Circuit Court for Montgomery County
Case No. 138187C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 155

September Term, 2023

JOSE LARA-CHACON

v.

STATE OF MARYLAND

Friedman,
Ripken,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.
Concurring Opinion by Friedman, J.

Filed: September 11, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

> For the *Seibert*[1] holding to apply at all there must be an unwarned custodial interrogation followed by a warned custodial interrogation, carried out *deliberately* as a two-step 'question first' process to undermine the effectiveness of the *Miranda*[2] warnings given at the beginning of the second interrogation.

Buck v. State, 181 Md. App. 585, 629 (2008) (emphasis added). In this case Appellant, José Lara-Chacon, argues that the deliberateness requirement or its "functional equivalent" was satisfied. We disagree and affirm his conviction.

BACKGROUND FACTS

The facts of this case are a senseless tragedy. Fortunately, we need not dwell on them, but will only focus on those relevant to the legal question presented. Therefore, in capsule, Lara-Chacon and his friend, Dimer Diaz-Martinez, were watching television and drinking tequila in Lara-Chacon's apartment. They were fooling around with knives when Diaz-Martinez attempted to stab Lara-Chacon in the stomach. Lara-Chacon hit Diaz-Martinez in the head with a baseball bat. Lara-Chacon then cut Diaz-Martinez's throat. At trial, Lara-Chacon presented a self-defense theory, but the jury rejected it, convicting him of first-degree murder. He was sentenced to life imprisonment, with all but 40 years suspended, and 5 years of supervised probation. He noted this timely appeal focused exclusively on the manner in which he was interrogated by police.

---

[1] *Missouri v. Seibert*, 542 U.S. 600 (2004). This case is discussed in greater detail later in this opinion.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

LARA-CHACON'S STATEMENTS

Relevant to this appeal, Lara-Chacon made three statements to the police:

- The first statement came when Lara-Chacon called 911. He reported that he and a friend had been drinking when his friend tried to stab him, that he fought back, and that the friend was now injured. This call was recorded, played for the jury, and entered into evidence.
- When the police arrived, they found Diaz-Martinez's dead body and almost immediately handcuffed Lara-Chacon. Officer Juvisa Dranzik of the Montgomery County Police Department (and a native Spanish speaker) asked Lara-Chacon some questions without giving the *Miranda* warnings. In response to this questioning, Lara-Chacon made a second statement that was recorded by Officer Dranzik's body-worn camera. The circuit court found that this was an unwarned custodial interrogation and excluded Lara-Chacon's second statement in its entirety.
- Finally, after the police transported Lara-Chacon to the police station, they advised him of his *Miranda* rights in Spanish and then conducted an interrogation. Officer Dranzik translated. In this interrogation, Lara-Chacon admitted that he and Diaz-Martinez had been drinking, that they were fooling around with knives, that Diaz-Martinez attempted to stab him, and that Lara-Chacon reacted by hitting Diaz-Martinez with a bat. Finally, Lara-Chacon acknowledged that he had cut Diaz-Martinez's throat to "finish it" or "finish him" and then placed the knife in Diaz-Martinez's dead hand. Lara-Chacon moved to suppress this statement as the product of an impermissible 'question first' procedure, but the circuit court ruled that it was admissible.[3] The instant appeal challenges whether this ruling was correct.

ANALYSIS

To orient ourselves, we begin by observing that a person's right against compelled self-incrimination is protected both by the 5th Amendment to the United States Constitution (as applied against the States through the 14th Amendment), by Article 22 of

[3] Lara-Chacon also challenged the effectiveness of the *Miranda* warnings. The motions court rejected this challenge as well. Lara-Chacon has not appealed from that determination. *See infra* note 9.

the Maryland Declaration of Rights, and by the common law of Maryland. As a result, a confession must clear "three hurdles before its use as evidence against a criminal defendant is permitted." *Madrid v. State*, 247 Md. App. 693, 715 (2020), *aff'd*, 474 Md. 273 (2021). Thus, to be admissible, a confession must be, *first*, voluntary under the Maryland common law, *second*, voluntary under the federal and state constitutions, and *third*, it must be elicited under the rules set out by *Miranda* and its progeny. *Id.* Here, we are concerned only with the third step, whether the police complied with *Miranda* and its progeny. More specifically, we are concerned with a very specific line of that *Miranda* progeny: the rules governing so-called 'question first' or '*Miranda*-in-the-middle' interrogations.

The first case in this line was *Oregon v. Elstad*.[4] The U.S. Supreme Court in *Elstad* held that the first, unwarned interrogation did not automatically prevent the second interrogation, so long as there were effective *Miranda* warnings in between. *Id*. at 318. Learning precisely the wrong lessons from *Elstad*, police began to conduct two-step, 'question first' interrogations in an intentional effort to undermine the effectiveness of the *Miranda* warnings. They would, we understand, intentionally withhold the *Miranda* warnings, interrogate until they obtained a confession, offer the *Miranda* warnings when they would be least effective, and then repeat the interrogation. Police departments trained their officers that this was the preferred interrogation method. *Missouri v. Seibert*, 542 U.S. 600, 609-11 (2004). The U.S. Supreme Court sought to put an end to this practice, but they did it, as they often do, with several conflicting and contradictory opinions. In *Missouri v.*

[4] 470 U.S. 298 (1985).

Seibert, the police had—and candidly admitted they had—deliberately used this 'question first' technique to subvert the *Miranda* warnings. *Id.* at 605-06. The plurality opinion, written by Justice Souter,[5] focused its attention on whether these midstream *Miranda* warnings "could be effective enough to accomplish their object." *Id.* at 615. The plurality opinion focused on the effectiveness of the *Miranda* warnings. *Id.* Justice Kennedy wrote a concurring opinion. Justice Kennedy's view was that the second statement should only be excluded if the police "deliberate[ly]," "intentional[ly]," or "calculated[ly]" used the 'question first' procedure. *Id.* at 621-22 (Kennedy, J., concurring). Thus, Justice Kennedy thought that the focus of judicial inquiry should be on the subjective intent of the police rather than on the objective effectiveness of the warnings. *Id.*

Maryland courts, like most courts throughout the country, have determined that Justice Kennedy's concurring opinion controls and sets out the governing law. *See Wilkerson v. State*, 420 Md. 573, 594 (2011); *Robinson v. State*, 419 Md. 602, 623 (2011); *Buck*, 181 Md. App. at 628; *Cooper v. State*, 163 Md. App. 70, 87-91 (2005).[6] Thus, the

[5] Justice Souter's plurality opinion was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 600. Justice Breyer also wrote a separate concurrence, which is not relevant to our analysis. *Id.* at 617-18 (Breyer, J., concurring).

[6] There are a minority of courts that have held that Justice Kennedy's concurrence in *Seibert* is not controlling, or is at least, not alone controlling. ANDREW V. JEZIC, PATRICK L. WOODWARD, E. GREGORY WELLS, & KATHRYN GRILL GRAEFF, MARYLAND LAW OF CONFESSIONS § 14:10, at 826-27 (2023-2024 ed.) (discussing cases); Locke Houston, Comment, Miranda *in the Middle: Why Justice Kennedy's Subjective Intent of the Officer Test in* Missouri v. Seibert *is Binding and Good Public Policy*, 82 MISS. L.J. 1129, 1141-53 (2013) (same). Although Lara-Chacon encourages us (without explicitly saying so) to join these courts, we are not at liberty to disregard the clear holdings of *Wilkerson*, *Robinson*, *Buck*, and *Cooper*, that Justice Kennedy's *Seibert* concurrence is controlling law.

threshold determination is whether the police "deliberately" employed a 'question first' strategy. Oft times, however, police are less forthright than they were in *Seibert* in admitting that they deliberately employed the 'question first' strategy. *Wilkerson*, 420 Md. at 600. In such a circumstance, the finder of fact must look to other factors to infer the subjective intent of the police. *Id.* Caution must be exercised, however, to ensure that the focus of the inquiry remains on the subjective intent of the police, not the objective effectiveness of the *Miranda* warnings, lest the court unwittingly follow the *Seibert* plurality's approach, not Justice Kennedy's.

When we review the motions court's denial of a motion to suppress, we ordinarily consider only the record at the suppression hearing. We review the evidence and inferences in the light most favorable to the prevailing party, that is, the State, and although we defer to the motions court's findings of fact, we independently review the application of the law to those facts to ensure that the evidence was obtained in a manner that is consistent with the governing law. *Wilkerson*, 420 Md. at 585.

The motions court properly analyzed the facts presented.[7] There was no direct evidence of the police's intent.[8] Whether the police deliberately used the 'question first'

[7] The motions court's analysis, in its entirety, was as follows:

> Now with respect to the second statement, the statement taken at the police station, … the … argument that [Lara-Chacon] makes is that – under the case law, that the Court should look at that as [a] continuation of the interrogation, that the unwarned statement was created … to get a warned statement from the defendant.
>
> However, the evidence … totally contradicts that argument. The detective at the station did not even know that [a] previous statement had been given by the defendant in the case. I found his testimony to be credible on that point in that there was a sufficient break between the two.
>
> [T]he case that's cited is where there's an unwarned statement and then immediately, they give *Miranda* and continue the interrogation. And really what the [U.S. Supreme] Court in that case found is that the initial statement was intentionally obtained in an effort to subvert the *Miranda* warnings.
>
> And that's really not the situation here at all that I find. And I find that that particular case was and is distinguishable in this matter. And I guess that's the [U.S.] Supreme Court *Seibert*, 542 U.S. 600. [*Seibert*] sets forth … the test for determining whether such statements are admissible. And as I mentioned, it really focused on was there a[n] ... intent, or the equivalent of an intent, to get around *Miranda*.
>
> And I do note that there was a substantial break between the prewarned statement and the *Miranda* warnings. They're in a different location, different circumstances. The only thing that's the same was that the officer on the scene was the officer who then helped interpret. But her interaction there was really as an interpreter. She … wasn't asking … substantive questions. She was simply relaying the information from the detective to the defendant and back. So I don't find that the argument under *Seibert* is appropriate under these circumstances.

[8] Although the state's attorney bore the burden of proof on this issue, *see Wilkerson*, 420 Md. at 596 n.10 (discussing allocation of burden of proof in *Seibert* issues), either party could have (but did not) ask Officer Dranzik directly whether she deliberately used a 'question first' technique. Similarly, either party could have (but did not) ask any of the police witnesses whether it is the policy of the Montgomery County Police Department to

technique might have been indirectly inferred if, for example, there was little or no temporal break between the unwarned questions and the warned questions. *Wilkerson*, 420 Md. at 600-01. Here, however, the motions court found that there was a significant break in time from which it inferred that the police did not deliberately use the 'question first' technique. Likewise, the change in location of the questioning—from the apartment to the police station—was a fact from which the motions court inferred that the police did not deliberately use the 'question first' technique. Next, it is apparent that when the police employ the 'question first' technique, the same personnel ask the suspect questions in both the unwarned and warned portions of the interrogation. *See Seibert*, 542 U.S. at 615; *Buck*, 181 Md. App. at 630. The motions court was correct in its view that the department's decision to use different interrogators in the two portions of the interrogation—except for Officer Dranzik who, in the second interview functioned only as an interpreter—was strong evidence that the police did not deliberately employ the 'question first' technique. Moreover, as the motions court found, it was relevant that the officers that conducted the second, warned interrogation were not even aware that the first questioning had occurred.

In conducting our own independent review of the law as applied to the facts, the analysis is relatively straightforward. The fact that Lara-Chacon was asked questions in two different settings alone, is insufficient to demonstrate that the police deliberately used a 'question first' technique. Lara-Chacon additionally argues that he was intoxicated at the

use the 'question first' technique. As a result, there is no direct evidence that the police used this technique deliberately.

time that he received the *Miranda* warnings. While his intoxication might be relevant to the effectiveness of the warnings, it can have no relevance to the intent of the police. Similarly, that Lara-Chacon had minimal education and spoke only Spanish is relevant only to the effectiveness of the warnings, not to the intent of the police.[9] Lara-Chacon also argues that the unwarned interrogation at the apartment had the effect of locking him into a self-defense theory of the case. We note that this "locking in" was also accomplished in the 911 call (as to which he raises no objection). But more importantly, we do not think the effect of a statement on defense strategy is relevant to the question of the police's deliberateness in employing the 'question first' technique. It just doesn't matter. Finally, we understand from her testimony that the primary purpose of Officer Dranzik's questioning of Lara-Chacon at his apartment was to secure the scene for the safety of the occupants, the public, and the police, not to obtain a confession. To us, this substantially undermines the claim that Officer Dranzik was deliberately employing the 'question first' interrogation technique.

We hold that there was no evidence that the police deliberately used the prohibited 'question first' technique, but that there was abundant evidence from which it could be inferred that the police did not deliberately use the prohibited technique. We find no evidence that the motions court's findings on this issue were clearly erroneous. Moreover, when we conduct our own independent constitutional appraisal, we find that use of Lara-

[9] Although it was not separately preserved, in an abundance of caution, we additionally reviewed the motions court's determination that the *Miranda* warnings were effective in this case. *See supra* note 3. We find no infirmities in that determination either.

Chacon's statement given at the police station after having been given the *Miranda* warnings did not violate his rights against self-incrimination.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO THE APPELLANT.

Circuit Court for Montgomery County
Case No. 138187C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 155

September Term, 2023

JOSE LARA-CHACON

v.

STATE OF MARYLAND

Friedman,
Ripken,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Friedman, J.

Filed: September 11, 2024

I concur in the majority opinion. I write separately to note that, in an appropriate case, rather than bringing a challenge based on federal constitutional analysis that is almost certainly foreclosed by controlling state and federal precedents, a defendant might consider bringing a case predicated on the Maryland Declaration of Rights. Although I can't say how such a case might be analyzed or decided, such a defendant might consider five points:

(1) Article 22 has a distinctive text and history that may lend itself to independent interpretation. *See* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637, 645-46, 659 (1998) (discussing Article 22 and how to create an independent argument under the Maryland Declaration of Rights).

(2) Maryland's highest court has held that Article 22 of the Maryland Declaration of Rights is broader and provides more protection than the U.S. Supreme Court's interpretation of the Fifth Amendment. *See, e.g.*, *State v. Rice*, 447 Md. 594, 644 (2016); *Marshall v. State*, 415 Md. 248, 259 (2010); *Crosby v. State*, 366 Md. 518, 527 n.8 (2001); *Hardaway v. State*, 317 Md. 160, 164-69 (1989); *Choi v. State*, 316 Md. 529, 535 n.3, 545 (1989).

(3) Our state's supreme court has been particularly willing to engage in the independent interpretation of our state constitution and declaration of rights in circumstances in which the U.S. Supreme Court's jurisprudence of the analogous provision is confused and deadlocked. *See, e.g.*, *Leidig v. State*, 475 Md. 181, 209, 237-39 (2021). A situation like *Seibert*, in which the controlling opinion reflects the idiosyncratic view of a single, now-retired U.S. Supreme Court Justice, with which no other Justice agreed, might satisfy this criterion.

(4) There may be very good reasons why a court might think that the objective efficacy of the *Miranda* warnings, rather than the subjective intent of the police, is a better test.

(5) Several of our sister states have relied on their respective state constitutions to develop independent interpretations of their protections against self-incrimination to come to different tests for 'question first' interrogation procedures than that required by Justice Kennedy's *Seibert* concurrence. *See, e.g.*, *People v. Paulman*, 833 N.E.2d 239, 244-47 (N.Y. 2005) (establishing a totality of the circumstances test under New York State and U.S. Constitution);

> *State v. Vondehn*, 236 P.3d 691, 702-04 (Or. 2010) (establishing a totality of the circumstances test under Oregon State Constitution and "explicitly ... reject[ing]" Kennedy concurrence); *see also State v. O'Neill*, 936 A.2d 438, 454 (N.J. 2007) (applying New Jersey privilege law).

Lara-Chacon failed to make or preserve any argument based on Article 22 of the Maryland Declaration of Rights. Moreover, I doubt that his claims would fare better under any alternative test. *See* slip Op. at 3 n.9. But a future case may.