-enforcement officials in the course of actively deceiving them further point, ineluctably, to the conclusion that incriminating responses are involuntary. See *United States v. Pinto*, *supra* (“[n]ot only did Hall (police officer) induce defendant’s statements by promises . . . but Hall actively deceived the defendant by promising to do something he knew he lacked the power to do. Hall was well aware that he did not have the authority to determine whether a defendant will be prosecuted or imprisoned.”)

In *United States v. Goldstein*, 611 F.Supp. 626, 632 (N.D.Ill. 1985), the Government argued that “ ‘a defendant’s ignorance of the full consequences of his decision’ to confess does not of itself render the confession involuntary.” The Court ruled that the Government’s reliance on *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985), missed the mark:

[b]ut the cited portion of *Elstad* addresses only the question whether *Miranda* considerations aside –the government has an affirmative duty to inform a defendant of the consequences of a confession. *What is at issue here is not the government’s failure to inform Goldstein, but rather its deliberate misrepresentations to Goldstein of his status. And when the government misleads a suspect concerning the consequences of a confession, his statements are regarded as having been unconstitutionally induced by a prohibited direct or implied promise.* (Emphasis added).

The district court's original order concluded that the detectives' statements "cannot be construed as an explicit promise of leniency," 1ER108, but rather were "simply a permissible means of lowering Defendant's guard" *Id.* The district court also concluded that Walker's statement "'And if I can respond to this complaint and say I've spoken to Jason, and he gave me the bong, and I went away, then we're over with it, okay,'" could be considered "at most an implication of leniency, and indirect promises do not have the potency of direct promises.'" (citing *Hawkins v. Lynaugh*, 844 F.2d 1132, 1139 (5th Cir. 1988). 1ER108. And in its order denying Fernandes' motion for reconsideration, the district court again relied upon *Hawkins v. Lynaugh*, in concluding that Walker's statements were not promises, but rather a "prediction of future events." 2ER287-289.

Fernandes' motion for reconsideration contained extensive reports detailing Fernandes' dyslexia (one of the four learning disorders he testified to at the suppression hearing),⁵⁴ and argued

⁵⁴ Although discounted by the district court in its order denying his motion for reconsideration, 2ER283-287, these exhibits shed insight into Fernandes' literal understanding of Walker's statements. For instance, page 1 of Exhibit 6 states:

"[d]yslexia is a language disability, not a reading disability, so not only does it affect the ability to read, write, and spell by conventional methods, **it affects the**

that Fernandes' dyslexia needed to be factored into the totality of the circumstances.⁵⁵

The materials tendered to the district court all support the conclusion that Fernandes' actions and words were the direct result of what Fernandes viewed as **promises** made to him by the officers and at most, acquiescence to lawful authority. While the district court rejected Fernandes' "interpretation" of those statements as promises, instead finding them merely a "prediction of future events," 1ER108, 2ER287-289, the words are clearly capable of being interpreted as a promise to "go away" if he complied with the detectives' directives. Moreover, from Fernandes' perspective, interpreting those statements as promises is entirely reasonable, given that he had never been arrested or detained for questioning, and also explains why he submitted to the assertion of lawful authority by the detectives by telling them he had bong and, "eventually," marijuana. While Fernandes himself did not testify that his dyslexia impacted upon his interpretation (he was not qualified to do so), the forensic reports regarding his dyslexia must be factored into the nexus of voluntariness. Given the forensic reports of Fernandes' particular severe dyslexic characteristics, a literal interpretation of the statements is entirely understandable and reasonable.

Regarding the district court's conclusion that the statements by the detectives were not promises, but rather a "prediction of future events," 1ER108, 287-289, examination of *Hawkins* reflects that the district court was incorrect in its conclusion. In *Hawkins*, the Court was faced with a contention that Hawkins was induced to confess by promises of help for his "illness," and analyzed two exchanges between the detectives and Hawkins, to wit:

Toward the beginning of the recorded portion of Hawkins' confession, Detective LaFavers made the following statement:

LAFIVERS: Mr. Hawkins its a ... you know a lot of the problem in life is the fact that you have the ability to admit that problem to

ability to communicate in more subtle ways. Dyslexics have processing, perceptual, and attention/concentration problems." (emphasis added)

Exhibit 6 also reflected other problems encountered by dyslexics, including the fact that a dyslexic "[t]akes spoken or written language literally -- **problems with generalization, applying information to new or different situations**" and "[d]ifficulty following oral directions and remembering what they have been told."

⁵⁵ Exhibit 7, a June 20, 2003, assessment report, stated the following:

I found that Jason frequently takes suggestions as instructions and orders. Sometimes, Jason simply obeys, but often, Jason flares up and is unwilling to accept the suggestion.....Jason takes long to comprehend instructions and is at the literal level of comprehension. He is unable to identify and comprehend certain complex phrases and complex information.

* * *

As a result of his disabilities, Jason has the tendency to be very literal in terms of his interpretation. Jason takes effort to and time to understand a sentence with an implied message. Jason requires sentences to be crafted such that they are very clear and explicit in any message they are trying to deliver. This may occur because he may view sentences individually and not in the context of a broader topic and he may miss subtle verbal and non-verbal cues. (emphasis added)

yourself. You know its a its not as much what you admit to others as it is being of the personality that you can admit it to yourself and I think you are doing it now and I think that you are probably overcoming a lot of the problem that you have been suppressing over the years. Its ... Its something that I can understand. It a ... It's something that you yourself can't hold yourself at fault for. It a ... It is something that occasionally happens to some of us, but its nothing that can't be helped. **Its something that we can help you with and we'll try.** We will do that. We understand what your situation is, we do. We're not here to in any way punish you or criticize you because it is understandable what your situation is.

Then, toward the end of the taped portion, after Hawkins had confessed to a series of rapes and attempted rapes and as the officers were preparing a typed statement for Hawkins to sign, the following exchange took place:

HAWKINS: Will they sentence me to die for that?

LAFEVERS: Huh?

HAWKINS: Will they sentence me to die for that?

LAFEVERS: **Sam, to be honest with you I would ... I would think that the courts in your situation *wouldn't* FN17 be very lenient. I really do. I think that they will observe the fact that you need help ... you're trying to seek that help already psychological-psychiatric help and a ... I think they would recommend a psychiatrist. Okay.** FN17. Emphasis added.

Hawkins, supra at 1138-1139 (emphasis added). The Court went on to state:

For, when viewed under the totality of the circumstances, **we are persuaded that Detective LaFavers' comments did not cross the line between expressions of sympathy and kindness and promises of leniency. `A promise is not the same thing as a prediction about future events beyond the parties' control or regarded as inevitable.'** When viewed from Hawkins' perspective LaFavers' statements cannot be deemed to have included a promise of a benefit that, in Hawkins' eyes, LaFavers had the power to either grant or withhold. On the contrary, LaFavers' remarks were carefully couched in terms of his personal opinion - `I would think.' Whether the officers overreached is not answerable by a process of semantical categorization. Rather, the question is whether the language used under all of the facts and circumstances would lead Hawkins to reasonably believe that he would not be held criminally responsible or put to death.

* * *

As for LaFavers' **earlier outright promises of help**, a promise of "help" might, arguably, be heard to mean that a defendant would receive psychiatric counseling in lieu of imprisonment. **However, LaFavers made no direct promise of leniency but only a direct promise to get Hawkins help, which could be considered at most an implication of leniency, and "indirect promises do not have the potency of direct promises."** In *Bram v. United States*, the Supreme Court held that a confession may not be " 'extracted by any sort of threats or violence, nor obtained

by any direct or implied promises, however slight.’ ” However, the *Bram* test “has not been interpreted as a *per se* proscription against promises made during interrogation,” and the test has been tempered by subsequent holdings that, depending on the totality of the circumstances, certain representations will not render a confession involuntary.

Hawkins went on to find the statements voluntary because there was no “**psychological pressure strong enough to overbear the will of a mature, experienced man.**” *Id.* Thus, Fernandes asserts that *Hawkins* clearly supports the conclusion that Walker's statements were promises, inasmuch as Walker affirmatively told Fernandes that if he gave them the bong and subsequently the marijuana, the detectives would go away and that would be the end of their response to the "complaint." This is the logical conclusion of the language used by Walker, including the statements that "I don't want you to get in any trouble. That's not why I'm here." Def. Ex. 18 at page 4, l. 10-12, and the insinuation that marijuana smoking on campus was not an issue (absent a complaint) and that he merely needed to quit smoking and get rid of his bong. Def. Ex. 18 at page 3, l. 1-18.

Additionally, *Hawkins'* use of the term "prediction" cites *United States v. Fraction*, 795 F.2d 12 (3rd Cir. 1986). Inspection of *Fraction* demonstrates that Detective Walker's statements -- including that reflected at page 4, lines 10 to 16 -- are a far cry from the type of statement that justifies the conclusion of a "prediction of future events." In *Fraction, supra*, the Court dealt with an FBI Agent's statement to the defendant that "I also told him that I would not be able to promise him anything in terms of help other than to notify the U.S. Attorney and a sentencing judge that he had cooperated in the matter." 795 F.2d at 13-14. The Court noted that most of the Circuit Courts "have uniformly rejected the contention that a promise to bring cooperation to the attention of the authorities suffices to render a confession involuntary." 795 F.2d at 14. The Third Circuit went on to state the following:

The issue is the voluntariness of the confession. Under *Bram* and its progeny, what renders a confession involuntary is that it was *obtained* as the result of a *promise*. **On the facts found by the district court, Agent White did not make a promise, merely a correct factual response to the defendant's question; and the confession was not induced by what Agent White said.**

In this context, **a “promise” is an offer to perform or withhold some future action within the control of the promisor, in circumstances where the resulting action or inaction will have an impact upon the promisee. A promise is not the same thing as a prediction about future events beyond the parties' control or regarded as inevitable. The issue, then, is whether, from the perspective of the defendant, Agent White's statements included a promise of a benefit which, in the defendant's understanding, the agent could either grant or withhold.**

The Court concluded that *Fraction*, who had extensive prior criminal experience, was not promised anything that induced him to confess.

Viewed against *Fraction*, upon which the language from *Hawkins* was based, it is undeniable -- particularly given Fernandes' severe learning disorders -- that the detectives had the ability to "respond to this complaint" and "go away" with Fernandes' bong and marijuana and "then we're over with it". Def. Ex. 18 at page 4, lines 10 to 16. This was a promise that the detectives clearly had the ability to deliver to Fernandes, when viewed from Fernandes' perspective.⁵⁶ It was also a promise that Walker testified he had the power to grant, as opposed to some "prediction about future events **beyond the parties' control or regarded as inevitable.**" Indeed, this was an affirmative

⁵⁶ Prior to January 31, 2007, Fernandes had never been arrested, although he had been robbed.

statement of Walker's alleged intent, which, when viewed in the entire context of what he had told Fernandes (and how he acted towards Fernandes up to that point in time, including putting his arm around Fernandes in a reassuring manner) was a promise (which resulted in the immediate production of the the bong). It was certainly a far cry from what might be viewed as a "prediction of the future" made by Walker at page 10, lines 19 to 22 of Def. Ex. 18, to wit: "So here's your choices right now. You can cooperate with us and let us get everything illegal out of your house, **and then we can--and then we can see what we can do next to try to help you out**" (which Fernandes did not agree to). Under *Fraction*⁵⁷ -- Walker's statements, viewed in their totality, were NOT a prediction of future events that do not rise to the level of a promise, but rather were promises that induced Fernandes to deliver the bong and eventually admit to the possession of marijuana, thus overcoming his free will and rendering his statements involuntary.

d. Misrepresentations Cannot Be Ignored.

The district court discounted the affirmative misrepresentations to Fernandes regarding why they were present and what they wanted to speak with him about. 2ER287-289.

In his motion for reconsideration, Fernandes cited a number of cases, including *United States v. Alvarez-Tejeda*, 491 F.3d 1013 (9th Cir. 2007), to demonstrate the significance of their misrepresentations. *Alvarez-Tejeda* stated the following:

“[W]e take a closer look when agents identify themselves as government officials but mislead suspects as to their purpose and authority. This is because people “should be able to rely on [the] representations” of government officials. *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990)(per curiam)(internal quotation marks omitted). If people can’t trust the representations of government officials, the phrase “I’m from the government and I’m here to help” will become even more terrifying.” (emphasis added)

Id. at 1017.

Fernandes also cited *Garvin v. Farmon*, 80 F. Supp. 2d 1082 (N.D. Cal. 1999). In *Garvin*, the Court addressed a confession that was obtained after detectives "suggested that by confessing to robbery, she could avoid a murder charge." *Id.* at 1086. The Court stated the following, which is fully applicable to the current situation:

To be sure, the Supreme Court has held that some types of police deception are permissible, such as falsely stating that a co-defendant has turned state's evidence. *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), or installing government agents as cellmates to elicit statements, *Illinois v. Perkins*, 496 U.S. 292, 296-97, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).... **Nor do the police have to divulge their ultimate areas of suspicion to a *Miranda*-warned suspect.** *Colorado v. Spring*, 479 U.S. 564, 575-577, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987).

Certain affirmative misrepresentations, however, have been held by the Supreme Court to constitute unconstitutional deception and coercion:

⁵⁷ Detective Walker's statements clearly could be interpreted by a reasonable person as a promise of non-prosecution from the standpoint of the detectives responding to the "complaint" of marijuana smoking and the surrender of any bong and marijuana, which would have been the "cause" of that complaint (although the "complaint" was a deception on Fernandes from Walker's perspective, because Walker was investigating the CI's allegation of Fernandes' drug distribution).

In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege. *See, e.g., Lynumn v. Illinois*, 372 U.S. 528, [83 S.Ct. 917, 9 L.Ed.2d 922] (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary); *Spano v. New York*, 360 U.S. 315, [79 S.Ct. 1202, 3 L.Ed.2d 1265] (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary).

Id. at 576 n. 8, 107 S.Ct. 851. **Although no decision has been found in which the affirmative misrepresentation was, as here, an intentional, false and material understatement concerning the legal consequences of a confession suggested by the police, it seems quite clear that such conduct is as coercive as the affirmative misrepresentations in *Lynumn* and *Spano*.** Were it otherwise, the police could trick many unrepresented suspects into making admissions in order to avoid the threat of a murder prosecution. As early as 1897, the Supreme Court has held:

The test is whether the confession was “extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.”

Bram v. United States, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897), approved in *Brady v. United States*, 397 U.S. 742, 749-50, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976). **The “improper influence” here was falsely suggesting to the accused that she could avoid a murder prosecution by confessing to robbery, all the while pressuring her to talk before she had counsel.** These were “circumstances calculated to undermine the suspect's ability to exercise free will.” *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Id. at 1089-1090 (emphasis added).

Fernandes obviously relied on the detectives' understated and misrepresented purpose of their visit, which, given the absence of *Miranda* warnings, constituted coercive police conduct impacting on the voluntariness of his statements.

e. Given The Totality Of The Circumstances, Fernandes' Statements Were Involuntary.

Based on everything above, Fernandes asserts that the totality of the circumstances reflects that his statements to the detectives were involuntary. *Cf. Withrow v. Williams*, 507 U.S. 680, 693-94 (1993)(listing factors).

END OF FERNANDES BRIEF

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IV. GENERAL FACTORS TO CONSIDER

Essentially, the general analytical framework for considering whether a defendant's statement is or is not going to be admissible would be as follows:

1. Did the defendant make a written, oral, sign language statement or engaged in non-verbal conduct that amounts to an assertion of fact (i.e., did defendant make a statement)?
2. If the defendant made a statement, was the defendant in custody?
 - * If not in custody, was the statement "voluntary" and not subject to exclusion under Article 38.21 & 38.23, CCP.
3. If the defendant has made a statement while in custody, is it the product of official interrogation?
 - * If not the product of official interrogation, was the statement voluntary?
4. If the defendant has made a statement while in custody that is the product of official interrogation, were warnings given?
 - * If no warnings given (*Miranda* and Article 38.22), statement is not admissible.
5. If warnings were given and the defendant has given a custodial statement that is the product of official interrogation, was there a valid waiver of rights (i.e., was there a voluntary, knowing and intelligent waiver of rights)?
 - * If no valid waiver of rights, statement is inadmissible.
6. If warnings were given and the defendant has given a custodial statement that is the product of official interrogation, did the defendant unambiguously assert rights?
 - * If no unambiguous assertion of rights, statement may be admissible.
7. If the defendant unambiguously asserted his rights after timely having been given warnings, any statement that is the product of custodial interrogation is inadmissible.
8. Did the defendant, having having unambiguously asserted his rights, reinitiate contact with authorities and waive rights?

The following provisions of the Texas Code of Criminal Procedure must be considered and consulted:

Article 38.21, CCP.: Allowing a statement to be used against the declarant if it appears that the same was freely and voluntarily made without compulsion or persuasion.

Article 38.22, CCP.: Governing when written and oral statements can be used, including warnings that must be given and reflected on written statements, and setting forth requirements before oral statements can be used, and also mandating trial court findings and jury instructions regarding the voluntariness of statements.

Article 38.23, CCP.: Governing when evidence obtained in violation of Texas law (constitutional and laws) and U.S. Constitution shall not be used.

Article 46B.007: Governing inadmissibility of statements made during competency examinations.