CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

② CRIMINAL LAW & PROCEDURE

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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QUESTION 3

Don was a passenger in Vic's car. While driving in a desolate mountain area, Vic stopped and offered Don an hallucinogenic drug. Don refused, but Vic said if Don wished to stay in the car, he would have to join Vic in using the drug. Fearing that he would be abandoned in freezing temperatures many miles from the nearest town, Don ingested the drug.

While under the influence of the drug, Don killed Vic, left the body beside the road, and drove Vic's car to town. Later he was arrested by police officers who had discovered Vic's body. Don has no recall of the events between the time he ingested the drug and his arrest.

After Don was arraigned on a charge of first degree murder, the police learned that Wes had witnessed the killing. Aware that Don had been arraigned and was scheduled for a preliminary hearing at the courthouse on that day, police officers took Wes to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects. As Wes walked into the courthouse with one of the officers, he encountered Don and his lawyer. Without any request by the officer, Wes told the officer he recognized Don as the killer. Don's attorney was advised of Wes's statement to the officer, of the circumstances in which it was made, and of the officer's expected testimony at trial that Wes had identified Don in this manner.

Don moved to exclude evidence of the courthouse identification by Wes on grounds that the identification procedure violated Don's federal constitutional rights to counsel and due process of law and that the officer's testimony about the identification would be inadmissible hearsay. The court denied the motion.

At trial, Don testified about the events preceding Vic's death and his total lack of recall of the killing.

1. Did the court err in denying Don's motion? Discuss.

2. If the jury believes Don's testimony, can it properly convict Don of:
   (a) First degree murder? Discuss.
   (b) Second degree murder? Discuss.

Answer A to Question 3

1. Did the court err in denying Don's motion?

The issue here is whether the court properly denied Don's motion to exclude evidence of the courthouse identification.

Right to Counsel:

Don's first ground for having the identification evidence excluded is that the procedure violated his federal constitutional rights to counsel.

Sixth Amendment: The Sixth Amendment of the US Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords citizens the right to counsel during all post-charge proceedings. The Sixth Amendment right to counsel only applies after a Defendant has been formerly charged. Here, Don was arraigned and therefore the Sixth Amendment right to counsel for his post-charge proceedings applies.

Don is arguing that the identification should be excluded on the grounds that it violated his federal constitutional grounds that the identification procedure violated Don's federal constitutional rights to counsel. However, Don's attorney was present with him during the identification. Don is going to argue that they were not made aware of the identification and given an opportunity to object to it. His lawyer was told of the identification and its methods, however, it is unclear as to when the attorney was advised of this information. It seems more likely that he was told after the identification had already been made.

However, the Sixth Amendment right to counsel does not apply to identifications of the suspect, since it's not a proceedings for purposes of the Sixth Amendment right to counsel.

Fifth Amendment: Miranda warning: Miranda warnings also afford the defendant of right to counsel. This right is to have an attorney present during all interrogation or questioning by the police. Miranda warnings are given to someone upon arrest. They include the right to remain silent and that everything said can be used in court against him, the right to have an attorney present and the right to have an attorney appointed by the court if the arrestee cannot afford one. [In] this case the right to counsel issue did not arise as a Miranda violation, since there was no questioning or interrogation of the police, and the Defendant has already been arraigned.

This case involves the Sixth Amendment right to counsel in all post charge proceedings. There are certain occasions where there is no right to counsel, for example, a photo identification of a suspect, taking of handwriting or voice samples, etc.

Because the identification of a suspect by a witness does not afford the Si[x]th Amendment right to counsel, and because Don's lawyer was actually present with him during the identification, the court was probably correct in denying Don's motion to exclude the evidence on this ground.

Due Process:

Don's second ground for having the identification evidence excluded is violation of due process of law.

Identification

The police may use different methods wherein witnesses can identify suspects as the crime doer. These methods include photo identification, lineups and in-court identifications. The identification process must be fair to the suspect and not involve prejudice and therefore not violate his due process rights. For example, the lineup must include others of similar build and appearance as the suspect.

The police in this case were going to have the Wes [sic]identify Don (or the murderer) through photo identification. However, they took him to the courthouse knowing that Don was having his preliminary hearing that day. The photo lineup did not have to be at the courthouse, in fact it is usually at the police station. This questions the officers' conduct and intent. Don is going to argue that this was done with the express purpose of having Wes see him at the hearing and associate him to the crime. This is prejudicial to Don and a possible due process violation.

The police will argue that it was mere coincidence that they ran into Don in the courthouse and that their intent was to have Wes identify the murderer [sic] through a photo identification. They will further argue that Wes told the officer he recognized Don as the killer without any request by the officer. Therefore his identification was spontaneous and not prompted. Therefore it did not violate Don's due process rights.

However it is very suggestive to a witness to see a defendant charged with the crime and make the identification that way. If Wes had identified Don independent of that situation then the identification would have been valid and there would be no due

process violation. However, that was Wes' first and only identification of Don, and Don is going to argue that it was prejudicial and violated due process of law.

<u>Officer's testimony</u>

Don is further claiming in his motion to exclude that the officer testifying to the identification would be inadmissible hearsay.

<u>Relevance:</u>

For any testimony or evidence to be admitted it must first be relevant. Here the officer's testimony will be established as relevant since it involves a witness' identification of the defendant as the murderer.

<u>Hearsay:</u>

Hearsay is an out-of-court statement made by a declarant that goes to the truth of the matter asserted. Hearsay is inadmissible generally because of the Defendant's right to confront and cross-examine witnesses. The officer is going to testify that he heard Wes tell him that he recognized Don as the killer. The statement was made out of court and goes directly to prove that Don is the killer. Therefore officer's testimony is hearsay. The question then is, is it admissible hearsay? There are exceptions to the hearsay rule depending on whether the declarant is available or unavailable to testify. There is no indication whether Wes is available or unavailable so we must look at the possible exceptions to the hearsay rule.

<u>Present Sense Impression:</u> Present sense impression is an exception to hearsay. This is when a declarant is expressing a present impression at that moment without an opportunity to reflect. The State will argue that Wes, upon seeing Don, merely expressed that he recognized him as the murderer. It was an impression at the present he was expressing. However this exception will probably not apply in this case since [sic].

<u>State of Mind:</u> The state of mind exception is a statement by the declarant that reflects the declarant's state of mind. For example, if the declarant said he was going to Las Vegas this weekend, that statement would be admissible to show that defendant intended on going to Las Vegas for the weekend. This is an exception to hearsay and would be admissible. The state of mind exception does not apply to this case.

<u>Excited Utterance:</u> A statement made when the declarant is an excited state caused by

an event and has not had a chance to cool down. Nothing in the facts here indicate that Wes' identification of Don was an excited utterance and therefore this exception does not apply.

Admission by Party Opponent: Statements made by the opposing party are usually admissible as an exception to hearsay. Here, since the statement the officer is going to testify to is not that of Don's but rather Wes, the exception does not apply here [sic].

Declaration Against Interest: When a declarant makes a statement that goes against his own interests, that statement is admissible as an exception to the hearsay rule. Again, Wes' statement was not against his own interest but against Don's interest and therefore this exception is not applicable here.

None of the other exceptions, including dying declaration, business record, are applicable here. It appears as though the officer's testimony is inadmissible hearsay. Therefore the court erred in denying Don's motion on this ground.

2. (a) First Degree Murder

Under common law, murder was homicide with malice aforethought. There were three types: murder, voluntary manslaughter and involuntary manslaughter. Statutes have categorized murder into de [sic].

The issue here is that if the jury believes Don's testimony, can Don be convicted of first degree murder[?]

Murder is the killing of another human being. It requires an actus reus (physical act) and a mentus rea (state of mind). The defendant must have the requisite state of mind in conjunction with a physical act to be guilty of murder. The state of mind does not have to be the specific intent to kill; it could be a reckless disregard or an intent to seriously injure or harm.

First degree murder is murder with premeditation or murder during the commission of violent felony (felony murder).

Premeditation: Premeditation and thus first degree murder, is a specific intent crime. Premeditation involves the prior deliberation and planning to carry out the crime in a cold, methodical manner.

In this case there are no facts to indicate that Don planned or premeditated Vic's murder. In fact, according to the facts, Don was intoxicated and has no recollection of the killing.

Intoxication: There are two states of intoxication, voluntary and involuntary. Voluntary intoxication involves the voluntary ingestion of an intoxicating substance. It is not usually a defense to murder. Voluntary intoxication can be a defense to specific intent crimes, if it was not possible for the defendant to have the state of mind to form intent.

Involuntary intoxication is the involuntary ingestion of an intoxicating substance, such as with duress, without knowing of its nature, prescribed by a medical professional, etc.

In this case, Don was intoxicated since he ingested the hallucinogenic drug. Although Don was aware of what he was taking when he took it, he will argue that he was forced to take it under duress. Since Vic threatened Don that he would abandon him in freezing temperatures far from any town, Don was forced to take the drug. Although involuntary intoxication is not a defense to murder, it is a proper defense to the specific intent required for premeditation and thus first degree murder.

Since Don did not premeditate the murder nor have the specific intent for premeditated murder, he cannot be convicted of first degree murder.

Felony Murder: Felony murder is murder committed during the commission of an inherently dangerous felony. There are no facts to indicate that Don was committing an inherently dangerous felony, independent of the murder itself. Therefore felony murder probably does not apply in this case and Don cannot be convicted of First degree murder.

2. (b) Second Degree Murder

Second degree murder is all murder that is not first degree and is not made with adequate provocation to qualify for Voluntary Manslaughter. Second degree murder does not require specific intent.

The issue here is if the Jury believes Don's testimony, can Don be properly convicted of Second degree murder?

Don is going to use the defense of intoxication. Although intoxication is not a defense to murder, involuntary intoxication can negate a required state of mind. Since it will

probably be determined that Don's intoxication was involuntary due to duress (see discussion above), Don will argue that he did not have the state of mind required to commit second degree murder. He will be compared to a person who is unconscious. An unconscious person cannot be guilty of murder. Don will argue that he was so heavily intoxicated that he has no recollection of the occurrences and therefore could not have had even the general intent to kill or seriously injure.

Voluntary manslaughter: in order for a murder charge to be reduced to voluntary manslaughter there must be adequate provocation judged by a reasonable standard and no opportunity to cool down and the defendant did not in fact cool down. Nothing in these facts suggests that Don acted under the heat of passion or was provoked in any way. In fact Don does not remember the killing and therefore there is no evidence of provocation.

Since was [sic] involuntarily intoxicated, he could not have the requisite state of mind for murder. Therefore he cannot be convicted of either first degree or second degree murder.

Answer B to Question 3

I. Court's Denial of Don's (D's) Motion

A. Violation of D's right to counsel

The Sixth Amendment guarantees defendants the presence of counsel at all critical stages of a criminal proceeding which results in imprisonment, as well as providing that the police may not elicit information from a defendant in the absence of counsel once criminal proceedings have been initiated against the defendant, usually in the form of an arraignment. Among those stages of a criminal proceeding which are considered critical are a preliminary hearing, at trial, when making a plea, at sentencing, and at any lineup or show-up conducted following the filing of charges against the defendant.

In this instance, the identification of D occurred after he was arraigned, and thus D did have a right to have counsel present during any lineup or show-up. However, this right to counsel does not extend to photographic identifications, which are not considered adversarial proceedings, but instead only to in-person lineups or show-ups. Thus, the police in this instance will claim that they simply took Wes (W) to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects, something for which D was not entitled to the presence of counsel, and the fact that W witnessed D emerging from the courthouse was not part of their plan, and something for which they should not be held responsible. Further, the police will refer to the fact that when D emerged from the courthouse they made no request that W identify D, but rather W made such an identification completely of his own volition.

D's counsel will most likely argue that the police were well aware that D would be at the courthouse at that particu[la]r time, and that bringing W to the courthouse ostensibly to view photographs was in reality simply a veiled effort to conduct a one-on-one show-up in which W could identify D, and that D thus had the right to counsel at such a proceeding.

In this instance, the court did not err in denying D's motion based on grounds that the identification procedure violated D's Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel at any post-charge lineup or show-up in part to ensure that the defendant's attorney will be aware of any potentially unfair methods utilized in the identification process, and can refer to these inequities in court. Because D's counsel was in fact present when W saw and identified D, D's attorney would be able to raise any objections he had to the identification, and thus D was not ultimately denied his right to counsel. Thus, even if the court were to find that the police bring[ing]

W to the courthouse amounted to a show-up in which D was entitled to the presence of counsel, D was with his attorney when the identification was made, and therefore his right to counsel was satisfied.

B. The identification as violative of due process of law

The Due Process Clause of the 14th Amendment, made applicable to the federal government by the Fifth Amendment, ensures that the prosecution bears the burden of proving each element of a criminal case against defendant beyond a reasonable doubt, and also guarantees that a defendant will be free from any identification which is unnecessarily suggestive or provides a substantial likelihood of misidentification.

In this instance, D's attorney would probably contend that the police bringing W to the courthouse on the date of D's prelimi[na]ry hearing to view photographs of suspects in fact raised a substantial probability that W would in fact observe D emerging from the courthouse, which is exactly what occurred. D's attorney would contend that any identification made in this context is extremely suggestive, as the fact that D is emerging from a court of law and was in the presence of an attorney places D in a situation in which he appears to be of a criminal nature, and is likely to lead an eyewitnesses to mistakenly identify D based solely on these circumstantial factors. Further, D's attorney would argue that the situation was unnecessarily suggestive because the witness could believe the fact that criminal proceedings had already been initiated against D, thus warranting his appearance in court, sufficient evidence, perhaps even in the form of testimony by other eyewitnesses, exists which incriminates D, and may make W more likely to believe that D was the man he had seen commit the killing.

The court probably did not err in denying D's motion based on the fac[t] that W's identification was violative of due process of law. The 14th Amendment guarantees against unnecessarily suggestive identifications, or identifications posing a substantial likelihood of misidentification, are intended primarily to remedy lineups in which a criminal defendant is placed in a lineup with other individuals to whom he bears no physical similarities whatsoever. It is unlikely that a court would find that a witness seeing an individual emerging from a courthouse would be so prejudicial as to lead to an unnecessarily suggestive identification.

C. Hearsay

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. In this instance, the officer's planned testimony that W had identified D at the courthouse would qualify as hearsay, as the officer would be testifying to a statement made by W ou[t] of court in order to prove that W identified D.

However, instances in which a witness has previously identified a suspect are admissible as exceptions to the hearsay rule even if the defense is not attacking the identification. Such statements of prior identification are considered to possess sufficient guarantees of trustworthiness that the party against whom they are offered is not denied his Sixth Amendment right to confront witnesses against him. Therefore, the court did not err in denying D's motion to exclude the evidence of the courthouse identification because the officer's testimony would in fact not be inadmissible hearsay.

II. Crimes for which D may be properly convicted

A. First degree murder

In order to convict a defendant of first degree murder, the prosecution must prove beyond a reasonable doubt that the defendant unlawfully killed a human being with malice aforethought, and that the killing was either premeditated and deliberate or was committed during the commission or attempted commission of an inherently dangerous felony (felony murder). In order to prove malice aforethought, the prosecution must show that defendant acted with an intent to kill, an intent to inflict serious bodily harm, acted with a depraved and malignant heart, or was guilty of felony murder.

In this instance, D's acts appear to be both the actual and proximate cause of Vic's (V's) death, as the facts indicate that D killed V and dumped his body beside the road. However, D would probably be found not to possess the requisite intent to kill or to inflict serious bodily harm by way of his raising the excuse of involuntary intoxication. Intoxication, whether voluntary or involuntary, may be raised to negate the presence of an essential element of a crime, generally intent. In this instance, D's intoxication would be involuntary, as he did not wish to take the hallucinogenic drug V offered, but was forced to when he feared that if he did not, he would be abandoned in freezing temperatures and his life would be in jeopardy. Ingesting a drug under such circumstances is the virtual equivalent of being unknowingly slipped the drug, or being forced to ingest the drug upon threats of death. As such, D was involuntarily intoxicated, and his intoxication resulted in his having no recall of the events between the time he ingested the drug and his arrest. D thus will be found not to have posssessed the requisite intent to kill or intent to inflict serious bodily harm necessary for a finding of first

degree murder. Further, even if D were not able to rely on the excuse of intoxication in order to negate a requisite mental state, there is no evidence that the killing was premeditated or deliberate, and because it did not occur during the commission or attempted commission of an inherently dangerous felony, there is no basis for finding D guilty of first degree murder.

2. Second degree murder

The jury most likely could not properly convict D of second degree murder, either. Second degree murder also requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed a human being with malice aforethought, though it relieves the prosecution of proving the additional elements of premeditation and deliberation or felony murder.

In this instance, D's involuntary intoxication resulting from his unwillingly ingesting a[n] hallucinogenic drug should sufficiently relieve him from being found guilty of second degree murder, as it negates the requisite mental states of intent to kill or intent to inflict serious bodily harm as discussed above. Further, D should not be convicted under a theory of depraved or malignant heart, as such a finding requires proof of reckless conduct which created a substantial and unjustifiable risk of death or serious bodily harm. A defendant must be consciously aware of the risk he is creating to be guilty of a depraved heart killing, and D's involuntary intoxication would most likely relieve him of guilt, since he had no recall of the events between the time he ingested the drug and his arrest, and would most likely not be considered to have appreciated the risk of his conduct.

If D were found to have been intoxicated voluntarily, rather than involuntarily, he could be properly convicted of second degree murder for V's killing. However, if the jury believes D's testimony that he only ingested the hallucinogenic drug because he feared if he did not he would be left out in the cold and could potentially die, they must find that D was involuntarily intoxicated, which would relieve him of guilt for second degree murder.

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Question 1

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along that I'd be caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss.

2. The currency? Discuss.

3. Dave's statement to the officer? Discuss.

4. The shotgun? Discuss.

Answer A to Question 1

1)

This question raises issues involving Dave's rights under the 4th Amendment and 5th Amendment.

Dave's Reading Aloud of a Newspaper Article

A criminal defendant may be required to give a voice sample. This does not violate a defendant's right against self-incrimination.

A criminal defendant is allowed to submit evidence that will prove that he could not or did not commit the crime. Here, the alleged robber spoke with a distinctive accent. Dave seeks to read a newspaper article to the jury in order to show that he was not the robber because he does not have an accent. The key issue, however, is whether Dave may do this given that he does not want to be sworn in as a witness or subjected to cross-examination. By doing so, Dave is denying the prosecution the right to cross-examine him and to test whether he is being truthful. It is possible for Dave to fake an accent or to have taken voice lessons to change this previous accent. All of these are factors that the prosecution should be permitted to test on cross-examination. Because the prosecution will not be given the right to cross-examine Dave, Dave's request to read to the jury should be denied.

THE CURRENCY

The 4th Amendment prohibits warrantless searches and seizures by a police officer in an area where a person has a reasonable expectation of privacy. The 4th Amendment applies to the states via incorporation into the 14th Amendment. Warrantless searches are permitted under certain circumstances.

State Action:

The 4th Amendment prohibits warrantless searches and seizures by a state actor. Here, the officer was conducting the search and seizure as a police officer and therefore state action is involved. In addition, the officer was searching Dave's briefcase - - an area where Dave had a reasonable expectation of privacy.

Search Incident to a Lawful Arrest

An officer does not need a search warrant if the search is done pursuant to a lawful arrest. Under this exception to the warrant requirement, an officer may search the person arrested and search the area within the person's immediate control if the officer suspects that the area would contain contraband or a weapon. In order for this exception to apply, the arrest

must have been lawful.

The officer arrested Dave after receiving a phone call from an anonymous caller stating that a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. An officer may arrest a person in public without a warrant if the officer has probable cause to believe that the person has committed a crime. A tip from an anonymous informant can be used as a basis for establishing probable cause if the officer reasonably believes that the tip is reliable. Here, the officer knew that a Bank was robbed at 1 p.m. by a man who had a shotgun. The officer received a tip at 3:30 saying that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, with the circumstances surrounding the Bank robbery are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Because the arrest was lawful, the officer could search Dave and the area within his immediate control if the officer suspects that the area would contain contraband or [a] weapon. Here, the officer suspected that the briefcase would have a sawed-off shotgun and it was within Dave's immediate control. Thus, the officer could search the briefcase. Any evidence found during this valid search could be admitted.

Plain View

Any evidence seen by an officer when the officer has a lawful right to search the area may be admitted. Here, the officer had a right to search Dave's briefcase under the exception to the warrant requirement for searches incident to a lawful arrest. Because the marked currency was in the officer's plain view during this search, the currency can be admitted as evidence against Dave.

Stop & Frisk

An officer who has reasonable suspicion to believe that a person is engaged in criminal activity may stop the suspect and conduct a warrantless frisk for weapons. An officer may not look inside containers during a stop & frisk. Thus, this exception to the warrant requirement will not be a basis for admitting the currency.

DAVE'S STATEMENT TO THE OFFICER

The 5th Amendment privilege against self-incrimination applies when there is state action and a custodial interrogation of a person. It gives a defendant a right to refuse to give testimonial evidence that would result in self-incrimination.

State Action

As discussed above, the action of the police officer involves state action.

Custodial Interrogation

Under the 5th Amendment, an officer must read a suspect his Miranda rights before conducting a custodial interrogation. A person is in custody if he believes that he is not free to leave the officer's control. Here, the officer approached Dave with his service revolver drawn and handcuffed Dave. Under these circumstances, Dave was in custody because he was not free to leave the officer's control.

An interrogation is any communication by the police to the suspect that is likely to elicit a response. Before engaging in a custodial interrogation, the officer must read the suspect his Miranda rights, which involves the suspect's right to remain silent and the right to ask for counsel.

Here, the officer would argue that his statement to Dave "I know you're the one who robbed the bank. Where's the shotgun?" was not an interrogation and that Dave's response to this statement was a voluntary statement. A statement by a suspect that is blurted out is admissible. Dave, however, would argue that the officer's statement "I know you're the one who robbed the bank" is a statement likely to elicit a response and that Dave would not have said anything had he not been prompted by the officer's accusation. Dave would probably win on this argument because accusing a suspect who is in handcuffs of committing a crime is the type of statement likely to elicit a response.

As a result, Dave's statement to the officer cannot be admitted because Dave was not read his Miranda warnings prior to the interrogation. Dave's statement could be admitted for impeachment purposes if Dave takes the stand and could be admitted in a grand jury proceeding.

THE SHOTGUN

The admissibility of the shotgun also depends on an analysis of whether Dave's 5th Amendment privilege against self-incrimination was violated when the officer asked Dave where the shotgun was without reading Dave his Miranda rights.

As discussed above, state action was involved and Dave was in custody when the officer asked him where the shotgun was. If the question to Dave was improper, the shotgun cannot be admitted because it is the fruit of a poisonous tree.

Dave will argue that he pointed to the trash container as a result of the officer's interrogation and that he wouldn't have done so but for the officer's interrogation. The officer will argue that Dave's "pointing" to the trash is not testimonial and therefore the 5th Amendment does not apply. The 5th Amendment does not typically apply to conduct but it may apply if the conduct is testimonial in nature. Here, Dave's pointing to the shotgun could be considered testimonial in nature because Dave was telling the police the location of his weapon.

Courts, however, allow an officer to question a suspect about the location of the weapon without giving Miranda warnings if it is necessary because of exigent circumstances. In other words, if the officer thinks that there might be a weapon laying around that might pose an immediate danger to the public the officer can question the suspect immediately following the arrest and pre-Miranda as a means of securing the premises and protecting the public.

Here, the shotgun is probably admissible under this exception because the officer knew that there was a shotgun used in connection with the robbery and has reason to believe that Dave was connected with this robbery given the discovery of the marked bills. Thus, the officer could ask about the location of the gun to secure the premises.

Answer B to Question 1

1)

Dave's Reading Aloud the Newspaper Article

The Fifth Amendment protects against self-incrimination. Therefore, the prosecution cannot compel D to testify against his will. Furthermore, the Sixth Amendment allows an accused to confront his accusers. Here, D wants to read aloud a newspaper article of the judge's cho[o]sing to demonstrate that he does not have a distinctive accent, which is something that was described by the bank teller. D would like to do this without being sworn in or subject to cross-examination by the prosecution. The issues hinges [sic] on whether reading the statement aloud is testimonial in nature. If it is testimonial in nature than [sic] the judge will not allow Defendant to do this without being sworn in because he will be a witness.

Non-Testimonial

Here, Defendant wishes to demonstrate that he does not have an accent. The content of his speech is not testimonial in nature because he is not asserting this own thoughts, opinions, observations, or knowledge, which are things that a witness would do. Here, D is not making any statements of fact. The evidence is relevant to demonstrate that D doesn't have an accent, but it is only the sounds of his speech that matters [sic] and not the content. It is akin to showing tattoos, needle marks, or hair color. Therefore, reading a newspaper is sufficiently nontestimonial and D will be allowed to do this.

The prosecution may argue that this is testimonial because D can alter the way that he is speaking and if they were allowed to cross-examine him this would come to light in front of a jury that he was faking. This argument would fail because there is no content for the prosecution to cross-examine him on and they can sufficiently argue in closing that he may be faking or offer a witness to counter his assertion that he does not have an accent.

Dave will succeed because his reading the newspaper aloud is sufficiently nontestimonial and will[,] therefore, be admitted at trial.

The Currency

The Fourth Amendment, incorporated to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures. In order to bring an action under the Fourth Amendment, the defendant must have standing and the action must be done by a government actor.

Standing

In order to have standing one must have a reasonable expectation of privacy in the items seized or search[ed]. Here, Defendant was seized and his briefcase searched. Therefore, since D had a reasonable expectation of privacy in himself and his briefcase he has standing.

Government Actor

A police officer is [a] government actor for the purposes of the Fourth Amendment.

Seizure of D

In order to arrest a person an officer must have a warrant based on probable cause signed by a neutral magistrate. Absent a warrant a search or seizure is per se invalid absent an exception. Here, there was no warrant for D's arrest.

Dave would argue that this was an illegal arrest and that the officer did not have probable cause based on this information first and foremost because of the amount of time passed between the robbery of the bank and the time that the officer contacted defendant two and half hours later. D would argue that it is unreasonable to think that a bank robber is going to just stand out in the middle of public [sic] with a gun two and a half hours later. Furthermore, D will argue that he was a man with a briefcase downtown, which is hardly a novel notion. Moreover, D will argue that the anonymous caller lacked any indicia of reliability and was not corroborated by anything other than the fact that D just happened to match the description of a man with a briefcase, but with no sawed-off shotgun. D will also point out that the bank teller described a shotgun whereas the anonymous calle[r] described a sawed-off shotgun, which are noticeably different. Therefore, D will argue that the officer had no probable cause to arrest D based on this information and therefore, the arrest was illegal.

The prosecution would like[ly] respond that the initial contact with D by the police officer was a detention based on reasonable articulable facts or if it rose to the level of an arrest that there was probable cause.

Detention based on Reasonable suspicion

The prosecution may argue that D was not arrested by [sic] merely stopped in order to investigate whether criminal activity was afoot. During a detention, an officer must have reasonable suspicion that criminal activity is afoot. Here, the officer had two basis [sic] as will be described in more detail below. The officer had the matching description of the bank robber with the briefcase and he had an anonymous caller who described D with a gun at the corner. Therefore, the officer had sufficient probable cause to contact D. The officer may detain a suspect long enough to investigate and determine if there is criminal

behavior or not. Here, the officer drew his weapon and handcuffed D because he believed that D had a gun based on the anonymous tip and the bank robbery information.

D will argue that this was an arrest and not merely a stop. D will argue that the officer approached him with a weapon drawn and handcuffed him and[,] therefore, it was an arrest because D was not free to leave.

The court will hold that this was a detention based on reasonable suspicion and was, therefore, not in violation of the Fourth Amendment.

Probable Cause

Moreover, the officer had probable cause to arrest D based on the information that he had. If an officer has probable cause to believe that someone has committed a felony they may arrest that person without a warrant as long as within 48 hours a magistrate makes a determination that there was probable cause for the arrest. If a person commits a misdemeanor it must be committed in the officer's presence for an arrest.

Here, the officer had reason to believe that D robbed a bank. Robbery is a felony under the law. The information that the officer had at the time that he contacted the defendant was that a bank was robbed at 1 pm, by a man with a shotgun who spoke with a distinctive accent. The robber had in his possession marked currency given to him by the teller which he put into a briefcase. The officer received a tip from an anonymous caller who described a man standing at a corner with a sawed-off shotgun in a briefcase. The officer arrived to [sic] the corner within minutes of the call, saw Dave there holding a briefcase and matching the description given by the anonymous caller.

The prosecution will argue that under the "totality of the circumstances" the officer's arrest was based on probable cause. Not only did the officer have reasonably articulable facts to contact D and investigate him to see if he had a weapon but also to arrest him in connection with the bank robbery. As the facts described above detail the officer had description of Defendant and just because minutes after the phone call he no longer had the weapon does not mean that the officer should just walk away without any investigation. The officer has a duty to investigate and determine if there is a safety issue and what is going on.

Therefore, based on the totality of the circumstances the officer has probable cause to arrest Dave and the seizure of D was not unlawful.

Search of Briefcase

Here, the search of the briefcase also requires and [sic] warrant exception because there was no additional warrant to search the briefcase. D had a reasonable expectation of privacy in his briefcase because it was something that was closed and not open to public

view or scrutiny.

Probable Cause

As stated above the officer had probable cause to believe that Defendant was armed with a shotgun and therefore had sufficient probable cause to search the bag to ensure for his own safety and the safety of others where the gun was. During a detention an officer may "pat down" an individual if they believe the person may have a weapon. Here, the officer did believe that D had a weapon which was something that could have easily fit in the briefcase. Therefore, the search of the briefcase was lawful.

Search incident to Arrest

Furthermore, as stated earlier there was sufficient probable cause for a lawful arrest. In a search incident to a lawful arrest, the arrest must be lawful, and the officer can search the Defendant and anything within the "wingspan" of the suspect under Chimel. Here, D was holding the briefcase which was sufficiently in his wingspan. Therefore, the search of the briefcase was a lawful search incident to arrest.

Finding the Currency

Although the officer had probable cause to search the briefcase for a weapon, he saw the currency in plain view when he opened the briefcase. Something is in plain view in a place the officer may lawfully be and without the officer touching or moving it around.

Conclusion: The currency found in the briefcase will not be suppressed.

Dave's Statements to the Officer

Miranda

Miranda protects against coerced confessions. It is a profalactic [sic] measure designed to provide additional protection for the 5th Amendment, incorporated to the states through the 14th Amendment, against self-incrimination. According to Miranda, if a suspect is interrogated and in custody, he is to be warned of his right to remain silent, that anything that he says can be used against him, that he has a right to an attorney and if he can't afford an attorney one will be appointed for him.

Here, Dave made two statements to the police officer and each needs to be analyzed separately to determine the admissibility. The first statement was when Dave pointed to the nearby trash can and the second is when he said "I knew all along that I'd be caught."

Pointing to the trash can

Statements can be express or implied. An express statement is an oral statement. An

implied statement is one made with assertive conduct or by silence. Here, Dave pointed to the trash can in response to the Officer's question "Where's the shotgun?"
In custody

Custody occurs where the suspect is not free to leave. At this point Dave was handcuffed standing on a street corner. This is sufficiently in custody for Miranda.

Interrogation

Interrogation occurs where the officer asks questions in order to elicit a response. Here, the officer asked where the gun was and D pointed to the trash can. Therefore, this was interrogation.

Dave's argument will succeed because the conduct of pointing to the gun should be suppressed and inadmissible at trial.

"I knew all along that I'd be caught"

This was an express statement made by Dave after he pointed to the gun. As stated above Dave was in custody, but the difference with this statement is that it was a spontaneous statement. The officer did not ask D if he knew that he would be caught. He asked him where the gun was. The prosecution would argue that the [sic] D's statement was spontaneous and therefore, not a violation of Miranda and should be admissible. D would argue that this was a result of a custodial interrogation and the statement should not come in.

Dave's argument will fail because this was a spontaneous statement and is, therefore, admissible.

Shotgun

The shotgun was found as a result of D's pointing to where it was located and therefore D will argue that it is inadmissible as the result of a Miranda violation.

Fruit of the poisonous Tree

When there are violations of the Fourth Amendment the exclusionary rule helps to protect against unreasonable officer conduct by excluding the evidence. D would likely argue that as a result of his unmirandized statement the gun should be supressed. This argument would likely fail because courts have not readily applied the fruits of the poisonous tree doctrine to evidence resulting from Miranda violations. Furthermore, under the doctrine of inevitable discovery the officers would have likely found the shotgun independent of D's pointing to it. Generally, when officers find the suspect of a crime who had only minutes before been seen with a weapon and now has no weapon to [sic] search the area around

where the defendant was found to see if he dumped the weapon.

Furthermore, D abandoned the gun before the officer even approached him so he had no expectation of privacy in the trash can.

Dave’s argument will fail and the gun will be admissible.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 1

On August 1, 2002, Dan, Art, and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed $750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the $750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him $150. Dan asked Bert for $300 of the remaining $600, but Bert claimed he, Bert, should get $500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining $600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned, and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:

   a. The death of Art? Discuss.
   b. The death of Bert? Discuss.

2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes? Discuss.

3. How should the court rule on Dan's motion to dismiss? Discuss.

Answer A to Question 1

1)

1. A. Dan - Liability for Art's Death

Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice can be shown by either intent to kill, intent to cause grevious bodily harm, or reckless indifference to human life. Here, Dan is probably not liable under any of these theories. Because Vince, the shopkeeper, shot Art, causing his death, Dan did not exhibit intent to kill or cause grevious bodily harm. Likewise, fleeing probably does not constitute reckless indifference to human life.

Felony Murder Rule

However, Dan might be convicted under the felony murder rule. The felony murder rule holds defendants liable for foreseeable killings committed during the commission of inherently dangerous felonies. Here, Dan, Art, and Bert were engaged in a robbery. A robbery is the taking and carrying away of the personal property of another by force with the intent to permanently deprive the victim of the property. Dan, Art and Bert robbed Vince because they took $750 from him at gunpoint, with the intent to keep the money. A robbery - especially an armed robbery of a convenience store - is likely an inherently dangerous felony. Art's death was the kind of death that frequently results from armed robberies, and thus was foreseeable.

Limitation of Felony Murder Rule - Fleeing

Liability for felony murder generally ends when the felons reach a place of safety after the felony. Here, because Art was killed while fleeing - before the felons reached a place of safety - this limitation will not apply.

Limitation on Felony Murder Rule - Death of a Co-Felon

However, most states have enacted limitations on the felony murder rule when the death of a co-felon is at issue. Under states that follow the agency rationale, a defendant can be found guilty if the killing was done by a felon or his agent. Under this view, Dan is likely not liable for felony murder because it was Vince rather than Dan or Bert who shot Art.

Under the proximate cause view of the felony murder rule, any killing proximately caused by the felony can make a defendant liable for felony murder. Under this rule, it is arguable that Dan should be liable for Art's death. Being shot while fleeing from a convenience store robbery is foreseeable. Thus, if the jurisdiction follows this view, Dan might be liable

for Art's death under a felony murder theory.

First Degree Murder

In most states, first degree murder requires premeditation or deliberation. Many states also include murders that fall under the felony murder rule in the definition of first degree murder. Thus, if this jurisdiction adheres to that view, Dan may be liable for first degree murder for Art's death.

Second Degree Murder

Second degree murder generally is murder that does not involve premeditation and deliberation, but also does not amount to any form of manslaughter. If the applicable statute defines felony murder as second degree murder, Dan may be liable for that crime instead.

Conspiracy

Conspiracy requires an agreement to commit a crime between two or more people, an intent to agree, an intent to commit a crime, and an overt act. A conspirator is liable for all reasonably foreseeable crimes committed in furtherance of the conspiracy. Here, Art, Dan, and Bert clearly agreed to rob Vince's store with the intent to commit the crime. Conspiracy does not merge with the completed crime. Thus, if Dan was liable for conspiracy, and a court found that Art's death was foreseeable, Dan could potentially be liable on these grounds as well. However, this is a stretch, especially since Vince killed Art.

B. Dan's Liability for the Death of Bert

Murder

As mentioned, one potential grounds of liability for murder is intentional killing or killing with an intent to cause great bodily harm. Here, Dan probably intended to kill Bert or at least intended to cause him great bodily harm. Dan simply shot Bert - there is no indication that he was merely trying to scare him.

First Degree Murder

Dan may be liable for first degree murder. Although premeditation and deliberation are generally prerequisites to a charge of first degree murder, some courts have held that one can premeditate or deliberate in very short periods of time. However, Dan will argue that he was "enraged" and had no time to deliberate or premeditate. Due to the spontaneous nature of the crime, Dan will likely not be found guilty of first degree murder. In addition, as discussed below, he is likely not guilty of felony murder. Thus, even if the state murder statute includes felony murder as first degree murder, Dan will likely not be liable for this

crime.

Second Degree Murder

Dan is much more likely to be guilty of second degree murder. As discussed above, he intended to kill Bert, but likely did not premeditate or deliberate. As discussed below, he is unlikely to be guilty of voluntary manslaughter or felony murder.

Felony Murder

A felony murder charge against Dan would be problematic. For one, liability for felony murder generally ends when the perpetrators have reached a place of safety. Dan and Bert had reached Chuck's house when Dan killed Bert. Indeed, they had begun to divide up the money. This would likely cut off any liability for felony murder based on the robbery of Vince's store.

In addition, the prosecution might argue that Dan is liable for felony murder because he took $600 from Bert's pocket. The prosecution might argue that this is a robbery, and that Dan's killing was a foreseeable result of the robbery. However, this is a weak argument. Dan only decided to take the money from Bert after he shot him. In addition, Dan might also be able to argue that since Bert did not have lawful title to the money, no robbery took place. This is because one element of a robbery is that the money be "property of another." Thus, Dan is likely not liable for felony murder for Bert's death.

Voluntary Manslaughter

Dan may argue that he is only liable for voluntary manslaughter. Voluntary manslaughter is a killing that would be murder, but was conducted while the perpetrator was highly upset. The upsetting incident must be the sort that would upset a reasonable person, the defendant must have been upset, a reasonable person would not have had time to cool off, and the defendant must not have cooled off. Dan will argue that he was "enraged" by Bert's demand of extra money. However, this argument is unlikely to succeed. For one, Bert's actions do not rise to the type of extremely upsetting provocation that generally suffices to reduce a murder charge to voluntary manslaughter. Moreover, there is no indication that a reasonable person would have had such a violent reaction to Bert's demand for money. Thus, Dan is likely not liable for voluntary manslaughter.

Conspiracy

As discussed above, any underlying conspiracy to rob Vince's store had likely ended by the time that the robbers reached Chuck's house.

2. Chuck's Liability

Accessory After the Fact

Chuck is likely guilty of being an accessory after the fact. An accessory after the fact is one who shields, shelters, or assists criminals after a crime. Chuck is clearly aware that Dan and Bert have committed a robbery. He threatens to tell the police about the crime unless he receives some of the money. He provides his house as a safe haven for Dan and Bert. If found guilty of this charge, Chuck would not be guilty as an accomplice - he would simply be guilty of an independent, lesser offense.

Accomplice

Chuck is probably not an accomplice to either Dan's killing of Bert or the robbery of Vince. To be an accomplice, one must assist a crime with the intent that the crime be committed. Here, there is no indication that Chuck had any idea that Dan, Art and Bert were going to rob Vince's store. In addition, given the spontaneous nature of Dan shooting Bert, there is no indication that Chuck intended that crime either. Mere presence at a crime scene does not necessarily result in accomplice liability.

Extortion

Chuck perhaps is guilty of extortion. Extortion involves the obtaining of property through threats. Here, Chuck threatened to tell the police about the robbery. As a result, he obtained $150 from Dan and Bert. Thus, because he obtained property through the use of threats, he might be guilty of extortion.

Conspiracy

There is no indication that Chuck was involved in any agreement - or even knew about - the convenience store robbery. Also, Dan seems to have acted alone when he shot Bert. Accordingly, Chuck is likely not be [sic] guilty of conspiracy.

Mispris[i]on of Felony

If the jurisdiction recognizes this crime, Chuck may be guilty because he aided and assisted Dan and Bert to cover up their crime.

3. Dan's Motion to Dismiss

The Sixth Amendment to the United States Constitution protects an accused's right to a speedy trial. When evaluating whether such a right has been violated, courts consider several factors. Among them are the reason for the delay, whether the defendant has objected to the delay, and the length of the delay.

Here, Dan's strongest argument is that the prosecutor's reasons for delaying the trial are simply not compelling enough to warrant impinging upon his constitutional rights. The prosecutor's desire to go on vacation and attend meetings and legal education classes seems more like a personal pred[i]lection than a good reason to delay Dan's trial. Dan will languish in jail during this time - nearly thirteen months after he was arrested and arraigned. Moreover, with the exception of the vacation, it is not at all clear why the prosecutor cannot attend the meeting or legal education courses on his own time. Finally, in any event, it is not clear why those events warrant delaying the trial from January 3 to September 1 - a delay of nine months. Dan will also note that he initially moved to have trial set in October, 2002. Finally, Dan will point out that the prosecutor's motion was granted on Jan. 3, which was essentially the eve of trial. Waiting until the last minute to continue a trial so long seems unfair and may have prejudiced his ability to mount an effective defense.

However, the prosecution will counter that Dan should have moved to have his charge dismissed on Jan. 3. Indeed, Dan waited until September 2 to move to dismiss. Although he "objected" on Jan. 3, he should have moved to dismiss then. By waiting to move to dismiss until after the trial began, Dan likely waived his rights. Accordingly, Dan's motion should be denied.

Answer B to Question 1

1)

May Dan ("D") be convicted of murder.

The first question is whether Dan may be convicted of murder in the 1st or 2nd degree. At common law, murder was the unlawful killing of a human being with malice aforethought. Malice aforethought was committing murder with any of the following mental states (1) intent to kill, (2) intent to do serious bodily harm, (3) reckless indifference to the unjustifiably high cost to human life and (4) intent to commit a felony. The types of felonies included in felony murder were inherently dangerous felonies.

Murder in the first degree is a statutory creation that involves the unlawful killing of another human being with premeditation and deliberation. In addition, many state statues have also included in the definition of murder in the first degree murders committed while committing a felony -- also enumerating inherently dangerous felonies.

Voluntary manslaughter is the unlawful killing of a human being which would be murder but for the existence of adequate provocation, and involuntary manslaughter is the killing of another human being with criminal negligence or during the commission of an unenumerated felony or misdemeanor.

2d Degree murder is a residual murder category that covers the unlawful killing of another human being that does not fall within the Murder in the 1st Degree or Voluntary or Involuntary Manslaughter categories. With this in mind, we can investigate whether Dan is liable for murder in the first or second degree.

All homicide crimes also require actual and proximate causation as well as the result of death.

KILLING OF ART.

Here, Dan did kill Art. Vince killed Art. Thus, the only theory that could convict Dan of the murder of Art would be the felony murder. Here, Art and Dan and Bert were committing robbery, an inherently dangerous felony.

Robbery is the taking of personal property of another from their person or presence by force or threats of force with the intent to permanently deprive.

Here, Dan, Bert and Art entered the convenience story and pointed guns at Vince (the requisite threat of force) and took $750 (personal property) from Vince's person. This, especially because of the existence of guns, qualifies as an inherently dangerous felony that should rise to the level of a felony that would qualify for Felony murder. Thus,

because the killing of Art took place whil[e] Dan was committing an inherently Dangerous felony, if this occurred in a jurisdiction where felony murder is included in the definition of first degree murder, Dan could be guilty of first degree murder.

There are however some limiting doctrines to felony murder. Notably in this instance, the killing must be a foreseeable result of the felonious conduct, and the redline view of felony murder provides that defendants cannot be guilty of felony murder for the murder of one of their co-felons by the police or by third parties. Thus, although the killing of Art certainly is a foreseeable result of committing a robbery, if this is a jurisdiction that follows the redline view, Dan will not be guilty of felony murder for Art, and will not be guilty of either first or second degree murder for Art.

It is noteworthy that Vince's killing of Art was not lawful because one may never use deadly force in defense of property, and here, Vince chased Art out of the store (after the physical danger to him passed) and killed Art, when Art failed to stop.

FOR DEATH OF BERT

The next question is whether Dan can be guilty of murder in the first or second degree of Bert.

The standards for murder in the first and second degree are set forth above. Here, the question will revolve around whether (1) Dan possessed the requisite premeditation and deliberation to kill Bill, (2) whether Dan could be guilty of felony murder, since this happened right after the robbery, or (3) whether adequate provocation existed to reduce the killing to a charge of involuntary manslaughter.

Premeditation.

Dan can be guilty of first degree murder of Bert if he committed the murder with premeditation and deliberation. Here, the facts do not indicate that he possessed that premeditation. Dan and Bert just committed a robbery together and were returning to divide the money. There is nothing to suggest that he had a prior plan to kill Bert. In fact, he only became enraged when Bert insisted on taking the entire share for himself. Thus, on these facts, he cannot be convicted of first degree murder on a premeditation and deliberation theory.

Felony Murder

The next question is whether he could be convicted of felony murder for the murder of Bert. Dan did just commit a felony (robbery) as discussed above. He had the requisite intent to commit that felony and it was an inherently dangerous felony. Thus, could his killing of Bert qualify for felony murder?

The felony murder rule also has the limited doctrine that the killing must occur during the commission of the felony. Once the felons reach a point of temporary safety, they are no longer considered as carrying out the felony for purposes of the felony murder rule.

Here, Dan and Bert had reached the safety of Chuck's house and[,] therefore, were no longer in the commission of a felony and[,] therefore, Dan cannot be guilty of felony murder.

2d Degree Murder and Voluntary Manslaughter

The next question is whether adequate provocation existed to make the killing a voluntary manslaughter. If not, the murder will fall into the residual category of Murder in the 2d degree. Here, since Dan acted with intent to do serious bodily damage to Bert (he shot and killed him), or at a minimum proceeded with reckless disregard for the unjustifiably high risk to human life, he will be guilty of second degree murder if the charge isn't reduced to voluntary manslaughter.

Vol manslaughter requires (1) provocation aro[u]sing extreme and sudden passion in the ordinary person such that he would not be able to control his actions, (2) the provocation did in fact result in such passion and lack of control, (3) not enough time to cool off btwn the provocation and the killin[g] [gna] d (4) the defendant did not in fact cool off.

Here, Bert refused to give Dan his $300. While it is understandable that the failure to give such money would aro[u]se anger in an ordinary person that had just put their freedom and life on the line in a robbery attempt, we are only talking about $300. While understandably angry, it is hard to imagine that an average person would lose control over $300 to the point of taking another person's life. Thus, Dan will not qualify for the reduction to voluntary manslaughter and will be convicted of 2d degree murder.

MAY CHUCK BE CONVICTED OF ANY CRIMES

The possible crimes Chuck could be convicted of is [sic] either all of the crimes that the principals committed (under an accomplice liability theory), or at a minimum an Accessory After the Fact.

ACCOMPLICE LIABILITY

If one aids, abets or facilitates the commission of a crime with the intent that the crime be committed, one can be found guilty on accomplice liability theories. The scope of liability includes liability for the crimes committed by the principals and all other foreseeable crimes. The common law used to distinguish between principals in the first and second degrees and accessories before and after the fact. Largely those distinctions have been discarded, although, most jurisdictions still do recognize the lesser charge of accessory after the fact.

Here, there is no evidence that Chuck aided, abetted or facilitated the crime until after it was committed. He provided a safehouse and subsequently demanded money. But mere presence or knowledge is not enough to ground accomplice liability.

ACCESSORY AFTER THE FACT

However, Chuck did assist after the crime happened (he provided a safehouse, and agreed not to tell the authorities in exchange for money), so at a minimum he will be guilty of accessory after the fact.

Extortion

Chuck may also be liable for extortion. Extortion is the illegally obtaining property through threats of force or threats to expose information. Here, he threatened to expose the criminals to the police if he didn't get paid, and so he will be liable.

Receiving Stolen Property

Chuck also will be liable for receiving stolen property. The requirement for this crime are [sic] that you know the circumstances around the property (ie, that it is stolen) and that you willing [sic] receive it. Chuck knew this money was the fruit of a robbery and received it in exchange for his providing a safehouse. Thus he will be liable of receipt of stolen property.

CONSPIRACY

Chuck also could be guilty of conspiracy. Conspiracy is (1) an agreement between two or more people, (2) the intent to agree, (3) the intent to pursue an unlawful objective and (4) in some jurisdictions, some overt act. Conspiracy does not merge into the completed crime.

HOW SHOULD COURT RULE ON DAN'S MOTION TO DISMISS.

The 6th amendment provides each defendant the right to a speedy trial. The 6th amd is applied to the states through its incorporation into the due process clause of the 14th amendment. The right to a speedy trial attaches post charge. Whether the defendant has been given a speedy trial depends on an analysis of the totality of the circumstances.

Here, Dan was arrested on August 2, and immediately charged. Thus his right to a speedy trial attached sometime in early August. The initial trial date was set for January 5, 2003. It is not likely that the denial of Dan's request for a trial 2 months after his charge is a violation of his constitutional rights since the court set a date very closely thereafter in January. However, the prosecutor's delay subsequent to that date does not rise to the level of providing adequate excuse for moving Dan's date (coupled with the fact that the request was made only days before the January trial was to commence). Here, the

prosecutor wanted to take a vacation cruise and take some legal education classes, and meet for a statewide meeting of prosecutors. First, none of these seem to rise to the level of an adequate excuse to delay a trial 9 months. Particularly since the defendant was denied bail and was sitting in jail. While the court could have granted a continuance for a short period of time for the meeting or to accommodate the prosecutor, given the defendant's status (sitting in jail), it was improper for the court to grant this motion, and the court may dismiss Dan's case.

It should be noted, however, that Dan should have moved earlier than September 2, as this would have permitted the court to fashion relief without having to dismiss the charge altogether. Accordingly, a court could find that he was not entitled to dismissal because of his delay.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 6

Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled.

The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery and searched him, finding cocaine in his pocket. After Paula gave proper Miranda warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer and possession of cocaine. Thereafter, he was arraigned.

The next day Paula gave Deft, who was without counsel, proper Miranda warnings, obtained a waiver, and interrogated him. He admitted striking Oscar.

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine? Discuss.

2. To suppress Oscar's identification during the lineup? Discuss.

3. To suppress Deft's admission that he struck Oscar? Discuss.

4. For an instruction to the jury that Deft's assault was justified on the basis of defense of another? Discuss.

Answer A to Question 6

6)

1. Deft's Motion to Suppress the Cocaine

The Fourth Amendment of the Constitution protects individuals from unreasonable searches and seizures by government officials. If a defendant's Fourth, Fifth, or Sixth Amendment rights are violated in connection with a criminal prosecution, the exclusionary rule, a judge-made doctrine, requires the exclusion of all evidence obtained in violation of such rights and all derivative evidence, or fruit of the poisonous tree.

Government Conduct

To make a Fourth Amendment claim, there must first be government conduct. Here, Larry was searched by Paula, a police ofiicer, which qualifies as government conduct.

Standing – Reasonable Expection of Privacy

A defendant also must have standing to challenge government action, which occurs if the defendant has a reasonable expectation of privacy in the item or place searched. Because Larry's body was searched, this clearly qualifies Larry to contest the act since he had a reasonable expectation of privacy in his own body.

Requirement for Probable Cause and a Valid Warrant

Generally, a search will be considered unreasonable unless the officer has probable cause to conduct the search, and the search is supported by a valid warrant. However, a number of exceptions to the requirement for a search warrant exist.

Search Incident to a Lawful Arrest

Paula did not have a valid search warrant. However, one exception to the warrant requirement is for searches incident to a lawful arrest. A lawful arrest can be made in public, without a warrant, if the officer has probable cause to believe that the defendant has committed a felony.

Paula was making a lawful arrest because she knew that Oscar had been assaulted and battered and that Deft fit the description of the perpetrator. Thus, she had probable cause to believe that Deft was the perpetrator of these felonies. Because Paula made a lawful arrest of Deft, her search of his body was also lawful. Thus, the court should deny Deft's motion to suppress the cocaine.

Hot pursuit

Paul[a] might also be able to argue that her search of Deft was lawful because Deft was a suspect who might get away. Her better claim, though, is that the search was incident to a lawful arrest.

2. Deft's Motion to Suppress Oscar's Identification During the Lineup

A defendant has a Fifth Amendment privilege against self-incrimination, which includes the right to counsel if the [the] defendant does not waive his right to such counsel. This right attaches whenever there is custodial police interrogation. A defendant also has a Sixth Amendment right to counsel, which attaches once the defendant has been charged with a crime. Here, Deft had not been charged with assault and battery by the time the lineup was conducted; thus, his Sixth Amendment right to counsel had not attached.

The facts show that Deft did not waive his Fifth Amendment right to counsel because he stated that he "wanted to talk to a lawyer before answering any questions." The question is whether the lineup even violated Deft's Fifth Amendment right.

A defendant is in custody when a reasonable person would believe he was not free to leave. Deft had just been placed under arrest; as such, he was in police custody at the time of the lineup.

Interrogation occurs whenever the police make a statement that is likely to elicit an incriminating response. During the lineup, there is no evidence that the police made any statements likely to elicit an incriminating response from Deft. Thus, Deft cannot be said to have been under interrogation during the lineup. For this reason, Deft's Fifth Amendment right to counsel was not violated by the lineup.

Even if Deft's Fifth Amendment right had been violated, the identification would likely still be admissible under an exception to the exclusionary rule, which allows evidence if it would have been discovered anyway. Oscar clearly saw Deft, his assailant, when Deft was committing the crime. Thus, the government can show that it would have had an independent source for the identification. Thus, the court should deny Deft's motion to suppress Oscar's identification.

3. Deft's Motion to Suppress Deft's Admission that He Struck Oscar

The issue is whether Deft's Fifth and Sixth Amendment right to counsel were violated by Paula's interrogation of Deft the day after Deft was arraigned. Paula did give Deft proper Miranda warnings, but she also obtained a waiver. A waiver of Miranda rights is valid if the defendant knowingly, voluntarily, and intelligently waived his rights. There are no facts to indicate that the waiver was not knowing, voluntary, and intelligent, so Deft's Fifth Amendment right to counsel was not violated, even though he was subject to custodial interrogation.

A defendant's Sixth Amendment right to counsel applies to all post-charge proceedings.

The question is whether Paula's interrogation of Deft was a post-charge proceeding. Because Deft had been charged and arraigned, his Sixth Amendment right to counsel had attached. Once this right attaches, a defendant cannot be questioned about the crime charged without the presence of the defendant's attorney, unless he explicitly waives his right to counsel. Although the facts show that Paul obtained a waiver of Deft's Miranda rights, they do not clearly show that Deft explicitly waived his right to counsel. Thus, the court should grant Deft's motion to suppress the admission. If, however, Deft testifies for himself in the criminal trial, then his admission can be used to impeach him on cross-examination.

4. Deft's Motion for a Jury Instruction that Deft's Assault Was Justified on the Basis of Defense of Another

A defendant may have a valid defense if he acts with reasonable force, with a reasonable belief that such force is necessary for self-defense or the defense of another. For the defense of others, courts are split on whether the defense exists in a situation in which the person being "defended" by defendant does not himself have the privilege of self-defense clothes against his "attacker." For example, if an officer in plain clothes conducted a lawful arrest of another, a third party "defending" the arrestee might not have the privilege to assert the defense since the arrestee also did not have the privilege against the officer.

Here, however, Oscar, the party making the arrest[,] was not a plain clothes or undercover officer; rather, he was wearing a uniform when he attempted to arrest Friend. Deft clearly knew that Oscar was a police officer.

A person also can lawfully resist an arrest if an officer clearly does not have lawful basis to make an arrest. This privilege, however, is very limited even as to the person being arrested and would only attach where there is no basis whatsoever to make an arrest of the person. This privilege does not extend to onlooking third parties who witness the arrest. These rules are necessary to protect society and to assist officers in the enforcement of the law for the conduct of a lawful and orderly society.

The facts do not show the circumstances behind why or how Oscar was making the arrest. It would seem that Deft might have a defense if, for example, Oscar were conducting the arrest in an extremely physically abusive manner and was unwarranted in doing so. In plainer terms, if Oscar were "beating the crap" out of Friend for no reason, then Deft might be entitled to assert a privilege of defense. However, there are no facts to indicate that Oscar was acting unreasonably; further, because Friend was resisting arrest, this weighs in favor of not extending the privilege, even if Oscar did have to resort to some physical means to complete the arrest.

In Deft's situation, absent additional extenuating facts just described, it simply was not reasonable for Deft to strike Oscar in an effort to aid Friend, even if Deft believed, reasonably or unreasonably, that Oscar was arresting Friend unlawfully. Accordingly, the court should deny Deft's motion to instruct the jury that Deft's assault was justified on the

basis of defense of another.

In short, the judge should deny all of Deft's motions except for his motion to suppress Deft's admission, which the court should grant.

Answer B to Question 6

Deft's Motion to Suppress Cocaine

The issue is whether Paula properly seized the cocaine from Deft's pockets. The Fourth Amendment protects individuals from unreasonable searches and seizures by government agents. It only applies to evidentiary searches when the individual has a reasonable expectation of privacy. Deft has a reasonable expectation of privacy in the contents of his pockets. Therefore the question is whether the government can show that Paula's search satisfied the requirements of the 4th Am.

Warrantless Search

Paula searched Deft's pocket without a warrant. Thus, the gov't must show that Paula executed the search pursuant to a valid warrantless search exception.

Search Incident to Lawful Custodial Arrest

An officer may search a suspect as a consequence of a lawful custodial arrest. In order to fit within this exception, the underlying arrest must be lawful. An officer may not arrest a suspect for a misdemeanor without a warrant unless the officer saw the suspect commit the misdemeanor. An officer may arrest a suspected felon if the officer had probable cause to believe the suspect committed a felony.

The first issue here is whether Paula had probable cause to believe Deft committed a crime. She based her arrest on Oscar's precise description of Deft. Since she knew Deft had assaulted Oscar the day before and because she was relying on Oscar's "precise" description, Paul[a] had probable cause to believe Deft had committed assault and battery. Probable cause is satisfied if an officer has trustworthy facts that lead to the probability that a suspect committed a crime. Oscar's description sufficed.

The second issue is whether Paula had probable cause to believe that Deft had committed a felony. In many states assault and battery are misdemeanors. However, battery is generally elevated to a felony when directed against a police officer under aggravated battery statutes. As long as this state makes battery of a police officer a felony. Paula's arrest of Deft was lawful because she had probable cause to believe he had committed a felony. Under the SILCA doctrine, the judge should deny Deft's motion to suppress the cocaine.

Other Warrantless Search Exceptions

If a judge determines that Paula's arrest of Deft was unlawful, the judge must suppress the cocaine because no other warrantless search exceptions apply to these facts. The other exceptions are: plain view, consent, auto searches, searches in hot pursuit or to seize evanescent evidence, and pat down searches performed with reasonable suspicion

that a suspect is armed. There are no facts to support any of these doctrines.

2. Deft's Motion to Suppress Oscar's ID

The issue is whether Oscar's pre-arraignment identification of Deft can be suppressed.

6Am Right to Counsel

Deft may argue that the identification should be suppressed because he did not have counsel present for it. Under the 6th Amendment, defendants have a right to counsel at all 'critical stages' of litigation following indictment/arraignment. Courts have ruled identification lineups are 'critical stages' under the Sixth Amendment.

Deft's arguments must fail here because the lineup occurred before his arraignment. Therefore, his 6th Amendment right to counsel had not attached. This is true even though Deft properly invoked his right to counsel after being given his Miranda warnings. The 5th Amendment provides Deft with a limited right to have counsel present during custodial interrogation. It does not apply to Deft's presence in a lineup because his physical appearance is not testimonial in nature.

Unnecessarily Suggestive

The only other argument that Deft may offer to suppress the identification is that the lineup was unnecessarily suggestive and resulted in a substantial likelihood of misidentification. Deft must pose this argument under the due process clause of the 14th Amendment, and a court would consider the suggestiveness of the lineup in the totality of the circumstances. There are no facts to suggest the lineup was unnecessarily suggestive, so Deft will likely lose this argument.

Thus, a court should not suppress Oscar's identification of Deft.

3. Deft's Motion to Suppress His Statement

This issue is whether Deft's admission should be suppressed. It should be suppressed under both the 5th & 6th Amendments.

5th Amendment

On the day of his arrest, Paula gave Deft Miranda warnings and he unambiguously invoked his 5th Amendment right to counsel by saying he wanted to talk to a lawyer before answering questions.

Once a suspect invokes his 5th Amendment right to counsel, the police may not question that suspect on that charge or any other charge until the suspect has spoken with an attorney. The facts that new charges were brought against Deft and that Paula readministered Miranda warnings and obtained a waiver do not change this analysis. Deft's invocation of the 5th Amendment right to counsel operates as a complete bar to questioning until he has a spoken with an attorney.

The proper remedy for testimony obtained in violation of the 5th Amendment is suppression except for impeachment. Therefore, the court should suppress Deft's statement from the prosecution's case[-]in[-]chief.

6th Amendment

As discussed above, defendants have the right to assistance of counsel at all "critical stages" of litigation after indictment/arraignment. Here, Deft's admission came a day after he was arraigned. Therefore, his Sixth Amendment right to counsel had attached. The only issue is whether interrogation is a 'critical stage'.

Courts have ruled that interrogation is a critical stage of ligation under the Sixth Amendment's right to assistance of counsel. Thus, Deft had a right to have counsel present when he admitted striking Oscar.

The proper remedy for a statement gained in violation of a suspect's 6th Amendment right to counsel is suppression of the statement. Thus, the court should suppress Deft's admission under the 6th Amendment.

4. Jury Instruction re: Defense of Another

The issue is whether the court should provide a jury instruction on the defense of defense of [sic] another. A defendant may justify a battery on defense of another when he acted out of a reasonable belief that another person had the right to use force in his own defense. A defendant asserting a justification of defense of another cannot use force that is excessive in the circumstances.

Here, the first issue is whether Deft had a reasonable belief that Friend could use force in resisting arrest by Oscar. An individual may use nondeadly force in order to resist an unlawful arrest by a uniformed police officer. Here, we are told that Deft believed Oscar was unlawfully arresting Friend. We do not know why Deft believed the arrest was unlawful. However, if Deft had a reasonable basis for his belief then he had the right to use nondeadly force in Friend's defense. This right stemmed from the fact that Friend has the right to use nondeadly force against a uniformed police officer making an unlawful arrest.

The second requirement is that Deft used reasonable force. We are told that he

struck Oscar. As long as this was a reasonable amount of force to use in the circumstances, then Deft can invoke the justification of defense of others.

Based on this analysis, the court should offer the jury instruction[s] on defense of others.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 3

Dan has been in and out of mental institutions most of his life. While working in a grocery store stocking shelves, he got into an argument with Vic, a customer who complained that Dan was blocking the aisle. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffered a skull fracture, and died.

Dan was charged with murder. He pleaded not guilty and not guilty by reason of insanity. At the ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior despite treatment.

1. Can the jury properly find Dan guilty of first degree murder? Discuss.

2. Can the jury properly find Dan guilty of second degree murder? Discuss.

3. Can the jury properly find Dan guilty of voluntary manslaughter? Discuss.

4. Can the jury properly find Dan not guilty by reason of insanity? Discuss.

Answer A to Question 3

3)
1. Guilty of First Degree Murder

First degree murder is a specific intent crime typically statutorily provided for. Typically, first degree murder consists of: (1) intentional killing of a human, (2) with time to reflect upon that killing, and (3) doing so in a cool and dispassionate manner.

Here, while there appears to be no statute that provides for first degree murder, it is unlikely that Dan would be guilty of first degree murder just the same.

Intentional killing
An intentional killing is one done with specific intent to take the life of another.

Here, the prosecutor will argue that Dan expressed a specific intent to kill Vic when he yelled he would kill Vic, which was accompanied by a striking of Vic with Dan's fist.

Therefore, it is likely given Dan's express words of intent, the prosecutor will meet her burden of proving a killing by intent.

Time to Reflect Upon the Killing
First degree murder requires time to reflect upon the killing. This is commonly known as premeditation. Premeditation, not in keeping with the lay person's understanding of it, however, requires merely a moment's reflection upon the killing.

Here, the prosecutor will argue that Dan reflected upon the killing of Vic when he took the time to say to Vic, "I'm going to kill you." However, Dan will argue that there was no time to reflect upon the killing of Vic because he "exploded" and then hit Vic. Such an intense anger coupled with a spontaneous statement "I'm going to kill you" will likely not be construed as sufficient time to reflect.

Therefore, a jury should not properly find this element of the crime established.

Cool and dispassionate manner
The defendant must have committed the killing in a cool and dispassionate manner. That means that the defendant killed another person in a calm and calculated manner without passion.

Here, the prosecutor will argue that Dan's action of striking Vic with his fist without an expression of sadness or fright may amount to cool and dispassionate. However, such an argument is tenuous.

Dan will successfully show that his actions were the result of an explosion, regardless of the reasonableness of those actions. Dan "exploded." This could hardly be construed as

"cool."

Therefore, a jury should not properly find this element of first degree murder established.

In sum, a jury would not properly find Dan guilty of first degree murder.

Defenses

Even if a jury could find Dan guilty of first degree murder, such an offense will be subject to the defense of insanity (discussed below).

2. Second Degree Murder

Second degree murder or common law murder is the intentional killing of a person with malice aforethought. Malicious intent will be implied by: (1) the intent to kill a person, (2) the intent to inflict a substantial bodily harm on someone, (3) an awareness of an unjustifiably high risk to human life, and (4) the intent to commit a felony.

Intent to kill a person

As discussed earlier, Dan could be found to have intentionally killed Vic as evidenced by his expressed words "I'm going to kill you." While words alone are sufficient to manifest intent, this is a subjective standard and a jury will be allowed to look to the totality of the circumstances. The jury will be able to consider that Vic told Dan that he was crazy and should be locked up, which aroused such anger that would negate a malicious intent.

However, a jury could find that Dan intended to kill Vic by using words of that intent, coupled with an action that indeed killed Vic.

Therefore, Dan could properly be found guilty of second degree murder, malicious intent implied by the intent to kill Vic.

Intent to Inflict Substantial Bodily Harm

If Dan is not found to have the intent to kill, the prosecutor will argue that he did manifest the intent to inflict substantial bodily harm on Vic.

Here, Dan used his fist to strike Vic. The striking of another person could inflict substantial injury on another, depending upon where the person made the strike. Dan used his fist to strike Vic on the head, causing a fracture to his skull. The prosecutor will argue that Dan must have intended substantial bodily harm because striking a person in the head is a place of extreme vulnerability.

On the other hand, Dan will argue that people get into fistfights all the time, whether it be on the streets or boxing. He will argue that fistfights are a common way for people to work out their arguments and no substantial injury is intended. This argument has little merit given the high susceptibility to injury from striking someone in the head.

Therefore, a jury could properly find that Dan intended to inflict substantial bodily harm.

Awareness of an Unjustifiably High Risk to Human Life
Again, the prosecutor will argue that even if Dan did not intend to inflict death or substantial bodily harm, surely Dan was aware of the high risk of human life.

Here, the prosecutor will argue that Dan was aware of this unjustifiably high risk because striking another on the head with the force of fracturing his skull is a high risk of which Dan could be aware.

Therefore, a jury could properly find that Dan had an awareness of an unjustifiably high risk to human life.

Felony Murder
There is no evidence that Dan was intending to commit a felony, the intent from which can be implied to the killing of Vic.

Therefore, there would be no second degree murder based on an intent to commit a felony.

In sum, a jury could properly find Dan guilty of second degree murder.

3. Voluntary Manslaughter

An intentional killing will be reduced to voluntary manslaughter by a provocation that arouses a killing in the heat of passion. Voluntary manslaughter consists of: (1) a provocation that would arouse intense passion in the mind of an ordinary person, (2) the defendant in fact was provoked, (3) no reasonable time for the defendant to cool between the provocation and the killing, and (4) defendant in fact did not cool [sic].

Sufficient provocation
Sufficient provocation to commit a killing is one that would arouse intense passion in the mind of an ordinary person.

Here, Dan will argue that shouting to someone that they are crazy and should be locked up is sufficiently inciting to induce anger. This is subjectively true where Dan had spent so much time in and out of mental institutions. He will argue that he was highly vulnerable to such insults.

On the other hand, the prosecutor will rightfully point out that this is a reasonable person standard that does not take into consideration the surrounding circumstances. A reasonable person would not be incited to kill simply by an insult of insanity.

Based on this argument, the prosecutor will successfully refute Dan's attempt to reduce his killing to voluntary manslaughter.

That being said, the other elements appear to exist.

Dan in fact provoked.
Dan was in fact provoked when he "exploded" and simultaneously killed Vic.

No reasonable time to cool between provocation and killing
Dan immediately struck Vic on the head after the insult. There was no reasonable time to cool and Dan did not in fact cool [sic].

4. Insanity

In order to be convicted of a crime, the defendant must complete a physical act (actus reus) contemporaneously with the appropriate state of mind (mens rea). Insanity is a defense to all crimes except strict liability because insanity negates the requisite intent necessary to be convicted of murder in all forms.

Insanity is a legal defense that must be set out by applying the requisite elements as opposed to expert testimony of a psychiatrist. There are four theories of insanity a defendant may set forth and will depend upon which theory a jurisdiction adopts. All four theories will be discussed below to determine which, if any, are proper.

M'Naughten Test
Insanity under this test is defined as the defendant was unable to understand the wrongfulness of his conduct and lacked the ability to understand the nature and quality of his acts.

Here, Dan testified that the crude remarks were so incitant that he was unable to stop himself. However, the prosecutor will argue that Dan showed his ability to understand the wrongfulness of his conduct because he shouted he would kill Vic. In addition, the mere fact of being unable to stop yourself implies that you indeed know it to be wrong but were unable to control yourself.

Based on this evidence, Dan would not successfully raise a defense under this issue.

Irresistible Impulse Test
Under this test, the defendant may prove a defense of insanity if he shows he lacked the capacity for self-control and free will.

Dan will probably be more successful to claim a defense of insanity under this test. As mentioned above, Dan "could not stop himself." This specifically evidences his inability to control himself. His will was subjugated by the insanity.

Based on this evidence, Dan will likely successfully claim a defense of insanity under this test.

Durham Test
The Durham Test subscribes to the theory that a defendant will have an insanity defense if his unlawful conduct was the product of a sick mind.

Dan will argue that he has spent much time in and out of mental institutions. Indeed, several witnesses testify as to Dan's history of mental illness. Such a history suggests that his conduct was a product of a sick mental condition rather than the product of his own free will.

Dan will likely succeed in bringing a defense of insanity under the Durham test.

Model Penal Code Test
Finally, under the test adopted by the Model Penal Code, a defendant's actions may be defended by way of insanity if he was unable to conform his actions to the requirements of the law.

Here, Dan will offer his history of mental illness and continued erratic behavior despite treatment as a way to prove that he lacked the ability to conform himself to the requirements of law, i.e. not to kill. This, however, seems to be a less compelling argument as Dan has been able to conform himself to the requirements of law in other aspects of his life. He was able to work in a grocery store and successfully stock the shelves.

Because Dan appears to have the ability to conform his actions to the requirements of law in all other instances, the prosecutor will likely defeat Dan's claim of an insanity defense.

Answer B to Question 3

3)

1. 1st Degree Murder

Murder is the killing of another human being with malice afterthought. The crime of murder is subdivided into degrees based on the intent of the accused. First degree murder is the most serious of the degrees of murder. A person is guilty of first degree murder if the prosecution can show beyond a reasonable doubt that he killed someone with deliberation and premeditation; or, in jurisdictions that recognize the felony murder rule, if someone was killed as the foreseeable result of his act, or of the act of a coconspirator, during the course of an enumerated felony. This is the felony murder rule.

Felony Murder

Dan will not be found guilty of first degree murder under the felony murder rule because he did not commit one of the underlying felonies. To be guilty under the felony murder rule at common law, the accused must have committed either rape, burglary, robbery, kidnapping, or arson, and the victim must have been killed during the commission of the crime (before the accused had reached a place of safety). The facts indicate that this killing occurred as the result of either no crime, if he was insane, or a battery, because he struck Vic. Battery is not an enumerated felony. Hence Dan cannot be guilty of first degree murder under this theory.

Premeditated and Deliberate

Premeditation requires that decision to kill have arisen when the accused was acting in a cool, composed manner, with sufficient time to reflect upon the killing. Deliberateness requires that the accused had the intent to kill when he engaged in the act that resulted in the death.

The facts indicate that Vic [sic] was stocking shelves before Vic encountered him. There is nothing to indicate that he had any animosity towards Vic prior to the incident, or even knew Vic. The facts indicate instead that Dan punched Vic after he exploded in anger in response to a comment Vic made. Vic's death resulted from a skull fracture caused by his impact with the ground. At no time do the facts indicate that Dan calmly and cooly reflected on killing Vic. In addition, it is not clear that he had the intent to kill Vic, as he only hit him once, an act that does not usually cause death. Although he shouted that he would kill Vic right before he killed him, the jury could likely not find that this shouting alone immediately before throwing the punch was enough. Moreover, it does not evidence a cool dispassionate manner, but instead, evidences the opposite. Therefore, because Dan's actions appear neither premeditated nor deliberate, he will likely not be found guilty of first degree murder.

Dan will also have the defense of insanity, discussed below, and the defense of diminished capacity if the jurisdiction recognizes it. Under diminished capacity, Dan will have to show that a disease of the mind prevented him from forming the intent required, even though it

did not raise to the level of insanity.

2. 2nd degree murder

Second degree, at common law, murder is the killing of a human being with malice afterthought. The mens rea of malice is satisfied when the accused intended to kill, intended to cause great bodily injury, showed a reckless disregard for an unjustifiably high risk of death, or killed during the commission of a rape, burglary, robbery, kidnapping, or arson. Because there is no issue as to the cause of Vic's death, the prosecution's issue will be in proving that Dan killed with malice and not in the heat of passion, as discussed in section 3 infra, then it cannot convict him of murder because he will have lacked the intent, and therefore must instead convict him of manslaughter. Again, Dan will also have the defense of insanity, discussed below.

Intent to kill - As discussed above, the jury will likely not be able to find that the facts show that Dan formed the intent to kill Vic because the facts indicate that Dan was in a rage when he punched Vic. Although Dan's testimony that he had been provoked to violence does not absolutely show that he lacked the intent to kill, if the provocation would have caused a reasonable person to become enraged, and did cause him to become enraged, and there was not enough time for a reasonable person to calm down, and Dan did not in fact calm down, then the jury will not be able to conclude that he had formed the intent to kill at the time he punched Vic. However, if the jury finds that Dan's passion was not reasonable, or he was not in the heat of passion, it could conclude that he intended to kill Vic because he shouted that he would kill Vic right before he killed him. However, Dan's actions are not consummate with the intent to kill. He only hit Vic once. He did not stomp his head in when he hit the ground or hit Vic with a weapon. Consequently, even if Dan was not in passion, it is likely that the jury would not find he had the intent to kill.

Intent to cause bodily harm - As discussed above in the intent to kill, it is likely that the jury would not find that Dan had formed the proper intent to cause bodily injury at the time he hit Vic because of his passion. Because it is the formation of the intent that matters, if Dan did not have the state of mind necessary to formulate the intent to cause substantial bodily injury because he was in the heat of passion as a result of the provocation, he cannot be found guilty under this theory either. However, if the jury does not find that the he [sic] satisfies the requirements for finding heat of passion, then it is likely that they will convict him for murder under this theory of malice. Not only did Dan yell that he intended to kill Vic, but Dan punched Vic, which is an act that presented the likely result of causing serious bodily harm. Thus, unlike above where he did not take an act that was likely to kill, Dan took the requisite act here. Thus, the jury could more reasonably find that he intended to cause great bodily harm when he punched Vic and because Vic died as a result of that action, Dan is guilty of murder.

Reckless disregard for an unjustifiably high risk to human life - To convict Dan under this theory, the jury would have to conclude that Dan appreciated the high risk of death caused by his actions, and that he proceeded to engage in reckless conduct in the face of it. As discussed above, if Dan was in the heat of passion, the jury cannot find that he

appreciated the unjustifiably high risk of his actions, and thus cannot convict under this theory. However, if the jury does not find that he acted in the heat of passion, then it would be possible to convict under this theory because Dan should have known that punching Vic could cause him to die, and Dan engaged in the actions anyway.

Felony murder - As discussed above, battery is not one of the crimes that satisfies felony murder, so he cannot be found guilty under this theory.

Dan will have the defense of insanity, discussed below.

3. Manslaughter

To find Dan guilty of voluntary manslaughter, the jury will have to find that Vic's provocation would have caused a reasonable person to become enraged, that it did cause Dan to become enraged, that there was not enough time for a reasonable person to calm down between the time the comment caused Dan to be enraged and the time he hit Vic, and that Dan did not in fact calm down during that time.

Although manslaughter is sometimes thought of as a defense, it is not Dan's burden to prove these elements. Instead, the prosecution must show the lack of a heat of passion killing in order to establish the necessary intent to convict Dan of either 1st Degree or 2nd Degree murder, as discussed above.

Reasonable person - The first test is whether a reasonable person would become enraged. The typical instances are when someone finds his spouse in bed with another. Here, there was a simple altercation between Dan and Vic. Vic complained that Dan was blocking the aisle. Dan swore at Vic in response and threatened to kick him out of the store. Vic told Dan that he was crazy. Dan flew into a rage and punched Vic. Vic died. The jury would likely find that these facts do not meet the requirement for a heat of passion killing because a reasonable person does not fly into a rage because someone else tells them [sic] they [sic] are crazy during an altercation that they [sic] escalated. A reasonable person would expect the other party to make a snide comment in response to being sworn at by a store employee who might have been blocking an aisle. If the jury finds that a reasonable person would not have become so enraged as to have punched Vic under the circumstances, then Dan will not be convicted of the lesser crime of manslaughter and will instead likely be convicted of 2nd degree murder, as discussed above.

Dan's particular mental issues or state of mind is [sic] irrelevant for this test. This is an objective test; it is based on what the reasonable person would do. Thus it is irrelevant if Dan is particularly sensitive to comments about being crazy; he only gets this defense if the comments would have engendered passion in a reasonable person.

Dan's passion - If the jury finds that a reasonable person would have been enraged by Vic's actions, then the next issue is whether Dan did. The facts are pretty clear on this point. They state that Dan exploded in anger, shouted he would kill Vic, and then punched him. This is exemplary of enraged behavior; therefore, the jury will almost certainly find

that Dan was enraged.

Cooling off time for a reasonable person - If the jury finds the first two elements are satisfied, they must also find that there was not enough time for a reasonable person to cool off between the provocation and the act. The facts indicate that the entire event occurred in a very short period of time, although it does not specify how long. Had Vic or Dan left the scene of the altercation, or had someone else intervened such that there was a delay between the exchange of words and the punch, then the jury could find that there was time to cool off. However, because the facts do not show any appreciable time lapse, the jury will likely conclude that a reasonable person would not have had time to cool off.

Dan did not cool off - Finally, the jury must find that Dan did not cool off. The facts are pretty clear on this as well, since he punched Vic immediately after going into his rage. Thus the jury will likely find this is the case.

Dan will have the defense of insanity here as well, discussed below.

<u>Insanity</u>
All jurisdictions recognize an affirmative defense of insanity, although there are four different theories across the various jurisdictions. Because it is an affirmative defense, the accused has the burden of proving by preponderance of the evidence that he met the test for insanity at the time in question. His sanity at the time of trial is not an issue. The evidence that supports Dan's defense of insanity is that he has been in and out of mental institutions most of his life, that he has erratic behavior, and that he could not stop himself from striking Vic. These facts tend to show that he has a mental disease that affects his ability to conform to the law, which is at the heart of all four of the insanity tests.

M'Naughten Rule - Under the M'Naughten Rule, an accused is not guilty by reason of insanity if, because of a disease of the mind, he lacks the capacity to understand the wrongfulness of his acts or cannot appreciate the character of his actions. This is basically a test of whether the defendant's mental disease prevents him from understanding right from wrong. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan's testimony explaining the punch, however, was that he could not stop himself from striking Vic. He did not indicate that he did not understand that he was striking Vic, or that striking Vic was wrong. Instead, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses this test, then it cannot find him not guilty by reason of insanity.

Irresistible Impulse Test - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he cannot exercise the self-control to conform his actions to the requirements of the law. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan also testified that he could not stop himself from striking Vic; in other words, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses

this test and the jury believes that Dan could not stop himself from striking Vic, and that the reason he could not do so was because of his mental illness, then it should find him not guilty by reason of insanity.

Durham Rule - Under the Durham Rule, an accused is not guilty by reason of insanity if the mental disease is the actual cause of the criminal act. In other words, if the act would not have been done “but for” the disease, then he is not guilty. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Consequently, if the jurisdiction uses this test and the jury believes that the reason Dan could not stop himself from striking Vic was because of his disease of the mind, then it should find him not guilty by reason of insanity. However, if it finds that the mental disease was unrelated to the reason he could not stop himself from striking Vic, then it should not find him not guilty by reason of insanity.

Model Penal Code Test - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he is unable to appreciate the criminality of his conduct, or to confirm his actions to the requirements of the law. This is basically a blend of the M’Naughten Rule and the irresistible impulse test. As discussed above with regards to the latter, if the jurisdiction uses this test and the jury believes that Dan could not stop himself from striking Vic, it should find him not guilty by reason of insanity.

Therefore, if the jury uses the irresistible impulse test, the Durham rule, or the MPC test, it could properly find Dan not guilty by reason of insanity. If it uses the M’Naughten rule, it could not.

THURSDAY MORNING
MARCH 1, 2007

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: “Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution.”

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.

2. How should the court rule on each ground of Dan’s motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Answer A to Question 4

1. Murder or Any Lesser-Included Offense

Elements of a Crime

The four elements of a crime consist of (i) a guilty act, (ii) a guilty mind, (iii) concurrence, and (iv) causation.

For a person to be found guilty of a crime, the guilty act must be voluntary. Here, Dan appeared to only want to burn the document, not let it go and have it drift away. On the facts, it seems like he only let the document go involuntary when the heat of the fire burned his hand. So it appears that Dan may not have committed the requisite guilty act. However, if we frame Dan's actions on a broader level, Dan did voluntarily burn the document and set into motion the chain of events leading to the ultimate killing of the pedestrian. The element of a guilty act is satisfied.

As to concurrence and causation, Dan's intentional act of igniting the parchment document set into motion a chain of events: he let go of the burning document, it settled in an open drum of flammable material, and it caused the drum to explode and kill a nearby pedestrian. On the one hand, it appears that there is no proximate causation because it is arguably unforeseeable for someone to die from an explosion as a result of burning a document. On the other hand, courts are generally flexible when it comes to foreseeability, and there is a viable argument that the result was foreseeable because playing with fire is a dangerous activity. A court will probably find causation.

However, what we need to establish is whether Dan possessed the requisite guilty mind. The discussion below addresses this element.

Murder

At common law, murder is the unlawful killing of a human being with malice aforethought, which is established by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily harm, (iii) reckless indifference to an unjustifiably high risk to human life (i.e., depraved heart murder), and (iv) intent to commit a felony underlying the felony-murder rule.

Intent to Kill

From the facts, it does not appear that Dan knew any of the following facts: the nearby presence of the open drum with flammable material, the pedestrian's presence near the drum, or the pedestrian's identity. Therefore, he could not have formed a specific intent to kill the pedestrian. Dan cannot be found guilty of intent to kill murder.

Intent to Do Serious Bodily Harm

On the facts, Dan did not intend to do any harm, let alone serious bodily harm. He was merely burning the document as a form of symbolic speech and probably did not even want to let go of the document.

Reckless Indifference to an Unjustifiably High Risk to Human Life

Dan's act of igniting the document and letting it go did not reflect reckless indifference to an unjustifiably high risk to human life. No reasonable person would think that a burning document could ultimately kill someone. For example, Dan did not carry a dangerous weapon such as a gun and fire it into a crowded room.

Felony Murder

Under the felony-murder rule, a person can be found guilty of a killing that occurs during the commission of an underlying felony that is inherently dangerous, usually burglary, arson, rape, robbery, or kidnapping. Dan did not have the intent to commit any of these felonies.

Lesser Included Offenses

Voluntary Manslaughter

Voluntary manslaughter is an intentional killing committed with adequate provocation causing one to lose self-control. We have already established above that Dan cannot be found guilty of an intentional killing, so we need not determine whether it can be reduced to voluntary manslaughter. In any event, Dan was not even provoked to begin with.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results either from (i) criminal negligence or (ii) misdemeanor-murder, which is a killing that occurs during the commission of a misdemeanor that is malum in se or inherently dangerous.

Criminal negligence exceeds tort negligence but is less than the reckless indifference of depraved heart murder. Significantly, for a person to be criminally negligent, he must have been aware of the risk. Here, Dan could have been aware of a general risk that results from a fire, which is an accidental burning of another object that occurs from a strong wind carrying the flame. On the other hand, Dan was not aware of the particular risk that an open drum of flammable material was nearby, which could kill someone. Dan cannot be found guilty of criminal negligence.
On the other hand, Dan may be found guilty of misdemeanor-murder, because he committed the misdemeanor of burning or mutilating a copy of the U.S. Constitution, and the commission of the misdemeanor caused the ultimate death of the pedestrian. On the other hand, the misdemeanor was not malum in se and not inherently dangerous. Dan should not be found guilty of involuntary manslaughter.

Conclusion: Dan cannot be found guilty of the crime of murder or any lesser-included offense.

(2) Dan's Motion to Dismiss the Charge of Attempting to Burn a Copy of the U.S. Constitution

(i) What he burned was actually a copy of the Declaration of Independence

Dan is being charged with attempting to burn a copy of the U.S. Constitution, but what he actually burned was the Declaration of Independence. At common law, factual impossibility is not a defense for attempting a crime. For example, if a person intends to shoot another with a gun and the gun happened to be out of bullets, the man is still guilty. However, legal impossibility is a defense to attempt. That is, if what the person was attempting to do was actually not a crime even though he thought it was, then he could not be found guilty of attempt.

Here, Dan's assertion that he actually burned the Declaration of Independence is a claim of factual impossibility. From the facts, we know that he had the specific intent to destroy a copy of the U.S. Constitution, so even though it was factually impossible for him to do it because he was holding the Declaration of Independence, he can still be found guilty of attempting to burn a copy of the U.S. Constitution.

Conclusion: The Court should deny Dan's motion to dismiss based on this ground.

(ii) The state statute on which the charge is based violates his rights under the First Amendment of the Constitution

The First Amendment protects free speech, and it is applicable to the states through the Fourteenth Amendment. The state action requirement is easily met here because it is a state statute making the act of burning or mutilating a copy of the U.S. Constitution a misdemeanor.

Symbolic Speech

Dan's act was a form of symbolic speech. For a regulation of symbolic speech to be valid and not violative of the First Amendment, the law must have a purpose independent of and incidental to the suppression of speech and the restriction on speech must not be greater than necessary to achieve that purpose.

Here, the state statute does not appear to have a purpose independent of and incidental to the suppression of speech. For example, the burning of draft cards was upheld, because it was found that the government has a valid interest in facilitating the draft, and that the suppression of the speech was incidental and no greater than necessary. Here, preventing the burning of the Constitution does not appear to serve any significant government interest other than to prevent people from showing their anger toward the government, which is within their rights under the First Amendment.

Unprotected Speech

The government may attempt to frame Dan's acts as unprotected speech that presents a clear and present danger. Such speech is intended to incite imminent unlawful action and is likely to result in imminent unlawful action, so that the state can regulate it. On the facts, Dan stood on the steps of the state capitol and yelled to a half dozen people entering the front doors while destroying what he thought was a copy of the U.S. Constitution, so arguably, he was trying to incite those people and get them enraged. On the other hand, there was no indication of encouraging harmful acts in his statement and burning a document in and of itself does not promote violence.

Moreover, even if the government can show that what Dan was specifically doing was inciting imminent unlawful speech, the government still cannot show that the state statute at issue is designed to restrain this kind of unprotected speech. The state statute merely bans burning the Constitution, but does not, for example, limit such acts to the steps of the state capitol, where the state might have an argument that doing such acts so close to government activity is dangerous and disruptive. The statute is overbroad and does not strive to only limit unprotected speech that is likely to incite imminent unlawful action.

Conclusion: The Court should grant Dan's motion to dismiss based on this ground.

Answer B to Question 4

Murder Charges Against Dan ("D")

The first issue is whether Dan may properly be found guilty of murder or any other lesser included offense.

Murder

Murder is defined as the killing of another human being with malice aforethought. In order to be found guilty of murder a Defendant must have committed a voluntary act and must have possessed the requisite mental state at the time of the act. A defendant will be guilty of murder if he committed the act (1) with the intent to kill, (2) with the intent to inflict great bodily injury, (3) if he acted in such a way as to demonstrate a reckless disregard for human life (often termed as having an "abandoned and malignant heart"), (4) or if the murder resulted during the commission of a highly dangerous felony.

Here, D's act of igniting the document constituted a voluntary act. The fact that the heat of the fire had burned his hand, and caused him to involuntarily let it go does not negate the fact that his act of burning the document in the first place was voluntary. However, an act, in and of itself, is not sufficient to convict D of a crime. The State must also prove that, at the time D committed the act of burning the document, he had the intent to commit murder.

On these facts, it is clear that Dan did not set the document on fire with an intent to kill. While an intent to kill may be inferred in cases where the D uses a deadly, dangerous weapon against a victim (a gun, knife, etc.), that is not the case here. Additionally, D did not act with an intent to inflict great bodily injury on anyone. Instead, his act of burning the paper was done to make a political point to those that were present nearby.

The State may try and argue that Dan's acts were done with an abandoned and malignant heart because, by igniting the document around individuals, he acted in a way that demonstrated reckless and unjustifiable disregard for human life. The State will not be able to meet their burden of proof under this theory either. Here, D's act of burning the paper is not the type of act that an individual could expect would lead to someone's death. The law demands more in order to show a reckless disregard for human life.

Felony Murder Rule

The state may try and argue that D should be convicted of murder based on the Felony Murder Rule ("FMR"). Under this rule, a D is liable for all deaths that occur during the commission of a highly dangerous felony, whether he intended to cause them or not. Instead, the intent is inferred from his intent to commit the underlying felony. In addition, the deaths caused during the commission of the felony must be foreseeable and must result before D has reached a point of temporary safety. Generally, the FMR has been reserved for deaths that occur during highly dangerous felonies, such as rape, arson,

kidnapping, robbery, and burglary.

Here, the issue is whether D can be found guilty of one of these underlying felonies so that the FMR applies. The only one that would be applicable would be the crime of arson. In order to show that D is guilty of arson, the State must prove that D (1) acted with the intent, or was at least reckless, (2) in burning, (3) the dwelling, (4) of another. Here it is clear that D did not intend to burn the nearby construction yard. Instead, the fire resulted because a wind blew the lit paper into an open drum of flammable material. However, the State may try and argue that the act of igniting a document on fire and allowing the wind to carry it away constituted a reckless act. However, the State will also have to prove that D burned a dwelling. Here, the paper did not cause a dwelling to burn, but rather flew into a construction site.

Thus, D could not be convicted of the murder of the Pedestrian based on the Felony Murder Rule because he did not commit a highly dangerous felony.

Voluntary Manslaughter

Voluntary Manslaughter is a killing of another human being while acting under the heat of passion. Voluntary Manslaughter is generally reserved for cases in which the D kills another because of an "adequate provocation". Here, Voluntary Manslaughter does not apply because there was no provocation which would have caused D to act the way that he did.

Involuntary Manslaughter / Misdemeanor Manslaughter

The remaining consideration is whether the State could properly convict D of involuntary manslaughter. Involuntary manslaughter is appropriate where the D is criminally negligent. Criminal negligence is a higher standard than is used in the tort context for negligence cases. In the criminal context, while D may not have been acting with an intent to kill, he nonetheless acted in a way that was so extremely unreasonable that a reasonable person in his shoes would have recognized that such actions are performed with a reckless disregard for the life of others. Here, the State will have to prove that not only was D's act criminally negligent, but also that the Death was caused by D's actions.

The State will likely fail on these facts because D's act of burning a document does not rise to the level of a criminally negligent act. D's conduct was not reckless in the sense that a reasonable person could have contemplated that burning a document could eventually lead to another person's death. Moreover, the State will have a tough time meeting the causation requirement because, while D was the but-for cause in P's death, the death was not foreseeable. Here, the death was caused by the explosion when the paper settled into an open drum of flammable material at the construction site. Thus, D could not, nor could a reasonable person foresee that such an act would result in a death due to such an explosion.

The State may also try and argue for misdemeanor manslaughter, which is appropriate

when a death is caused during the commission of a lesser-included felony or by those specified by state statute. Here, it is highly doubtful that the burning of the Constitution is the type of misdemeanor that would be included under such a rule. As a result, the State will not succeed on these grounds.

2. Dan's Motions to Dismiss

Attempt Charges vs. Dan

In order to prove attempt, the State must show that (1) D intended to commit the crime, and (2 he took a substantial step towards completing the crime. Regardless of the underlying crime, attempt is always a specific intent crime.

Here, the State will be able to show that D's burning of a document that he believed to be the U.S. Constitution demonstrates his intent to commit the crime. Additionally, because he actually ignited the document, the second element is also satisfied. The issue thus is whether D has any valid defenses to the charge.

Mistake of Fact

D's motion to dismiss is based on a mistake of fact defense. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is not a good defense to attempt. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. By way of analogy, a thief who attempts to receive stolen goods may not later argue that, because the police had secured the drugs and transferred them to him undercover, he cannot be guilty because the goods were no longer "stolen". The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods. Here, D's mistake of fact may be a defense to the actual misdemeanor itself, but will not provide a defense to attempt.

First Amendment

The First Amendment protects an individual's freedom of speech. However, included in the First Amendment is a protection of expressive activities that constitute speech. Here, it is clear that D's act of burning the Constitution was an act of expression as it was intended to convey his political views regarding the problems inherent with government-endorsed religion and the commingling of church and state.

Statutes my limit expressive activity if they are unrelated to the expression that constitutes speech and are narrowly tailored to serve such goals. Here, the State may have a difficult time proving that this act is unrelated to expression because it seems to want to prevent individuals from burning or mutilating the Constitution as a way of

expressing their political views.

The State would likely try and analogize to the U.S. Supreme Court case of O'Brien. There, a statute made it a crime to burn draft cards. When the defendant burned his draft card as a way of protesting against the war, he was prosecuted under the statute. The Court held that the statute was constitutional because it was not aimed solely at curtailing individuals' ability to express their viewpoints. Instead, the County had an interest in the administrative matters of the draft and that draft cards were essential to the country keeping track of its draft members, soldiers, etc. Thus, because this statute was content-neutral, the Court applied intermediate scrutiny and found that the statute was narrowly tailored to a compelling state interest.

However, as noted above, no such interest appears to exist for the state's statute in this case.

D will likely point to the flag burning cases, such as Johnson, where the Court has held that statutes making it a crime to burn the U.S. flag are unconstitutional because they restrict speech under the First Amendment. In the flag burning cases, the Court has noted that these statutes are aimed at curbing an individual's right to express his views and thus warrant strict scrutiny. Because they are not necessary to advance a compelling interest, they are violative of the First Amendment.

The present case seems much closer to Johnson than O'Brien because the statute is aimed at expression rather than activities unrelated to expression. As such, it is unconstitutional because it impermissibly burdens the freedom of speech under the First Amendment. The State will have to meet a very high burden because strict scrutiny would be applied and thus it would have to show that the statute is necessary to advance a compelling state interest. Because no compelling interest appears to exist, the statute will be struck down.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

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Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.

2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

Answer A to Question 3

1. Dan's Motion to Exclude his Statement to Sid

5th Amendment

The 5th Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5th Amendment.

6th Amendment

The 6th Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6th Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6th Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6th Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooing Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had "terrified" Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he "couldn't be responsible for Dan's safety," implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that "Your deadline is coming fast." Dan will argue that the statement regarding Dan's safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn't join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

Answer B to Question 3

Dan's Motion to Exclude

Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4th, 5th, and 6th Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4th, 5th, and 6th Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5th or 6th Amendment rights, the statement cannot be admitted.

5th Amendment Right

The 5th Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5th Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5th Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5th Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,

interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5th Amendment rounds.

Impeachment Purposes

Even if Dan's statement violated his 5th Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

6th Amendment Right

The 6th Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6th Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6th Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6th Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5th Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

Conclusion

Dan's statement to Sid likely violated his 6th Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5th Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6th Amendment right.

Dan's Conviction for Murder or any Lesser-Included Offense

Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the 'imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

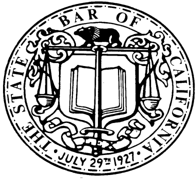
Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING
FEBRUARY 28, 2008

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.



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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 6

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.

2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.

3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

Answer A to Question 6

1. Motion to suppress the cocaine

Standing:

Dave has standing to bring this motion because he is being charged with possession of cocaine that was found in his car. He, unlike Ted, has a reasonable expectation of privacy in compartments within his car that are not visible in plain view, and can therefore assert a violation of the 4th Amendment if they are unlawfully searched, and assert the exclusionary rule to suppress evidence found that way.

Traffic stop

A police officer has the right to stop and detain a car that is violating any provision of the vehicle code. Here, the car was speeding and weaving in violation of the code, so Polly had the right to cause the car to pull over. Upon such a stop, both the driver and passenger are considered detained according to the Terry v Ohio doctrine. The request for Dave's driver's license and registration were lawful, as was her intended search for arrest warrants.

Search

However, instead of going to her patrol car, Polly saw Ted "slip something under the seat." This must have been a very minimal viewing, and somewhat lacks credibility, because Ted was in the passenger seat, and Polly was walking away from the driver's side back to her own vehicle. Anyway, assuming that she actually did [see] what she says she saw, her actions were still unlawful. Polly opened Ted's car door, looked under his seat, and opened a bag found there. This action qualifies as a search, because a person has a reasonable expectation of privacy in the compartments of his car which are not visible in plain view. The contents of a paper bag under a car seat are certainly not in plain view. Therefore, to search it, Polly needed a warrant, or a warrant exception.

Auto Exception:

The auto exception the warrant requirement allows an officer to search any compartment within a car in which the officer has probable cause to believe that she will find evidence of a crime. Here, Polly saw Ted "slip something under his seat." Under these circumstances, that sight is not enough to generate probable cause. If asked, she could not articulate with particularity what it is she suspected she saw. There were no other facts to cause Polly to suspect that something under Ted's seat would contain evidence of a crime. The mere fact that Ted appeared to be concealing whatever-it-was is not enough. A Supreme Court case involving a student on school grounds, who held a black pouch behind his back when approached by the principal, provides precedent that the mere inarticulate hunch or suspicion created when a suspect appears to be hiding something is not enough to create reasonable suspicion, much less the higher standard of probable cause.

Search incident to arrest:

Before a Supreme Court decision [in] March of 2009, an officer would be allowed to search the passenger compartment of a car during or after the arrest of a car's occupant, based on a search incident to arrest. However, this rule has been changed, and does not allow a search if the passenger has been removed and is no longer in arm's reach of the contents of the car. Additionally, Polly had not chosen to arrest Ted and Dave at the time she made the search. Although she had the right to arrest Dave for a vehicle code infraction, she had not made the decision to do so, and therefore, even under the old rule, she would not have been able to use this exception to search under Ted's seat.

Terry frisk

As stated earlier, the traffic stop was a detention. When an officer detains a suspect because of a reasonable suspicion that a crime has occurred (here, the vehicle code infractions), she has the right to frisk the suspect for weapons to protect herself. This allows a visual scan, as well as a brief physical inspection of the outer garments by running her hands along them. To do this, the officer must have at least a reasonable

suspicion that the person might be carrying a weapon. Here, Polly went far beyond what was allowed. She wasn't looking for weapons; she was simply indulging her suspicious curiosity when she checked to see what Ted put under the seat. As mentioned above, she had no reason to believe Ted would be concealing a weapon. Now, if perhaps she had run her check for warrants, and found a warrant out for Ted or Dave for a violent offense, that might have generated the necessary suspicion for some kind of frisk. But even then, the frisk would have required her to command Dave and Ted out of the car and she could frisk their clothing - not permitted her to look under their seats and inside bags.

Conclusion:

Since no warrant exception permitted Polly to make the search, and she did so in violation of Dave's reasonable expectation of privacy without a warrant, the search was unlawful, the cocaine that was found is "Fruit of the poisonous tree" and should be excluded.

2. Motion to suppress Ted's statement or for a separate trial

Confrontation Clause

A statement by a coconspirator is not admissible against a defendant as an admission of a party opponent. Therefore it must be admissible under some other hearsay exception if it is hearsay. Even if it is admissible under evidence law, the constitution sometimes allows for suppression.

The confrontation clause of the constitution requires that for any testimonial evidence offered against a defendant, the defendant must have the opportunity to confront and cross-examine the declarant. Here, Dave and Ted are being tried jointly, and Ted's statement is offered substantially against both of them. Ted's statement is not admissible against Dave unless Ted can be cross-examined. And because it is Ted's trial too, Ted has the right not to take the stand because of his Fifth Amendment right against self-incrimination. If Ted exercises this right, then Ted cannot be cross-examined, and Dave's right of confrontation is violated. The remedy is, as Dave requested, to either exclude the statement, or try Ted and Dave separately.

The prosecution, if it wishes to avoid both these remedies, can argue that the statement is not offered "against" Dave. The statement really doesn't incriminate Dave in any way; in fact, it is more exculpatory than anything for both defendants. More facts would be needed to be sure of this, because if Dave's defense is that Ted owned the cocaine, then the statement, while good for Ted, weakens Dave's defense. Or if Ted has changed his story, this prior inconsistent statement may hurt Ted's credibility, which may hurt Dave's defense by association with Ted. So the prosecution's attempt to include the statement and maintain a joint trial will probably fail, but will succeed if Ted's statement is not harmful to Dave's defense.

If the statement is helpful to [the] prosecution of Ted, the prosecution will not wish it to be excluded. Rather than exclude it, the prosecution will prefer to try Dave separately, and this remedy will be granted upon the prosecution's agreement.

Miranda

Even if Ted's statement was obtained in violation of Miranda rights or 14th Amendment voluntariness rights, Dave cannot assert those rights as a reason to exclude the statement from use against him. A defendant can only assert his own constitutional rights in seeking to exclude evidence, not those of another person.

3 . Motion to discharge Dave's attorney and substitute a new attorney in his place

A criminal defendant has an absolute right to counsel at trial, as long as incarceration is a possible punishment. The issue is whether Dave has a right to discharge and replace his attorney a week before trial. Dave has retained an attorney, not used a publicly provided one, and this is helpful to his case, because no public financial hardship is involved. However, because [the] trial is so soon, the court has discretion to grant Dave's motion only if it finds that the case will not be unduly delayed. The court will not permit Dave to delay the case so much that he will have a defense of a speedy trial violation; however, it may allow Dave the delay if he waives that defense. And, if the substitution will cause delay that will make a necessary witness unavailable, the court will be disinclined to grant it.

The court will balance Dave's interests as well. If he has differences with his attorney that make it impossible for his attorney to provide him with competent representation, then the court will be strongly inclined to grant the substitution, because otherwise Dave may have a case for Ineffective Assistance of Counsel that could undo the court's and prosecution's time and efforts. If the only consequence of the substitution will be delay, the court will consider its calendar, and it will also consider the right to a speedy trial. But weighing all these considerations, the court will likely permit the substitution because no facts show that any undue burden on the court will occur.

Answer B to Question 6

Question 1: The Motion to Suppress the Cocaine

Fourth Amendment / Fourteenth Amendment Applicability: Any action by the state (a government official) that invades a person's reasonable expectation of privacy (REOP) will trigger the applicability of the Fourth Amendment protections against unreasonable searches and seizures.

Here, assuming that Polly was a state police officer, the Fourth Amendment will apply to her actions through selective incorporation via the Fourteenth Amendment.

Fourth Amendment -- State Action: Private actors are not bound to constitutional norms. As mentioned above, any Fourth Amendment challenge to a search or seizure must involve "state action" in the searching and seizing. Here, there is no question that Polly, a police officer, is an agent of whatever state or local government she works for. Since her actions revealed the cocaine, the state action requirement is satisfied.

Fourth Amendment -- Reasonable Expectation of Privacy: To have standing to bring a Fourth Amendment claim to suppress seized evidence, the person asserting the claim must have standing.

To have standing under the Fourth Amendment, Dave must prove that he had a reasonable expectation of privacy in the contents of his passenger compartment. Under existing case law, because Dave is the owner of the vehicle that was stopped by Polly, Dave has a reasonable expectation of privacy in the contents of the passenger compartment of the vehicle, as well as the trunk and any other places that items could be stored.

Note also that the state cannot argue that Dave lacked a REOP due to the item being in plain view from the exterior of the car (placing an item in plain view in the passenger

compartment may indicate that the owner had no reasonable expectation of privacy), the item in question--the bag--was under a passenger seat, and not visible from the exterior of the car.

Therefore, Dave has standing (a REOP in the item seized) to move for its suppression.

The Traffic Stop -- Lawful Stop: A police officer may conduct a routine traffic stop if the police officer has reasonable suspicion that a law has, is, or will be violated by the occupants of the car, or if the police officer has probable cause that the car contains contraband, or the driver has violated the law.

Here, Polly personally observed Dave's car "speeding" and "weaving in and out of traffic" in violation of the Vehicle Code. Therefore, Polly was justified under the Fourth Amendment in stopping the car, because she had at least reasonable suspicion, if not probable cause, that a law had been violated.

The Traffic Stop -- Lawful Seizure: The Supreme Court has made clear that a traffic stop seizes not only the driver, but any passengers, under the Fourth Amendment. However, because the stop was justified (as discussed above), this seizure is lawful under the Fourth Amendment.

The Search of the Passenger Compartment -- Improper Search

Warrant Requirement

The general rule, subject to a number of exceptions, is that any search by a state actor of any area that a person has a REOP in cannot be conducted without (1) probable cause, (2) supported by a validly executed warrant.

Here, it is clear that Polly did not have a validly executed warrant to search Dave's car. Therefore, we must look to see whether any exceptions will apply to this general rule.

<u>Automobile Exception Does Not Apply Because NO PROBABLE CAUSE</u>

The automobile exception, which exists because items in an automobile may be quickly transported and disappear before a warrant can be applied for and issued, is only a replacement for the general warrant requirement. However, it does not absolve the state actor from having probable cause to search.

Probable cause to search means that the person has probable cause to believe that the place to be searched will contain specific items of contraband. It is determined based upon a totality of the circumstances, and must be based upon more than just mere suspicion, but reliable sources and articulate observations.

Here, Polly merely saw Ted slipping "something" under his seat as she was walking away. Polly had no other facts to support a belief that the item was contraband or a weapon, nor could she be sure that Ted was actually performing that act (she was walking when she observed it). Therefore, Polly did not have probable cause to perform the search of Dave's car. Moreover, the basis for the stop itself was a routine traffic violation, and not something (perhaps intoxicated driving) that would provide probable cause to search the automobile compartment (perhaps for open liquor bottles).

Because Polly did not have probable cause to search Ted's car, the automobile exception cannot apply.

An Exception to Probable Cause -- A Terry Search of the Car: An officer may conduct a "Terry Frisk" of a person if the officer has reasonable and articulable suspicions that the person may be armed. This is to ensure that officers are safe while conducting their duties.

Here, the state may argue that Polly's observation created an articulable and reasonable suspicion that the occupants of the car were stowing weapons or other materials that might put her in danger. Therefore, pursuant to her lawful seizure of Ted

and Dave, she was within her rights to conduct a “Terry Search” of the automobile (only for weapons) to ensure her safety.

However, a Terry search is limited solely to a search of weaponry, and the paper lunch bag was likely clearly not a weapon (even if Polly conducted a plain feel of it, which she didn’t). Polly was not authorized to open the bag under a Terry search theory, because she did not first ascertain that it was contraband based upon a “plain feel.”

Therefore, this exception will also not apply.

Plain View Does Not Apply: As mentioned earlier, because the paper bag was beneath the passenger seat, the item was not in plain view of the officer from a lawful vantage point (outside the car), nor was the paper bag immediately incriminating on its face. Therefore, the discovery of the paper lunch bag does not meet either of the requirements for this exception.

Evanescent Exception Does Not Apply: The evanescent exception often applies to contraband that can be easily disposed of, or will easily disappear, thereby excepting officers from obtaining a valid warrant. However, it requires that the officer have probable cause to search the area in which the contraband is discovered. Because no probable cause existed, this exception does not apply.

No Consent: The seizure of a passenger vehicle in a routine traffic stop does not provide consent to the officer to search the passenger compartment, nor did Dave or Ted give such consent to Polly. Therefore, this exception will also not apply.

No Exception to the Warrant Requirement or Probable Cause Applies [To] The Cocaine: Because no exception to the warrant requirement or probable cause applies to the circumstances here, the search of the car and the discovery of the cocaine must be suppressed. Thus, Dave will likely succeed on this motion.

Question 2: Motion to Suppress Ted's Statement or for a Separate Trial

State Action: Again, private actors are not bound to constitutional norms. Thus, the statement must have been obtained by a "state actor" for the suppression motion to be valid. Here, the statements by Ted were obtained by questioning by Polly, who as discussed above is a state actor. Therefore, this requirement is met.

Suppression of Statement After Unlawful Arrest -- No Standing to Bring: As discussed in Question 1, the arrest of Ted and Dave was the result of an improper search of Dave's vehicle, because the probable cause to arrest Ted and Dave was based entirely upon the improperly seized cocaine. If probable cause to arrest is based solely on unconstitutionally obtained evidence, then the subsequent arrest is invalid and unlawful.

Any statements made by a suspect in custody following an unlawful arrest must be suppressed unless the state can show that the "taint" of the unlawful arrest has been purged. Case law is unclear whether Mirandizing a suspect unlawfully arrested is sufficient to "purge the taint" of the prior arrest, even if the suspect waives his Miranda rights following a properly administered warning. What is clear is that releasing the suspect would purge the taint (but that didn't happen here).

However, regardless of the merits of this valid issue, Dave has no standing to bring a claim that Ted's statement was improperly obtained as evidence of an unlawful arrest. This is because only the person who made such a statement can bring such a challenge. Thus, Dave would be wise to encourage Ted to bring this argument forward.

Co-Defendant Confession, Confrontation, and Self-Incrimination Rights -- Redact or Suppress: Because this is a criminal trial with co-defendants, special constitutional concerns arise when one defendant's confession is being admitted against the other defendant. This is because of the intersection between the right of a defendant against self-incrimination (and the right to not take the stand) and the right of an accused to

“confront” the witnesses against him, meaning being able to put the witness under oath, cross-examine him, assess his demeanor, and physically be present for the process.

The Confrontation Clause only applies to “testimonial statements,” which case law clearly includes confessions to police officers within the definition. Here, Ted’s statement falls within this category, because his statement was made to Polly after waiving his Miranda rights. Therefore, the admission of the statement falls within the “testimonial” category of testimony.

Moreover, the testimony clearly implies that Dave is responsible for the contents of the bag, as Ted makes it clear that he--the only other passenger in the car--had nothing to do with the paper bag. This testimony will likely be used against Dave to show that he had true possession of the bag.

Under these facts, because Ted cannot be forced to take the stand and be confronted (because he can assert his Fifth Amendment right to not take the stand), the confession must be redacted as to not cast any negative light onto Dave, or be suppressed.

<u>Conclusion on Suppression</u>: Because it is unlikely that the statement can be redacted to not cast an accusatory light upon Dave, the court will likely grant its suppression.

<u>Conclusion on Alternative -- Separate Trials</u>: The Court may alternatively grant separate trials for Dave and Ted, and should do so in the interests of justice, since it appears under the facts that Dave and Ted will be asserting inconsistent defenses, and will likely attempt to implicate each other in the process.

This has the potential of prejudicing each defendant’s right to a fair trial, and confuse the issues to the jury, because the jury may be tempted to conclude that one defendant is “correct” and the other defendant is “wrong” in accusing the other of fault. This may violate the Fourteenth Amendment requirement that the state bear the burden of

proving the element of every crime charged, and, therefore, separate trials may be the only way to ensure that the state still bears this burden.

Under these circumstances, the court, in the interests of justice should grant the request for separate trial.

Question 3: Motion to Discharge Attorney

The Sixth Amendment Right to Counsel of Choice: The "root meaning" of the Sixth Amendment, per Supreme Court case law, is that the Sixth Amendment right to counsel also includes a Constitutional right to the counsel of one's choice. This right, of course, does not apply to appointed counsel (which the Supreme Court has clarified), but only to retained counsel. Moreover, this right is not absolute. A criminal defendant cannot improperly delay criminal proceedings by abusing this right, constantly requesting permission to substitute counsel for no good reason.

Here, it is clear from the facts that Dave has retained counsel, and was not appointed counsel by the court. Therefore, Dave does have a Constitutional right to the counsel of his choice. However, it is also clear that the time frame in which Dave has requested a new lawyer is one week before trial.

Under these facts, the court must consider whether granting the request for substitution of counsel would be unfairly prejudicial to the other parties (both the co-defendant and the state), because it would likely have to grant time for the new counsel to become familiar with the details of the case.

Thus, under these facts, it is unlikely that the court would agree--at the eve of trial--to allow the defendant to exercise his Constitutional right to the counsel of his choice.

The Sixth Amendment Right to Go Pro Se: Note that the Sixth Amendment also guarantees the right of a defendant to represent himself (subject to competency

requirements and a knowing and intelligent waiver of the right to an attorney). Here, the Court could grant the discharge of the present attorney (but deny the substitution of a new attorney) if Dave would rather represent himself. However, the facts do not show such a desire, and therefore, the Court will likely not propose such an alternative.

The Sixth Amendment Right to Effective Counsel: The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. The deficiency of counsel in representation, if it causes actual prejudice (a reasonable probability of a different outcome due to the deficiency), is a structural Constitutional error that is grounds for reversal of a conviction and retrial.

Here, the facts show that Dave was merely dissatisfied with his attorney's performance. If Dave had alleged an actual conflict of interest (which would exist if the same attorney represented both Dave and Ted), and the court agreed with this claim of actual conflict, the court should allow Dave to discharge his present attorney and substitute a new attorney, or risk any conviction being reversed under the Sixth Amendment.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 5

Harriet was on her porch when Don walked up, pointed a gun at her, and said, "You're coming with me." Believing it was a toy gun, Harriet said, "Go on home," and Don left.

While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don's clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him.

A month later, Officer Otis arrested Don for possession of stolen property, i.e., the gun. During a booking search, another officer found cocaine in Don's pocket.

Don was charged with possession of stolen property and possession of cocaine. He moved to suppress the gun and the cocaine, but the court denied the motion.

While in jail, Don drank some homemade wine. As a result, when he appeared in court with counsel, he was slurring his words. The court advised Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way. Don agreed and pleaded guilty. Subsequently, he made a motion to withdraw his guilty plea, but the court denied the motion.

1. Did the court properly deny Don's motion to suppress:
    a. the gun? Discuss.
    b. the cocaine? Discuss.

2. Did the court properly deny Don's motion to withdraw his guilty plea? Discuss.

3. If Don were charged with attempted kidnapping against Harriet, could he properly be convicted? Discuss.

Answer A to Question 5

1) Whether the Court Properly Denied Don's Motion to Suppress

A) The Gun

Officer Otis (O) discovered a gun on Don (D) while D was walking home and subsequently encountered a police checkpoint for contraband. Thus, whether the gun is admissible evidence depends on whether the checkpoint was constitutional. D will likely argue that the checkpoint violated his Fourth Amendment rights, which prohibits unreasonable searches and seizures.

The Checkpoint

All Fourth Amendment violations must come from the hands of the government. This is easily satisfied because the checkpoint at which the gun was discovered was a police checkpoint. However, the general rule is that for a checkpoint to be outside the scope of Fourth Amendment protection, the checkpoint must be conducted in a nondiscriminatory manner, and must be for purposes other than the police investigation of criminal activity. In this case, the checkpoint was likely conducted in a nondiscriminatory manner. A nondiscriminatory checkpoint generally checks every person who passes through or some other equal rule, such as every third person that passes through.

However, D will likely argue that the checkpoint is invalid because it directly relates to the investigation of criminal activity. The United States Supreme Court has held that a constitutional checkpoint only occurs when the underlying purpose is not criminal investigation. Such examples include DUI checkpoints being motivated by the state interest of safety on public roads, and informational checkpoints, to investigate the occurrence of an accident that happened in the area recently. In this case, the police checkpoint is specifically looking for contraband, i.e., illegal materials. While O may argue that the checkpoint's purpose of checking for contraband directly advances public safety, this argument will likely be rejected given the fact that it directly relates to criminal investigation. Thus, the checkpoint is unconstitutional.

Since D's gun was discovered through an unconstitutional police checkpoint, the court improperly denied D's motion to suppress the gun.

Terry Stop and Frisk

O may attempt to argue that the gun is a valid seizure because it was performed pursuant to a Terry stop and frisk. A stop and frisk allows an officer to pat down a suspect when the officer has a reasonable suspicion that the suspect may be armed and dangerous. In this case, O will argue that he had a reasonable suspicion that D could be armed, thus giving O the ability to pat down D's clothing, thus leading to a constitutional avenue towards discovery of the gun. However, this argument will likely fail because the Supreme Court has held that "reasonable suspicion" requires more than a "hunch," but instead a set of articulated facts that give rise to the notion that criminal activity is afoot. In this case, O had no suspicion because he was merely checking people at the police contraband checkpoint. In other words, O had less than a hunch, and thus no reasonable suspicion that would give rise to a constitutional stop and frisk.

Thus, as discussed above, the court improperly denied D's motion to suppress the gun.

B) The Cocaine

At the checkpoint, O seized the gun from D. O subsequently checked the serial number and located the registered owner of the gun, who said that the gun had been stolen from him. One month later, O arrested D for possession of stolen property. During a booking search at the police station, another officer found cocaine in D's pocket. Thus, the admissibility of the cocaine depends on whether the booking search was constitutional.

Booking Search

As discussed above, the Fourth Amendment protects against unreasonable searches and seizures. The Supreme Court, however, has held that administrative searches, such as routine booking searches performed for safety and to ensure that suspects' personal items are not lost, are not subject to the Fourth Amendment. Thus, the prosecution will likely argue that the cocaine was properly found and confiscated.

However, D will argue that the cocaine should be suppressed because the booking search was based on an arrest founded on probable cause from an illegal search, i.e., the checkpoint discussed above.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine precludes the admission of evidence that was lawfully seized based on prior unconstitutional acts. As discussed above, D will argue that the gun which led to his arrest and subsequent booking search was unconstitutional, and therefore the cocaine is a fruit of the poisonous tree. In response, the prosecution will likely argue that the cocaine is admissible under the independent source and inevitable discovery doctrines.

The independent source doctrine makes evidence admissible because the police had an alternative, constitutional, avenue towards its discovery. This argument is likely to fail. The only avenue the police have to D's cocaine is from a booking search based on an arrest founded on probable cause from an illegal search. There is no other source. While O may argue that his independent source is his research of the serial number and discussion with the registered owner, such an argument is likely to fail because O would not have performed those actions without the illegally confiscated gun. Thus the independent source doctrine does not apply.

The inevitable discovery doctrine makes evidence admissible because the police authorities would have eventually discovered the evidence through their investigation anyway. The argument is also likely to fail for the same reason that the independent source doctrine, discussed above, will fail: the only route towards the cocaine that O had was from a gun that was from the fruit of an illegal search.

Thus, the cocaine is the fruit of a poisonous tree, and should be suppressed unless the prosecution can show that the taint associated with the illegal search is attenuated.

Attenuation of Taint

The attenuation of taint doctrine will admit improperly seized evidence if the police can show factors that have led to the attenuation of the taint. In this case, O will argue that, despite the fact that the gun was discovered at a police checkpoint, the probable cause for the arrest was for stolen property. Specifically, it was O's investigation into the serial number of the gun and discussion with the true registered owner of the gun which led to the probable cause to arrest D for stolen property. Prior to this attenuation, the gun was merely the product of an illegal search, but now the gun is evidence in a claim of stolen property by the registered owner. Furthermore, O will argue that an entire month passed by, thus indicating that the illegal search was not the main motivating factor in D's ultimate arrest for stolen property. A court would likely agree.

Thus, the court properly admitted the cocaine discovered in the booking search because, although the arrest was based on a gun discovered in an illegal search, there was a sufficient attenuation of the taint of that illegal search to support probable cause to [sic] for D's arrest for stolen property.

2) Whether the Court Properly Denied Don's Motion to Withdraw His Guilty Plea

Whether the court denied D's motion to withdraw his guilty plea depends on: (1) whether D's initial guilty plea was knowing and voluntary, and (2) whether proper formalities were followed when D entered his guilty plea.

D's Guilty Plea and Voluntary Intoxication

The general rule is that a defendant's plea of guilty must be knowing and voluntary. In this case, D drank homemade wine and as a result, he was slurring his words. This indicates that, even if counsel and the court advised him of the nature of his rights, it is likely that D lacked capacity to understand the material details associated with a guilty plea and subsequently D could not have made a knowing and voluntary guilty plea.

Formalities to Enter a Guilty Plea

For a guilty plea to hold up under appellate review, at the time the defendant enters a guilty plea, the judge must inform the defendant: (1) the maximum possible sentence; (2) the mandatory minimum sentence; (3) that he has a right to a jury trial, and; (4) that

he has a right to plead not guilty. All of this information and dialogue must be on the record.

In this case, none of these formalities were followed. Instead, the court merely advised D that if he waived his right to a trial, the court would take his guilty plea and let him go on his way. Thus, although the court somewhat advised D regarding his right to a jury trial, it is clear that the court failed to inform D of the maximum possible sentence, the mandatory minimum, and that he has the right to plead not guilty.

Thus, the court improperly denied D's motion to withdraw his guilty plea because: (1) it is highly unlikely that D lacked capacity through voluntary intoxication to making a knowing and voluntary guilty plea, and (2) the court failed to follow constitutionally required formalities for accepting and entering a guilty plea.

3) Whether Don May Properly Be Convicted of the Attempted Kidnapping of Harriet

Whether D may be convicted of attempting to kidnap Harriet depends on whether D committed the criminal act ("actus reus") simultaneously with the requisite mental intent ("mens rea").

Mens Rea

Since the jurisdiction is not identified, this analysis presumes that the common law is applied. Under the common law, a crime may either be a general intent crime or a specific intent crime. While there is no clear-cut rule delineating the two, suffice to say that a general intent crime requires a lower mental threshold, while a specific intent crime requires a higher threshold of mental acknowledgment, such as purposefully engaging in the crime or knowing the likely outcome of the defendant's acts.

In this case, kidnapping is a general intent crime. However, if D were charged with attempted kidnapping, it would be a specific intent crime. The inchoate crime of attempt requires that the defendant have the specific intent to commit the crime. Thus, to be properly convicted a jury must find that D specifically intended to kidnap Harriet (H). It is likely that D intended to kidnap Harriet, as he pointed a real gun at her and said, "You're coming with me." While one act (pointing the gun) or the other (saying "You're

coming with me") alone may be insufficient to establish that D had the mens rea to effectuate a kidnapping, both acts together make it highly likely that D intended to kidnap H. However, D will point out that after H told him to go home, D obliged and left. Thus, it is unclear whether D had the requisite mental state to commit an attempted kidnapping.

Thus, because it is unclear whether D had the requisite mental state to commit an attempted kidnapping, required under the inchoate crime of attempt, D may not have the requisite mens rea to [be] convicted of attempted kidnapping. However, specific intent may be indicated by the actions that D took to effectuate the kidnapping, discussed below.

Actus Reus

While the normal crime of kidnapping requires that D falsely imprison Harriet (H) and either move her location or conceal her presence from others for an extended period of time, since D is hypothetically being charged with attempted kidnapping, D need not go that far. Under the common law, to be convicted of an attempted crime the defendant must be in "dangerous proximity" of committing the crime, while in other jurisdictions the defendant need only take a "substantial step" towards the commission of the crime.

In this case, it is likely that D's actions satisfy both the "dangerous proximity" and "substantial step" doctrines. Walking up to someone, pointing a gun at them, and saying "You're coming with me" is within the dangerous proximity of committing the crime, as the defendant is face-to-face with the intended kidnapping victim coupled with the fact of oral communication threatening or coercing the intended victim. Likewise, the same actions are obviously a substantial step towards the commission of a kidnapping, as D has taken the time to approach H at her house, pull a gun on her, and coerce her to come with D, which would have the result of completing the kidnapping crime, i.e., by moving the victim.

Furthermore, these acts are extremely probative as to D's mental state, as it is highly unlikely that someone who not only took a substantial step towards attempting a

kidnapping, but is also in the dangerous proximity of doing so, would have the requisite mental state to be convicted of attempt.

Thus, if D were charged with attempted kidnapping against H, D could properly be convicted for the reasons discussed above.

Answer B to Question 5

1a. Don's Motion to Suppress the Gun

Don's motion to suppress will be based on the argument that the confiscation of his gun was an impermissible search-and-seizure in violation of his Fourth Amendment rights.

Governmental Conduct

For Fourth Amendment rights to attach, the search-and-seizure must have been done by government actors. In this case, Otis stopped Don at a checkpoint, and was presumably on duty. Note that even if Otis had stopped and searched Don while he was off duty that would still be sufficient for governmental conduct.

Reasonable Expectation of Privacy

In addition, the Fourth Amendment also requires that the individual have a reasonable expectation of privacy in the items or place searched. Here, the gun was located in Don's clothing and on his person. The fact that the police had to pat down Don to find it alone evidences that he had a reasonable expectation of privacy. The fact the gun was stolen and that Don was not the proper owner is not sufficient to demonstrate that he lacked a reasonable expectation of privacy.

Warrant

Generally, 4th Amendment search requires a valid warrant, where there must be particularity and probable cause. Here, there was no warrant. Therefore, Otis cannot have been in good faith relying on the warrant even if it was defective, so an exception to the warrant requirement must apply.

Checkpoint

Don will first argue that the confiscation of the gun was invalid because the checkpoint was not authorized by law. A valid checkpoint requires a neutral reason for stopping or selecting people for the checkpoint. For example, if the officers stop every third person that passes through the checkpoint, that would be a sufficiently neutral basis for the checkpoint. In this case, there is no specific evidence of an improper police purpose in stopping Don and the officer's actions are thus presumptively going to be valid.

A valid checkpoint also must address some legitimate government concern or interest. Again as an example, a checkpoint to stop drivers and watch for those that are driving under the influence is permissible because there is a valid interest in keeping dangerous drunk drivers off the road. Here, the checkpoint was to stop pedestrians carrying contraband. Don will argue that pedestrians, even if they are intoxicated, do not present inherently dangerous risks similar to that posed by drunk drivers.

In addition, Don will argue that while it may be permissible to stop pedestrians for specific reasons, there must be some sort of articulable purpose. Here, the officers are simply looking for contraband, which could be evidence of any offense. Officers are not allowed to stop every passerby without having any reason for the stop. Therefore, the checkpoint here is probably not valid absent some more articulable purpose.

Terry Stop and Frisk

A secondary justification to stop Don would be on the basis of a Terry stop. A Terry stop requires reasonable suspicion that the individual stopped either be dangerous or have some improper purpose. If the officer has reasonable suspicion necessary for the stop, if the officer also has reasonable suspicion that the suspect is dangerous, then the officer may pat down or frisk the individual to look for weapons. If during the patdown the officer by "plain feel" thinks an item is either a weapon or drugs, then the officer is allowed to seize the item.

In this case, there is no evidence that Officer Otis had reasonable suspicion to stop Don. Don was simply "walking home" and while [he] had a weapon, the weapon was in his clothing and there is no indication Otis saw the gun, saw a bulge in Don's clothing that could indicate he was armed, or some other reason that Don was acting suspiciously. Otis may point to the totality of the evidence here, that Don was leaving Harriet's after what might have been an attempted kidnapping, but even given this fact there is no indication from the way that Don was walking home that he had just tried to kidnap someone.

Therefore, the seizure of Don's gun was probably not valid under either the justification of a checkpoint or a Terry Stop and Frisk.

1b. Don's Motion to Suppress the Cocaine

Fourth Amendment Attachment

The search of Don that found the cocaine was done by a government official after Don had been arrested and Don had a reasonable expectation of privacy of items contained in his pocket. Therefore, 4th Amendment protections attach.

Booking Search

Don will first argue that the booking search was impermissible. A booking search is valid as long as it is conducted as a result of and in accordance with the regular practice of the police office. If so, the search does not require probable cause, nor does it require reasonable suspicion. In this case, the cocaine was found during a booking search of Don, in Don's pocket. Because there is no evidence of anything other than the fact that this was a routine booking search, the search-and-seizure was proper.

Fruit of the Poisonous Tree

Even though the booking search itself was valid, Don will argue that it is impermissible because the booking search only arose as the result of the impermissible search-and-seizure that led to the gun. The booking search was conducted after Officer Otis arrested Don for possession of stolen property in the gun found at the checkpoint search.

Evidence that is discovered through impermissibly tainted evidence is also invalid. In this case, because the gun was improperly seized, the prosecution will have to show some alternative means of acquiring the evidence. If the prosecution can show that they had an independent source for the evidence, would have inevitably discovered it anyway, or that the secondary evidence arose from intervening acts of free will by the defendant, then the evidence is valid anyway.

Independent Source

If the police can derive the evidence from an independent source, that will be sufficient to cleanse the taint of the impermissible evidence. In this case, the officers found the cocaine as a result of the booking search, which only arose directly from the seizure of

Don's gun. After the officers seized the gun, they checked the serial numbers and located the registered owner, who informed the officers that the gun had been stolen. The officers then followed up on the owner's statements and arrested Don for possession. There was thus only one source for the evidence that led to the cocaine, and that source was impermissibly tainted.

Inevitable Discovery

If the police can show that they would have inevitably discovered the cocaine that would also be sufficient to cleanse the taint of the seizure of the gun. Again, there is no evidence here that the officers would have discovered the cocaine without the information obtained from the gun. Without the gun, the officers probably never would have discovered the cocaine, and thus the inevitable discovery exception is inapplicable.

Intervening Acts of Free Will by Defendant

Finally, if the officers show that there had been some intervening act of free will by Don that led to the discovery of the cocaine that could lead to its admissibility as well. The prosecution will point out the fact that the police did not arrest Don for one month after the initial search, and they will thus argue that time was sufficient to clear the taint. This is probably the prosecution's best argument; however, it still fails to show any direct relationship to the evidence from anything other than the illegal search. Therefore, the cocaine will probably have to be excluded as well.

2. Don's Motion to Withdraw His Guilty Plea

Before a judge can accept the defendant's guilty plea, the judge must inform the defendant that the defendant has a right to plead not guilty and demand a trial. The judge must also inform the defendant of any mandatory minimums that will result from the guilty plea as well as the possible maximum penalty. The judge should also inform the defendant of his ability to secure an attorney or alternatively proceed per se. Finally, the judge must inform the defendant that all of this information and the defendant's plea itself must be on the record.

In this case, the judge did not do any of this. The court advised "Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way." Don then pled guilty. The judge did not inform Don of the possible results of pleading guilty, nor did the judge tell him that his plea would be recorded. Arguably, the judge satisfactorily met the requirement of informing Don of his right to trial by telling him about his ability to waive it, but the judge still should have expressly stated his right, instead of simply discussing his ability to waive trial.

Furthermore, Don will point to the fact that the judge should have been aware of Don's lack of capacity when making the decision. As a result of drinking wine in jail, Don "was slurring his words" when he went into court. The judge at this point should have been even more careful than normal to comply with the various requirements in taking a defendant's guilty plea. However, the judge failed to meet these requirements. Therefore, the court improperly denied Don's motion to withdraw his guilty plea.

3. Attempted Kidnapping

Kidnapping requires refraining a person's ability to move or leave along with either concealment or movement of the person. Here, there was no actual kidnapping because even if Harriet's ability to leave was briefly restrained by Don pointing the gun at her, because Harriet didn't believe the gun was real and Don left, there was no concealment or movement.

Attempted kidnapping requires the specific intent to kidnap as well as a substantial step towards completion of the act. In this case, while there is no direct evidence of Don's state of mind, his actions demonstrate that he probably had the requisite specific intent to kidnap. First, as evidenced by his later arrest, Don had brought a real gun with him, pointed it at Harriet and made a demand of her. This is all relevant to show Don's state of mind, that he did intend the outcome he stated that she come with him. Furthermore, had Harriet believed that it was a real gun she probably would have gone with him, sufficient for kidnapping. Therefore, while more evidence would be helpful, there is a sufficient amount of evidence to conclude that Don had the requisite intent.

In addition to the specific intent to kidnap, Don must also have completed a substantial step towards completion of the kidnapping. This test is not the most restrictive. If Don had simply brought the gun to Harriet's home and at the point was arrested, the fact that he brought a gun with him that far would probably be a substantial step. Here, however, Don not only brought the gun, he pointed it at Harriet and made a demand. There was not much more left for Don to do. Don may point to the fact that the act itself was not completed, or the fact that Harriet was not scared, but neither of these outcomes is required for an attempt. Therefore, Don would be convicted of attempted kidnapping.

The minority rule would require not that Don completed a substantial step towards kidnapping but rather that Don was dangerously close to succeeding in kidnapping. Here, the acts of drawing the gun and demanding that Harriet come with him were probably sufficient to be dangerously close to success. Don will again raise the fact that Harriet did not come with him, and will have a better argument by pointing to the fact that Harriet was not in fact even scared of him, but again this argument goes to the result of the actual crime of kidnapping. Don had done everything required to complete the act besides Harriet acquiescing to his demand. Therefore, because Don had done everything he could besides trying to further convince Harriet the gun was real, he would probably be convicted even under the minority rule.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

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Question 1

Vicky operates a successful retail computer sales business out of the garage of her house. Vicky told Dan that she intended to go on vacation some days later. Dan subsequently informed Eric of Vicky's intended vacation and of his plan to take all of her computers while she was away. Eric told Dan that he wanted nothing to do with taking the computers, but that Dan could borrow his pickup truck if Dan needed it to carry the computers away.

While Vicky was scheduled to be away on vacation, Dan borrowed Eric's pickup truck. Late that night, Dan drove the truck over to Vicky's house. When he arrived, he went into the garage by pushing a partially open side door all the way open. Vicky, who had returned home early from her vacation, was awakened by noise in her garage, opened the door connecting the garage to the house, and stepped into the garage. When she saw Dan loading computers into the back of the truck, she stepped between Dan and the truck and yelled, "Stop, thief!"

Dan pushed Vicky out of the way, ran to the truck, and drove off. He immediately went to Fred's house where he told Fred what had happened. In exchange for two of the computers, Fred allowed Dan to hide the truck behind Fred's house.

What crimes, if any, have Dan, Eric, and/or Fred committed? Discuss.

Answer A to Question 1

I. Dan's Crimes

By plotting to break into Vicky's home to steal her computers and then actually doing so, Dan committed the crimes of burglary, larceny, robbery, and battery. He may have also conspired to commit burglary and/or larceny with Eric.

Burglary

At common law, burglary was defined as the unlawful breaking and entering of the dwelling house of another at night with the intent to commit a felony therein. Most modern jurisdictions have amended the elements to include burglary of any structure and have not limited it to nighttime burglaries.

Here, Dan committed burglary when he entered Vicky's home to steal the computers.

Breaking and Entering

Burglary requires that the burglar break and enter into the structure. "Breaking" constitutes any form of forcible entry, including pushing open a partially open door. "Entry" requires physical entry by any part of the burglar's body or a tool under his control.

Here, Dan pushed a partially open side door to V's garage fully open in order to gain entry. This is evidence of breaking. Further, Dan entered the garage, which is a part of Vicky's residence. Thus, the elements of breaking and entering are satisfied.

Structure of Another

Dan entered into Vicky's garage, both the location of her retail sales business and part of her home (her dwelling place). This is sufficient to constitute a protected structure for purposes of burglary, which belonged to another (Vicky). Therefore, this element is met.

With the Intent to Commit a Felony Therein

Burglary requires the intent to commit a felony (or a misdemeanor in some jurisdictions) inside the structure at the time of the breaking and entering.

In this case, Dan had the intent to commit larceny of Vicky's computers when he entered her garage. He had previously expressed this desire to Eric, and nothing in the facts suggests he changed is mind prior to entering. In fact, his actions of actually taking the computers demonstrates that the intent was present.

Therefore, Dan committed burglary.

Larceny

Larceny at common law was the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the victim of the property.

Trespassory

Trespass is the unpriviliged, nonconsensual invasion of another's protected space.

Here, Dan did not have the consent of Vicky to enter the garage at night and therefore his decision to do so was a trespass. While Dan might argue it was not trespassing because Vicky opened her business up to the public and her business was located in the garage, this argument will fail because he clearly did not have implied or actual authorization to force his way into the garage at night when Vicky was not operating her business and was in fact supposed to be on vacation.

Asportation

Asportation is the taking and carrying away of another's property. For larceny purposes, even slight movement of the property is sufficient.

In this case, Dan took computers from Vicky's garage, loaded them into his truck and drove off with them. Thus, he moved the computers and this element is satisfied.

Personal Property of Another

The computers were the tangible, moveable personal property of Vicky and her business. The computers did not belong to Dan and he had no claim of right to the computers. Therefore, this element is satisfied.

Intent to Permanently Deprive

At the time of the taking, the defendant in a larceny case must have the intent to permanently deprive the owner of the property.

Here, Dan had the intent to permanently deprive because he planned to steal the computers and presumably sell them for value. Nothing in the facts indicates a contrary intent on Dan's part, so this element is satisfied.

Therefore, Dan also committed larceny.

Robbery

Common-law robbery requires that the defendant take and carry away the personal property of another from their person or presence by force or threat of force, with the intent to permanently deprive.

The requirements that Dan took and carried away the computers belonging to Vicky with the intent to permanently deprive have been described above. The remaining elements follow.

Person or Presence

Robbery requires that the items be taken from the victim's person or presence, which has been broadly defined to include anything the victim is holding or, indoors, items from the same room that the victim was in at the time of the taking.

Here, Vicky was present in the garage when Dan loaded some of her computers into the truck. In fact, she stepped between Dan and the truck as he was attempting to flee with the computers, so it suggests that she was immediately present when her property was taken. Therefore, this element is likely satisfied because the computers were taken from within a very close proximity to Vicky. As such, they were taken from her immediate presence.

Force or Threat of Force

A robber must use physical force or threaten to use physical force to commit robbery.

Here, as he was attempting to flee, Dan physically pushed Vicky out of the way. Shoving another person is physical force, which Dan used to accomplish and complete his taking of Vicky's computers.

Dan will argue that he did not accomplish the taking by force because he already had the computers in his possession before Vicky confronted him. He will defend by saying that the force was only used to effectuate his escape, and not the robbery itself. However, because the robbery would not have succeeded but for the physical force to the victim, it's likely to satisfy the requirement of forcible robbery.

For those reasons, Dan also robbed Vicky.

Battery

Battery is the intentional unlawful application of physical force to another person. Battery is a general intent crime, meaning there is no requirement that the defendant intend to cause injury to the victim. He must only intend to commit the physical action that constitutes the force.

Here, Dan physically shoved Vicky out of the way as he was escaping. He intended to complete the shoving action because it allowed him to get Vicky out of his way and proceed to the truck. Therefore, Dan committed a battery.

Conspiracy to Commit Burglary/Larceny

Conspiracy is an inchoate offense that required at common law an agreement between two or more people to accomplish the same unlawful objective with the intent to complete that objective. Many jurisdictions require proof of an "overt act" to establish conspiracy. In a majority of states, only bilateral conspiracies are permissible, but a minority of states recognize the idea of a "unilateral conspiracy," where the defendant

believes he is conspiring with another "guilty mind" who in fact shares a different objective.

The prosecution may attempt to argue here that Dan conspired with Eric to rob Vicky because he discussed his plans with Eric in advance and Eric loaned Dan his truck for purposes of the robbery. However, as will be addressed below, it is not clear that Eric had the intent for the robbery to be completed. If Eric lacked the requisite intent to accomplish the robbery, then Dan can only be convicted of conspiracy in a jurisdiction that recognizes unilateral conspiracy.

II. Eric's Crimes

Conspiracy to Commit Burglary/Larceny

The issue is whether Eric had the intent to enter into an agreement with Dan for an illegal purpose (the burglary/larceny) and if Eric intended for the illegal object to transpire as planned. Here, the facts suggest that Eric lacked that intent, so he is likely not guilty of conspiracy.

The prosecution will argue that Eric's decision to loan his truck to Dan knowing that Dan intended to use it to burglarize Vicky's business is evidence that Eric conspired to commit that crime. However, Eric specifically told Dan that he wanted "nothing to do with taking the computers." Although the prudence of nonetheless letting Dan use his truck to commit the robbery is questionable, the facts do not prove that Eric intended to participate in the burglary or that he shared Dan's goal for the burglary to succeed. He may have been indifferent to the theft being committed or even favorable to the idea, but this is not persuasive evidence that he intended for Dan to succeed in the burglary. Since the prosecution will have the burden to show intent beyond a reasonable doubt, this is unlikely to be a persuasive argument.

Therefore, it's likely that neither Dan nor Eric could be convicted of conspiracy.

Accomplice Liability

An accomplice is someone who aids, abets, counsels or encourages the principal to commit a crime with the intent that the principal succeed. A majority of jurisdictions

hold accomplices liable for all reasonably foreseeable crimes that the principal committed.

Burglary and Larceny

Here, Eric was likely an accomplice to the burglary and larceny committed by Dan, and he should be convicted of those offenses. By offering to let Dan use his truck to carry away the computers after he stole them, Eric aided Dan by giving him a getaway vehicle. Without Eric's participation in loaning Dan his truck, it's not clear that Dan would have been able to commit the crimes. Therefore, if it was foreseeable that Dan would commit burglary and larceny, Eric is liable therefor.

In this case, Eric knew that Dan intended to enter Vicky's business and take her computers. Therefore, he was personally informed of Dan's intent to commit larceny and burglary. In fact, he specifically told Dan that he could use Eric's truck "if Dan needed it to carry the computers away." Therefore, Dan is liable as an accomplice to burglary and larceny.

Robbery

Eric will argue he is not an accomplice to the robbery of Vicky because it was unforeseeable that Vicky would be home and therefore that Dan would take anything from her person or presence. He will claim that he thought Vicky was on vacation, and that therefore, the most that Dan could be guilty of is burglary and/or larceny.

On balance, however, this argument is likely to fail. Eric had no personal knowledge of Vicky's travel plans, and by agreeing to lend Dan his truck for the purposes of escaping with Vicky's computers, he assumed the risk that Dan might have erred in determining Vicky's travel plans. Further, because the business was in Vicky's garage and therefore on her property, it would not be unforeseeable that someone might be either on Vicky's property for business purposes or that someone else besides Vicky was living there. As such, the presence of another person was reasonably foreseeable, and so was the robbery of the computers from that person's presence.

Eric is therefore guilty of robbery as an accomplice.

Battery

Similarly, Eric will argue that it was not reasonably foreseeable that Dan would commit battery against Vicky because he didn't even know that Vicky would be present. For the reasons discussed above, this argument will likely fail. Committing a home invasion always carries with it inherent risks that someone will be present, and breaking into a business carries similar concerns. It was foreseeable that Vicky or another person might be there during the burglary, and therefore, that Dan might use force against them in order to effectuate his escape.

As such, Eric is guilty as an accomplice to battery.

III. Fred's Crimes

Accessory After the Fact

Most jurisdictions will label an individual who aids, abets, counsels or encourages a criminal in avoiding apprehension to be an "accessory after the fact" if they did not play any role in the crimes before they happened. Such a defendant is an accomplice, but is generally only punished for his own behavior in obstructing justice rather than the crimes of the principal.

Here, Fred knew that the computers Dan brought to his home were stolen from Vicky by Dan. Nonetheless, in exchange for two of them, he agreed to let Dan hide his truck on Fred's property. This action aided Dan in covering up the crime and aiding detection. Hiding the getaway vehicle that Vicky had seen Dan driving away increased the chances that Dan would get away with the theft of her property, and therefore Fred acted as an accessory after the fact.

Receipt of Stolen Property

If the jurisdiction in this case recognizes knowing receipt of stolen property as a criminal offense, Fred is likely guilty of that crime as well.

Dan specifically informed Fred that the computers were stolen, but Fred agreed to take them in exchange for hiding Dan's truck. Therefore, the scienter requirement is

met here because Fred had firsthand knowledge of the computers' stolen status but agreed to take them into his possession.

Answer B to Question 1

Dan's criminal liability:

Burglary:

Burglary is the breaking and entering at nighttime into the dwelling house of another with the intent to commit a felony therein.

Breaking and Entering:

A person must physically enter the dwelling house of another to commit a burglary. Here, Dan entered into the garage of Vicky's house by pushing a partially open side door all the way open. Although he did not literally break anything to enter into the garage because the door was already open, this element is still met. Only the slightest movement is required to "break" into the house. The door need not be locked either. Thus, by pushing the partially opened door to the garage open and subsequently entering the garage, Dan committed a breaking and entering.

At nighttime:

Although modern statutes have eliminated the requirement that a burglary be committed at night, the common law crime of burglary required that the burglary happen at night. Here, the facts indicate that Dan drove over to Vicky's house at nighttime. Thus, the common law element and any modern statutory elements are met.

Dwelling house of another:

The common law definition of burglary required that the breaking and entering be of the dwelling house of another, that is, where the person lived and slept. Modern statutes have expanded this element to include any structure such as an office building. Here, Dan broke into the garage of Vicky's house. Vicky did not sleep in her garage, but she did conduct her computer business out of her garage and frequently spent time in there. Additionally, the garage was connected to the house by the door that Vicky entered when she heard the noise. Thus, the garage is part of Vicky's dwelling house, and this

element is met under the common law definition of burglary. The element is also met under a modern statutory definition because a garage would be considered a structure.

Intent to commit a felony therein:

A person must have an intent to commit a felony inside the dwelling house at the time that they committed the breaking and entering. Here, when Dan learned that Vicky was going away on vacation, he informed Eric that he planned to take all of her computers. Thus, Dan intended to commit larceny, analyzed below, once he broke into Vicky's house. He had this intent at the time he pushed the partially open side door. Thus, Dan had the requisite intent to commit a felony once inside the garage, and his intent was simultaneous with his breaking and entering.

Because Dan broke and entered into Vicky's garage, at nighttime, with the intent to commit a larceny, he has committed burglary.

Larceny:

Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive.

Trespassory taking and carrying away:

A person must take the personal property from the possession of another and move the property, if only the slightest bit. Here, Dan loaded Vicky's computers into the back of the truck. The computers were in Vicky's possession because they were stored in her garage as part of her retail computer sales business. Thus, Dan has met the element of a trespassory taking and carry away

Personal Property of another:

Here, the computers belonged to Vicky as she ran a retail computer business out of her garage. Thus, this element is met.

Intent to Permanent Deprive:

A person must intend to permanently deprive the victim of the possession of the personal property or act knowing that there actions will result in a substantial risk of loss. Dan intent to take all of her computers, which he told Eric. Although the facts do not indicate what he was going to do with the computers once he took them, it is unlikely that he was going to return them to Vicky, especially after he pushed her out of the way and drove off with them. Thus, Dan acted with the intent to permanently deprive Vicky of the computers. Because all the element for larceny are met, Dan committed larceny when he took Vicky's computers.

Robbery:

Robbery is the trespassory taking and carrying away of the personal property of another by the use or threat of force from the person of another. Here, Dan took the computers from Vicky's garage and loaded them into his truck meeting the requirement of a trespassory taking and carrying away. The computers where Vicky's personal property, which she stored in her garage. Although Dan though Vicky was away when he entered the garage, Vicky heard him and stepping into the garage as Dan was loading the computers into the back of the truck. She stepped in between Dan and the truck, at which point Dan pushed her. Although the computers were not on Vicky's person, the computers were in the immediate area. When she yelled at Dan, he pushed her by using force. Therefore, Dan used force to take the computers from the area in Vicky's immediate control. Because of the use of force when he took Vicky's computer, he has committed robbery as well.

Battery:

Battery is the unlawful application of force on the person of another, committed with the intent to cause the application of force to another. Here, Dan pushed Vicky out of the way when she stepped in between him and the truck. This was the unlawful application of force on Vicky. He acted with the intent to push Vicky out of the way because he was trying to move her to escape. Thus, Dan committed a battery as well.

Eric's Criminal Liability:

Conspiracy:

A conspiracy is the agreement of two or more person for an unlawful objective, with the intent that the unlawful objective be obtained. Additionally, statutes now include that an overt act be committed in furtherance of the conspiracy. Here, Dan told Eric of his plan to take all of Vicky's computers while she was away on vacation. Eric told Dan that he wanted nothing to do with the theft although he let Dan borrow his truck knowing Dan would use the truck to take the computers away. Eric did not agree with Dan to commit the burglary of Vicky's home. He did not have the same unlawful as Dan. Although he handed Dan his keys, which would qualify as an overt act, he did not have the intent to burglarize Vicky's home and steal her computers. Thus, he did not enter an agreement with Dan for the unlawful purpose of stealing from Vicky. Eric is not liable for conspiracy.

Accomplice Liability:

An accomplice to a crime aids, encourages, counsels, or abets a person committing the crime, with the intent that the person commit the target crime. Here, Eric gave Dan his keys to his pickup truck so that Dan could use the truck to move the computers. This was aid to the principal, Dan, who actually committed the burglary because Dan was able to move the computers once he could use Eric's truck. Although Eric wanted nothing to do with Dan taking the computer away, he told Dan that he could borrow his truck if he needed it to carry the computers away. Thus, although Eric did not want to actually take part in the burglary, he acted knowing that burglary would take place. He knew that Dan would use the truck to burglarize Vicky's house. Eric had the requisite intent for accomplice liability. Because he both aided Dan in committing the crime against Vicky, and acted with the intent to aid Dan, Eric is liable as an accomplice.

Vicarious Liability for the Target Crime:

An accomplice is liable for the crimes committed by the principal if the principal's crimes were foreseeable. It was completely foreseeable that once Eric gave Dan the keys to his car, Dan would steal all of Vicky's computers and Dan would use Eric's truck to move them. Additionally, it was foreseeable that Vicky might be home even though she told Dan that she would be on vacation; it is possible that her vacation plans had to be cancelled, as it turned out. If Vicky or anyone else was in the house, it was foreseeable

that Dan would use some measure of force to take the computers. Thus, Eric is liable for Dan's crimes of burglary, larceny, robbery and battery because all of these crimes were foreseeable once Eric gave Dan his keys to his truck knowing Dan would try and steal the computers.

<u>Fred's Criminal Liability</u>:

<u>Accessory after the fact:</u>

Under the common law, accomplices were liable as accomplices in the first degree or in the second degree based on how they aided the principal and when their aid occurred. Modernly, a person who aids a felon in his escape is liable as an accessory after the fact. This is a separate crime, and an accessory is not liable for the principal's target crime. Here, Dan immediately went to Fred's house after he drove off from Vicky's house. He immediately told Fred what he had done. Thus, Fred knew that Dan was a felon and that he was trying to escape after he stole Vicky's computers. He aided Dan because he allowed Dan to hide the truck behind Fred's house. This would make it harder for the police to spot that truck that Vicky would report, and thus help Dan in his escape. Fred is liable as an accessory after the fact. Unlike Eric who acted as an accomplice, Fred's liability as an accessory does not mean that he is also liable for the separate crimes that Dan committed.

<u>Receipt of Stolen Property:</u>

Receipt of stolen property requires that the person receive, buy, or accept property knowing that the property was stolen. Here, Dan immediately told Fred what he had done once he arrived at Fred's house. Fred was aware that the computers belonged to Vicky, and that Dan had just unlawfully taken them from Vicky's garage. When Fred accepted two of the stolen computers in exchange for allowing Dan to hide his truck behind Fred's house, he accepted the property knowing that it was stolen from Vicky.
Thus, Fred is criminally liable for the crime of receipt of stolen property.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 6

Dan worked at a church. One day a woman came to the church, told Dan she wanted to donate some property to the church, and handed him an old book and a handgun.

Dan had originally intended to deliver both the book and the gun to the church's administrators, but he changed his mind and delivered only the book. He put the gun on the front seat of his car.

The next day, as he was driving, Dan was stopped by a police officer at a sobriety checkpoint at which officers stopped all cars and asked their drivers to exit briefly before going on their way. The police officer explained the procedure and asked, "Would you please exit the vehicle?"

Believing he had no choice, Dan said, "Okay."

After Dan got out of his car, the police officer observed the gun on the front seat and asked Dan if he was the owner. Dan answered, "No. I stole the gun. But I was planning to give it back."

Dan is charged with theft and moves to suppress the gun and his statement to the police officer under the Fourth Amendment to the United States Constitution and Miranda v. Arizona.

1. Is Dan likely to prevail on his motion? Discuss.

2. If Dan does not prevail on his motion, is he likely to be convicted at trial? Discuss.

ANSWER A TO QUESTION 6

1. **<u>Is Dan ("D") likely to prevail on his motion?</u>**

A. On Fourth Amendment Grounds. The Fourth Amendment protects the citizenry from unreasonable searches and seizures by the government. Thus violations require government action. They also require that the search or seizure be unreasonable, something that may be an issue for D. A search is a violation of a reasonable expectation of property; a seizure is an instance in which a person does not feel "free to leave" based on governmental presence. Generally, for a search to be reasonable, there must be a warrant. A warrant is granted by a neutral judge and must be based on articulable facts shown in an affidavit and must be reasonable and particular in terms of scope and time. In this case, there was no warrant to search D's car or to seize D. Thus, the search and seizure is presumptively unreasonable, subject to certain exceptions. One important exception is the checkpoint search; another such exception is consent. As an initial matter, a person must have standing to challenge the search. Because Dan was driving his own car, he will have standing.

i) The Checkpoint Search: Warrantless, even suspicionless, road checkpoints have been upheld by the Supreme Court under certain circumstances. First, the search must be supported by the justification of highway safety - including prevention of DUI, etc. Second, the checkpoints must be administered in such a way that officer discretion is very limited. This means that an officer must go through a protocol driven method of stopping the cars - i.e., either every car, or one of every ten cars, etc. The officer may not stop whatever car he subjectively thinks looks criminal. Third, the search must be reasonable in scope - it must not exceed the degree necessary to check for whatever the search is aimed at.

Here, it does appear that the checkpoint search is aimed at a valid justification - a sobriety checkpoint. This has been expressly held as constitutional by the Supreme Court. However, there are some other issues. For one, all cars are being stopped. While this is not presumptively unreasonable, it will be an issue, as it basically allows a

policeman to stop and seize every single person driving down the expressway. Secondly, the police required D to step out of his car. Under Supreme Court precedent, police only have been allowed to stop people. If sobriety or another criminal violation seem likely, then the people can be asked to exit their car. Because of the stopping of every car, and the demand that the drivers exit the car, this may be found to be an unreasonably long stop than what is necessary to meet the highway safety justification.

Conclusion: There is a chance that this checkpoint too far exceeds permissible protocol based on Supreme Court precedent. However, it is a close call. I will consider this to be a reasonable and permissible warrantless search, though the court may be convinced otherwise.

ii) Consent to Search: A person may validly waive his right to be free from unreasonable search and seizure by giving consent. Because it is likely that the stop and seizure was permissible up until the time that D was removed from his car, his consent to get out of the car would completely remove any potential objection to the search and seizure. The question will be whether the consent was freely and voluntarily given. Courts have found that when police attempt to search a person's house on the basis of consent, they do not have to tell that person that he or she has the right to refuse consent. This does not remove the "voluntary" aspect of consent. Here, Dan subjectively thought that he had no choice, but he still consented to getting out of the car. Assuming that the court would apply the consent rule used in home searches to a car search, this consent should be found to be voluntarily given.

Conclusion: Thus, the search for the gun was likely reasonable based on consent, regardless of whether or not it was legitimate based on checkpoint rules for the cops to remove him from his car.

iii) The Plain-View Doctrine: It appears, either because the entire checkpoint process was constitutional, or because D gave his consent to be moved from the car after a constitutionally permissible checkpoint stop, that the stop and seizure was constitutional

at the time Dan got out of the car. Thus, the police were constitutionally on solid ground when Dan was out of the car. The plain-view doctrine allows police who are legitimately in a place and see something criminal in plain-view to use that plain-view finding in court. The justification is that a person does not have a reasonable expectation of privacy in something the person lets the public see. Here, the gun will qualify under the plain-view doctrine. The police need not rely on any Terry type frisks of automobiles, or the automobile exception, because they do not apply. The gun was in plain-view, and to the extent that the officer "searched" the car by looking in the window, the plain-view exception applies.

iv) CONCLUSION: The search and seizure was reasonable and the gun should be admissible. The checkpoint rule may validate the entire process, but even if it doesn't then the checkpoint rule was at least legitimate up until the time D was asked to exit the car. Because he consented, there is no violation of the 4th amendment. The gun is admissible based on the plain-view doctrine.

B. Will D prevail on 5th Amendment Miranda Grounds? The 5th Amendment protects the right against self-incrimination. Miranda v. Arizona, a case based on this right, holds that a person's statements made cannot be used against him in court if the Miranda warning is not given. However, Miranda applies only to custodial interrogations, and not when a person is not in custody or voluntarily offers information. Miranda warnings include the right to remain silent, the right to counsel, the knowledge that counsel will be provided to a person, and the knowledge that anything said while in custody may be used against that person in court.

i) No Miranda Warnings were given. Here, the cops gave no warnings. Thus, D's statement is protected if it was made during a custodial interrogation.

a. Custodial. Custodial situations are those in which a reasonable, innocent person does not feel free to terminate the encounter and leave at will. Here, D was out of his car being asked in the company of some police. It seems up to this point to have been

a pretty friendly encounter, with the cops not showing much force or intimidation. Still, it's hard to say whether someone would reasonably feel at this point justified and correct in telling the police that this interview has to stop, and that the person is just going to drive away; especially before the sobriety check is performed. Thus, it's a close call. However, as D is out of his car, speaking to police, and about to be subject to a sobriety test, I would conclude that this is a custodial situation as a reasonable person would not feel free to terminate the questioning and leave.

b. Interrogation: An interrogative question is one that is reasonably likely to elicit an incriminating response. This is a pretty close call as well. On one hand, the officers had no indication that the gun was criminally possessed, and thus a mere question about it may not be enough to reasonably expect an incriminating response. On the other hand, if the gun was criminally possessed, then a truthful response would be incriminating. However, because the officer questioned D about the gun without any suspicion at all of it being stolen, I would find this to be a non-interrogative question. I.e., if they knew that there was a stolen gun around, and then they asked, that would be more likely to be an incriminating response. Here, this just seems like the officers inquiring about a gun in the car without any suspicion whatsoever. Thus, Dan's statement should be admissible. It also appears that even if he had denied the ownership of the gun, the bit about him admitting to the crime was completely volunteered. I.e., the cops did not ask him whether he stole the gun. They asked him if he owned it. Thus, D's answer could have been "No." Instead, and completely unprompted, D volunteered that he stole the gun.

ii) CONCLUSION: This was likely a custodial situation. The situation probably not interrogative, but it may have been. Even if it was not an interrogative scenario, D's statement that "I stole the gun" was not in response to any questioning by the police, and is voluntary and admissible. If it is found to be an custodial interrogative situation, the only part of the statement that will be inadmissible will be the answer to the policeman's question: "No."

2. **Which theft crime will D be convicted of?**

A. Theft crimes are specific intent crimes. This means that the thief must specifically intend the proscribed conduct - i.e., the thief must have the mens rea to permanently deprive the true owner of the object possession. Theft crimes include larceny (trespassory taking and carrying away of the personal property of another with intent to permanently deprive); larceny by false pretenses (larceny, plus getting actual title to the property by intentional and legitimate fraud); larceny by trick (larceny, but obtaining mere possession of the property by trick or deception); and embezzlement (the fraudulent conversion of the personal property of another by one legally in possession of that property).

B. No larceny crime lies: This will be an embezzlement, if it's anything. The reason is because the larceny crimes all require an intent to steal the item at the moment of possession. Here, Dan did not form the intent to keep the gun until he had already been in legitimate and lawful possession - as a courier for the church, and holding it for the church. The continuing trespass doctrine will not apply, because that applies to scenarios where a person has borrowed something against the owner's intent, but doesn't plan to steal it until later. That person is never in lawful possession. Because Dan's specific intent mens rea was not formed at the moment of possession of the gun, no larceny crime will lie.

C. Embezzlement: Embezzlement is:

i) Fraudulent: I.e., wrongful. Here, D was supposed to deliver the gun to the church, but has kept the gun. Thus, he is in wrongful possession of the gun at the time the gun was found on him.

ii) Conversion: This means the intent to permanently deprive the owner (Church) of possession. This will be the major issue. Dan tells the cops he wanted to give the gun back; further we have no indication that he ever meant to keep the gun forever - maybe he just wanted to drive around with it for a little bit. Because this is a specific intent crime, the prosecution will have a tough job proving that Dan subjectively and

specifically intended to keep the gun forever when he decided to not turn it in. It is important to note that once he kept the gun with intent to steal it, the crime was complete - it doesn't matter if he later developed the intent to return it. The prosecution could point to the fact that he was driving around with it and didn't turn it in when he was supposed to, which may help; so will the statement that "I stole it." This will be the issue at trial, right now it looks only probably proven at best.

iii) Of the personal property of another: The woman gave the gun to the church. As such, the gun was the property of the church.

iv) By someone in legal possession: Dan worked for the church, and it was his job in this instance to deliver the gun to the church. Thus, he has legal possession of the gun when the woman gave it to him. She gave it to him thinking he was going to give it to the church, because he was an employee of the church. The church charged him with the duty of taking donations and delivering them to it. Thus, this possession was legal. It is akin to a bank manager stealing money that he or she is supposed to be counting.

D. CONCLUSION: Embezzlement may lie, but only if the prosecution can prove specific intent to steal the gun, which will be tough.

3. **General conclusion: Gun and statement ("I stole it.") admissible. Embezzlement if there is specific intent, which there likely is.**

ANSWER B TO QUESTION 6

1. **Motion to suppress**

The fourth amendment prohibits unreasonable searches and seizures by the state. Miranda v. Arizona requires that warnings be given to an individual subject to "custodial interrogation" in order to protect the individual's right to be protected from self-incrimination. This is clearly state action, so the issues here are whether the gun was seized pursuant to an unreasonable search or seizure, or whether the statement was obtained in the context of custodial interrogation.

Exclusionary Rule and Fruit of the poisonous tree doctrine

The exclusionary rule requires that a court exclude evidence seized pursuant to an unlawful search or seizure. The fruit of the poisonous tree doctrine also provides that evidence that is obtained as a result of an lawful search must also be excluded, subject to certain exceptions. The exclusionary rule also requires the suppression of statements obtained in violation of Miranda, although the fruit of the poisonous tree doctrine does not apply to Miranda. Here, if the gun was seized during an unlawful search or seizure, or if the statement was obtained in violation of Miranda, this evidence must be suppressed.

Gun

Expectation of privacy

An individual has standing to challenge a search or seizure when they have a reasonable expectation of privacy in the place or property being searched. When an individual knowingly exposes something to the public, he no longer has standing to challenge a search of it. In this case, Dan placed the gun on the front seat of his car. It is not clear if his windows were tinted, or if someone could see easily into the car and see the gun. However, typically an individual has an expectation of privacy as to the inside and contents of their car, so Dan probably has standing to challenge the search. He certainly has standing to challenge any detention of his person, which would constitute a seizure if a reasonable person would not feel free to leave.

Routine checkpoint

Routine sobriety checkpoints are not considered seizures under the 4th amendment, so long as they are administered in a nondiscretionary manner and do not detain individuals for an unreasonable period of time. In this case, the officers at the checkpoint were stopping all cars, and were asking all drivers to briefly exit before going on their way. As a result, this checkpoint was not a seizure of Dan or his car, and did not implicate the 4th amendment.

Consent

In addition, a search or seizure is not unreasonable if an individual consents to the search. Valid consent must be knowingly and voluntarily given. Whether an individual validly consented is determined objectively, and the court considers whether a reasonable police officer would believe that the individual consented to the search or seizure. In this case, the police officer explained the procedure and asked if Dan would exit the vehicle. As a result, Dan appears to be informed about the procedure and his consent was knowing. His consent was also voluntary because he said okay, and stepped out of the car. A reasonable police officer would consider this to be valid consent.

Plain-View

The plain-view doctrine provides that where a police officer has a right to be in the place that he is, any objects in plain view may be validly searched or seized if there is probable cause to believe that the objects are products or instrumentalities of a crime. In this case, the officer had the right to be in the place that he was, as discussed above, because he had the right to stop Dan pursuant to the nature of the checkpoint and Dan's consent. At this time, the gun was in plain-view. The officer then asked Dan if the gun was his, and he responded that it was stolen. At that time, the police officer had not yet searched or seized the gun because he had not touched it or moved it in any way. However, when Dan confessed that it was stolen, probable cause arose for the officer to seize it, and the seizure was therefore lawful under the plain view doctrine.

Even if the statements were elicited in the context of a Miranda violation (to be discussed below), because the poisonous tree doctrine does not apply to Miranda, and because the gun was in plain view, the seizure of the gun was still lawful.

Dan's motion to suppress the gun is likely to fail.

Statement

A statement is obtained in violation of Miranda where an individual is in custody, and an officer is interrogating the individual without first providing the appropriate Miranda warnings. Here, it is clear that the officer did not provide Miranda warnings, so the question is whether Dan was in custody and whether the police officers question as to whether Dan owned the gun constituted interrogation.

Custody

An individual is in custody for the purposes of Miranda where a reasonable person in his position would not feel free to leave and end the detention. However, the supreme court has specifically held that routine traffic stops did not constitute custody for the purposes of Miranda. In this case, therefore, the routine security checkpoint would not be considered custody for Miranda purposes. It does not matter that Dan thought that he had no choice, because the test is objective, and not subjective. When the police officer asked Dan if he would consent, it is also possible that a reasonable person in Dan's position would have interpreted this question as indicating that he was free to not consent.

Because Dan was not in custody at the time that he made the statement, it was not illicit in violation of Miranda and is admissible.

Interrogation

A police officer is considered to be interrogating an individual where his questions are reasonably likely to illicit incriminating statements. Here, the officer asked Dan if he was the owner of the gun. This question does not seem designed to lead to an incriminating statement, only to determine who was the owner of the gun. In

responding to the question, Dan would have been expected to give a simple yes or no. In the event of a non, probably a statement about who it belonged to would be expected. From the perspective of the officer, it probably seemed unlikely that this question would illicit a confession to the theft of the gun.

Because Dan was not being interrogated at the time he made the statement, it was not obtained in violation of Miranda for this reason as well. Dan's motion to suppress the statement is likely to fail.

2. **Likelihood of conviction**

Elements of theft

Larceny, or theft, is the taking or concealing of the property of another with the intent to permanently deprive the owner or rightful possessor of that property of the property. The issue here is whether Dan took property that belonged to the church, and whether he intended to permanently deprive the church of the gun.

Taking

A taking of the property of another occurs where the defendant physically moves the property of another, or conceals it on his person. In this case, although Dan may have had a right to possess the gun at the time that the woman handed it to him, it belonged to the Church as soon as the woman handed it over and told Dan that she wanted the Church to have it. Although Dan may have intended to give the gun to the church, a taking of the gun occurred when he did not give it to the church and instead placed it in his car. When he turned over the book and mislead the church as to the donation, his right of possession did not continue to exist and his action met the first element of larceny.

Intent to permanently deprive

A defendant need not have had the intent to permanently deprive the owner or rightful possessor at the time that the taking of the property occurred. It is enough that the intent to permanently deprive arose after the taking. In this case, it is not clear if

Dan had the intent to permanently deprive. It would appear that he did not intend to ever give the gun to the church when he gave them only the book and placed the gun in his car. This is circumstantial evidence of an intent to permanently deprive and may be sufficient to meet the requirements for this element. On the other hand, he also told the officer that he was planning on giving it back. If he merely later changed his mind about the gun, this would be irrelevant, because if he had the requisite intent even this would be enough. However, this statement could also be circumstantial evidence indicating that he never had the required intent. This is a question for the jury to decide, depending on whether they believe the defendant's statements.

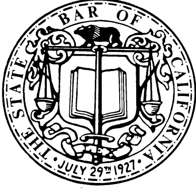
Mistake of law

Dan appears to believe that he "stole the gun." His beliefs about the illegality of his actions are immaterial however. His statement would be relevant only to determine whether he had an intent to permanently deprive. This is because belief that one completed an unlawful act that is actually lawful does not render the act unlawful.

Embezzlement

Embezzlement is a type of theft, and is the taking of a piece of property that the defendant had a right to possess at the time of the taking. Therefore, even if Dan had a right to possess the gun at the time, Dan could still be convicted of embezzlement, as opposed to basic theft. This conviction would turn on whether the jury found that placing the gun in the car was sufficient to indicate that Dan intended to convert the Church's property into his own and permanently deprive the church of it.

Because Dan took a gun that he did not have a right to possess, and because circumstantial evidence indicates he intended to permanently deprive the church of the gun, he is likely to be convicted at trial for theft.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question Number	Contents
1	Criminal Law and Procedure
2	Professional Responsibility
3	Remedies
4	Torts
5	Civil Procedure
6	Business Associations

Question 1

Max imports paintings. For years, he has knowingly bought and resold paintings stolen from small museums in Europe. He operates a gallery in State X in partnership with his three sons, Allen, Burt, and Carl, but he has never told them about his criminal activities. Each of his sons, however, has suspected that many of the paintings were stolen.

One day, Max and his sons picked up a painting sent from London. Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources, from a small British museum.

Max believed the painting that they picked up was the stolen one, but he did not share his belief with the others.

Having read an article about the theft, Allen also believed the painting was the stolen one but also did not share his belief.

Burt knew about the theft of the painting. Without Max's knowledge, however, he had arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later.

Carl regularly sold information about Max's transactions to law enforcement agencies and continued to participate in the business for the sole purpose of continuing to deal with them.

Are Max, Allen, Burt, and/or Carl guilty of:

(a) conspiracy to receive stolen property,

(b) receipt of stolen property with respect to the copy of the stolen painting, and/or,

(c) attempt to receive stolen property with respect to the copy of the stolen painting?

Discuss.

ANSWER A TO QUESTION 1

(a) Max, Allen, Burt, and Carl's liability for conspiracy to receive stolen property

Max

The issue is whether Max is liable for conspiracy to receive stolen property.

Conspiracy requires (i) an agreement, express or implied, to accomplish an unlawful objective or to accomplish a lawful objective with unlawful means, (ii) an intent to agree to commit conspiracy, (iii) an intent to achieve the unlawful objective, (iv) an overt act in furtherance of the objective of the conspiracy.

(i) Agreement

There was no express agreement among Max and any of his sons, Allen, Burt, and Carl that the paintings were stolen. Max has knowingly bought and resold paintings stolen from small museums in Europe, and operates a gallery in State X with his sons. Max never told them about his criminal activities; thus there was no way they could have expressly agreed to commit the conspiracy. However, Max and Ted have an agreement, because Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources.

There was no implied agreement among Max and his sons because there is no circumstance or conduct to indicate that they were in agreement. Max never affirmatively ensured that his sons were additionally compensated for keeping it a secret that they were undergoing criminal acts, nor had any of them given Max an indication confirming their understanding even if no explicit words were exchanged regarding the conspiracy. Here, each of his sons suspected that many of the paintings were stolen. However, Max had no idea that his sons might be aware. When Max picked up the painting that he thought was stolen, he did not share this belief with the others.

(ii) Intent to agree to the conspiracy

There must be at least two guilty minds to be liable for conspiracy. Under the minority jurisdictions, unilateral intent is sufficient if the guilty mind genuinely believed that the other non-guilty mind had the intent to agree to the conspiracy. There was no intent to agree to commit the conspiracy because Max never shared his beliefs with the others that he was dealing with stolen paintings. Here, Burt did not share his knowledge about the theft of the painting. Nor did Carl have an intent to agree, because he was solely continuing to participate in the business for the sole purpose of selling the information to the police. Thus, there could not have been an intent to agree to the conspiracy with either Burt nor Carl based on the majority rule. Under the minority approach, there is still no intent to agree because the facts indicate that Max did not tell Carl about his illegal activities and nothing suggests Carl shared his information with Max. Because there was no agreement in the first place among Max and any of his sons, Max did not have the intent to agree to commit the conspiracy.

Max and Ted have the intent to agree to the conspiracy, as evidenced by Max's arrangement to pick up the painting that Ted stole.

(iii) Intent to achieve the unlawful objective

There must be an intent to achieve the objective, which here is the intent to receive stolen goods. Max had the intent to receive the stolen goods because he has knowingly bought the paintings stolen from small museums in Europe.

(iv) Overt act in furtherance of the objective

There must be an overt act in furtherance of the objective, which is anything including mere preparation. Here, Max committed an overt act when he picked up the painting which he thought was the stolen painting.

Max is guilty of conspiracy with Ted.

Allen

See rule above.

(i) Agreement

Allen did not enter into an agreement to commit the conspiracy because even though he suspected that many of the paintings were stolen, and that he believed the one stolen by Ted was stolen, he did not share his belief with others.

(ii) Intent to agree

Allen did not intend to agree to the conspiracy because he did not share his belief that the painting may have been stolen with others. He only learned that the painting was stolen from reading an article and not from the other members.

(iii) Intent to achieve the objective

Allen may have had the intent to achieve the objective because he did nothing to stop the receipt of the stolen paintings.

(iv) Overt act

An overt act was the picking up of the painting sent from London.

Thus, Allen is not liable for conspiracy.

Burt

See rule above.

(i) Agreement

Burt made no agreement to enter into the conspiracy, because even though he suspected that they were stolen, and knew about the painting, he did not share his knowledge with the others. However, Burt has an agreement to enter into the conspiracy with Ted, because he arranged for Ted to send Max a copy of the stolen property and to retain the stolen painting itself for sale later.

(ii) Intent to agree

Burt had no intent to agree with the others, because he did not tell Max, and he arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later. However, Burt had the intent to agree with Ted, given that Ted was the other end of the deal and he arranged for Max to receive the stolen painting.

(iii) Intent to achieve the objective

Burt had the intent to achieve the objective because he knew the painting was stolen, and was going to sell it later at a more convenient time to gain a personal benefit.

(iv) Overt act

Overt act was committed when they picked up the painting from London.

Thus, Burt is liable for conspiracy with Ted.

Carl

See rule above.

(i) Agreement

Carl made no agreement to enter into the conspiracy.

(ii) Intent to agree

As discussed under Max's discussion, in the majority jurisdiction, because two guilty minds are necessary, there is no intent to agree since Carl was acting solely to sell the information to the police, and not to actually engage in the unlawful conduct. However, under the unilateral approach, one guilty mind, Max's guilty mind, would be sufficient for Max to be guilty of conspiracy. However, Carl would not be liable because he has no intent to agree himself.

(iii) Intent to achieve the objective

Carl has no intent to steal property, but is only participating to sell the information to the police.

(i) Overt act
Overt act was committed when the painting was received from London.

Conclusion

Because there is no agreement to conspire, neither are liable for conspiracy with each other, but Burt and Max are liable for conspiracy as a result of their individual agreements with Ted.

(b) Max, Allen, Burt, and Carl's liability for receipt of stolen property with respect to the copy of the stolen painting

Co-conspirators are liable for the target crime and any crimes committed in furtherance of the conspiracy. As above, anyone who was liable for the conspiracy would be liable for the crime of receipt of stolen goods. However, the target crime of receipt of stolen goods did not occur because it was a copy of the stolen painting. Thus, no liability for the target crime at this point.

Receipt of stolen property requires (i) receipt or control of stolen property, (ii) of personal property by another, (iii) with the knowledge that the property was obtained in a way that constitutes a criminal offense, (iv) with the intent to permanently deprive.

Max

Max knew the property was obtained in a way that constituted a criminal offense, because he arranged to buy the painting recently stolen by Ted, one of his criminal sources. A painting is personal property, and it was stolen by another, Ted. He had the intent to permanently deprive because his motivation was to resell the stolen paintings. However, he did not actually receive or come into control of the property because the one he received was actually not stolen. Thus, he is not liable.

Allen

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Burt

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Carl

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting. Further, Carl did not have the intent to permanently deprive because he was only working with the police so that the police could regain the stolen property and return it to its rightful owner.

Conclusion

Because no one actually came into receipt or control of the stolen property, they cannot be liable for the copy of the stolen painting.

(c) Max, Allen, Burt, and Carl's liability for attempt to receive stolen property with respect to the copy of the stolen property

Attempt requires the specific intent to achieve the criminal act and a substantial step in the direction of the commission of the act or dangerously close to the commission of the act.

Max

Max had the specific intent to receive stolen property. He believed that the painting was the stolen one. Even an unreasonable mistake would negate specific intent. However, if the facts were as he believed them to be, it would have been a crime, and thus, his intent cannot be negated. Mistake of fact is no defense. He committed a substantial step when he picked up the painting from Ted.

Allen

Allen also believed the painting was stolen because he read an article about the theft. Even if the stolen painting was not actually stolen, mistake of fact is no defense, and the

act would have been criminal had the facts been as he believed them to be, and thus, he is also liable for attempt.

Burt

Burt knew about the theft of the painting. He had specific intent to receive the stolen painting. But as to this copy, he had arranged for it to be simply a copy, and had told Max to retain the stolen painting for sale later. Thus, he had no specific intent to receive stolen property when he picked up the copy of the painting. Thus, he is not liable for attempt.

Carl

Carl suspected that many of the paintings were stolen. However, he did not have the specific intent to receive stolen property. He did not intend to permanently deprive because he was merely working with the police.

Conclusion

Max and Allen are liable for attempt, but Burt and Carl are not.

ANSWER B TO QUESTION 1

A. Conspiracy to Receive Stolen Property

The crime of conspiracy requires: (1) an agreement between two or more people to accomplish an unlawful or fraudulent purpose, and (2) an overt act taken in furtherance of the conspiracy. Under the majority rule, all parties to the conspiracy must agree to pursue the unlawful or fraudulent purpose; however, under the minority rule, the agreement of only one participant is sufficient to establish the conspiracy (for instance, in circumstances where one participant conspires in an effort to commit a crime and the other is an undercover law enforcement officer). Regarding the overt act requirement, nearly any act taken by any co-conspirators in furtherance of the unlawful objective will suffice.

Co-conspirators are liable for both conspiracy as a separate crime, for and all foreseeable crimes committed by any co-conspirators in furtherance of the unlawful objective. There is no doctrine of merger applied to conspiracy, and thus one may be convicted of both conspiracy and the underlying crime(s) committed in furtherance of it. A co-conspirator need not personally participate in an underlying crime committed by a co-conspirator in furtherance of the conspiracy, so long as the crime was a foreseeable result of the unlawful objective.

In this case, there was no express or implied agreement between M, A, B, and C to receive the painting stolen by and acquired from T. Agreement among co-conspirators need not be in writing and need not even be expressed orally, but rather can be implied from conduct and knowledge under the circumstances. However, there must be some evidence of an understanding and meeting of the minds among the parties of the conspiracy that they will pursue an unlawful objective for conspiracy liability to occur. Here, while M certainly had the requisite knowledge and intent to receive stolen property, he did not do anything to obtain the agreement of A, B, or C to do anything in furtherance of that objective. In fact, M never told any of his sons that he regularly

bought stolen paintings from Europe, nor did he share his belief as to the specific painting in question being the stolen one. Far from agreeing with them to receive stolen property, he was trying to shield them from that fact. Moreover, the mere fact that A. B, and C suspected their father's nefarious activities does not suffice to create an implied agreement between any or all of them and him to pursue that common unlawful objective, as they neither shared those suspicions and/or knowledge with M or with each other. Nor does it matter that A believed the painting was stolen (and that the one they picked up was the stolen one), as he never did anything, through words or conduct, to share that belief. The same is true for B and C -- though each independently suspected or knew of their father's activities, there is nothing to suggest that through words or conduct, an agreement was reached between M, A, B, and C (or any subcombination of them) to receive stolen property. Thus, there is no conspiracy liability for M, A, B, and C here.

Moreover, if evidence of an agreement existed, there would also be a question as to whether C's role sufficed to show an agreement among the co-conspirators. As noted above, under the majority rule, all co-conspirators must agree to pursue an unlawful objective. Thus, C's status as informant to law enforcement and participation for the sole purpose of continuing to deal with law enforcement would destroy his agreement to further the objective in question. As a result, under the majority rule there would be no conspiracy for this reason as well. Under the minority rule, however, the agreement of only one participant will do, and thus there would be an agreement, if evidence of it existed, notwithstanding C's status.

If evidence of such an agreement did exist, however, the overt act requirement would be satisfied. The four of them going to pick up the painting that T had sent from London would qualify as an overt act in furtherance of a conspiracy, as nearly any conduct that is in furtherance of the objective in question will qualify.

Further, if an agreement existed, the defense of impossibility would not be available to M and his sons. While a defense of legal impossibility would work (i.e., if the objective of

the conspiracy is not actually illegal, there can be no conspiracy liability for agreeing to commit a lawful act), here the defense would be factual impossibility (i.e., that though they had hoped to receive a stolen painting, it was not in fact the stolen one but rather a copy). Factual impossibility is not a defense to crimes in general, nor is it to the crime of conspiracy, and thus if evidence of an agreement had existed it would not prevent their guilt.

Lastly, M and T may well be guilty of conspiracy to steal and/or receive the stolen painting. M and T agreed for T to sell the stolen painting to M, and T took the act of sending the copy and arranging for payment in furtherance of the conspiracy. Similarly, B has conspired with T, and if he receives the stolen painting from T, he may face conspiracy liability for the theft and/or receipt or sale of the painting as well.

B. <u>Receipt of Stolen Property</u>

The crime of receiving stolen property requires that the defendant: (1) receive property that has been wrongfully taken from the rightful owner with the intent not to return it to its true owner, and (2) know that the property in question was wrongfully taken from its rightful owner. A defendant's knowledge may be express or implied under the circumstances, and, furthermore, the knowledge requirement may be met if the defendant under the circumstances is "willfully blind" to the fact that the property has been stolen.

In this case, however, the painting that M, A, B, and C received was not in fact stolen. Thus, they will not be guilty of having received stolen property based on their receipt of the copy. However, if B later does receive the true stolen painting from T, he would be guilty of this crime. With regard to receipt of the copy, however, B is not guilty for the reason that the copy was not stolen and for the additional reason that he knew that it was not the stolen item in question, and thus could not be found to have known or be willfully blind to the fact that it was stolen.

M, A, B, and C might also argue factual impossibility, as discussed above. However, since one of the prima facie elements of this crime is that the property is in fact stolen and that element is not met under these facts, there is no need to apply this defense here.

If M and his sons had received the authentic stolen painting, even in the absence of a conspiracy agreement among them, each of M, A, B, and C would be guilty of this crime. M and B plainly knew it was stolen, and A believed it was from the article, making his knowing receipt of the true article a crime (absent his immediately returning it to the authorities). C regularly sold information about M to the authorities, and thus also likely knew the painting was stolen. Thus, if they had received the true painting, each would be guilty of receipt of stolen property.

C. <u>Attempt to Receive Stolen Property</u>

Attempt is a specific intent crime. It requires: (1) that the defendant take sufficient action toward the completion of a crime, and (2) specifically intend to commit that crime. There is a split of authority as to the appropriate test to use for determining whether a defendant has done enough to constitute an attempt. While all courts agree that "mere preparation" for the crime is not sufficient to impose criminal attempt liability, some courts require that the defendant take a substantial step toward the commission of the crime. Other courts require instead that the defendant come dangerously close to succeeding in committing the underlying crime in question. Unlike conspiracy, the crime of attempt is subject to the doctrine of merger, meaning that if a defendant actually does commit the underlying crime, the attempt merges into the completed crime, and the defendant thus cannot be liable both for attempt and for the completed crime.

M and A: In this case, M knew the painting had been stolen and believed the copy was the real thing, and A also knew it had been stolen and believed that this one was the real thing. Thus, M and A each specifically intended to commit the crime of receiving stolen property. Moreover, each took a substantial step toward doing so, and came

dangerously close, by picking up the copy of the painting. But for B's dirty double-crossing of his father and brothers, M and A would have succeeded in committing this crime. Thus, each of M and A is guilty of attempt to receive stolen property, regardless of the fact that the painting they picked up was a copy.

M and A will argue factual impossibility, as discussed above. However, this defense will fail, as factual impossibility is not a defense in general, nor is it a defense to attempt. After all, if M had tried to pickpocket someone's wallet but that person had left their wallet at home, M would nonetheless be liable for attempted larceny. So it is here with regard to attempt liability.

B: B presents a different case. Clearly he took a substantial step toward and came dangerously close to committing the crime, but he did not specifically intend to commit the crime of receiving stolen property by taking the copy of the painting. He in fact knew that the painting they picked up was a copy, and had not been stolen, and thus lacked specific intent. Thus, B would not be guilty under these circumstances for attempted receipt of stolen property by taking the copy of the painting sent from London. As noted above, he may be guilty for other conduct -- such as actually receiving the true stolen painting if T sends it to him, or for receiving proceeds of the sale of the true stolen painting under his agreement with T.

C: C, however, did believe that the painting that he picked up with the others was in fact stolen, and thus, like M and A, would be guilty for attempt. The fact that he was participating with law enforcement would not change this fact. C might be able to obtain immunity from prosecution as a result of his assistance, but absent a grant of immunity, he would be guilty along with M and A of attempted receipt of stolen property.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 4

One summer afternoon, Officer Prowl saw Dan, wearing a fully buttoned-up heavy winter coat, running down the street. Officer Prowl ordered Dan to stop. Dan complied. As Officer Prowl began to pat down Dan's outer clothing, a car radio fell out from underneath. Officer Prowl arrested Dan and took him to the police station.

At the police station, Officer Query met with Dan and began asking him questions about the radio. Dan stated that he did not want to talk. Officer Query responded that, if Dan chose to remain silent, he could not tell the District Attorney that Dan was cooperative. Dan immediately confessed that he stole the radio.

Dan was charged with larceny. He retained Calvin as his attorney. He told Calvin that he was going to testify falsely at trial that the radio had been given to him as a gift. Calvin informed Dan that he would make sure he never testified.

Calvin filed motions for the following orders: (1) suppressing the radio as evidence; (2) suppressing Dan's confession to Officer Query under *Miranda* for any use at trial; and (3) prohibiting Dan from testifying at trial.

At a hearing on the motions a week before trial, Dan, in response to Calvin's motion for an order prohibiting him from testifying, stated: "I want to represent myself."

1. How should the court rule on each of Calvin's motions? Discuss.

2. How should the court rule on Dan's request to represent himself? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Ruling on Calvin's Motions

Motion to Suppress the Radio as Evidence

Fourth Amendment Protections

The Fourth Amendment, incorporated to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their person, home, and personal effects. A seizure occurs when an individual's freedom of movement is limited by an officer such that the person would not feel free to leave the officer's presence. A search occurs when an officer gathers information in which the individual has a reasonable expectation of privacy, such as a physical search of the person's body, a search of the person's home, or eavesdropping on private conversations through wiretapping. However, if the officer is in a location in which he is entitled to be, he may observe the person's conduct or identify contraband that is within plain view, since people do not have a reasonable expectation of privacy for things they disclose to the public, such as speaking on a public street. The general standard for reasonableness to affect a search or seizure is probable cause, although lesser standards apply in certain circumstances, as discussed below. The Fourth Amendment generally requires that police officers obtain a search warrant before searching a person and an arrest warrant before an arrest to ensure that the probable cause standard is met.

Terry Stop

Under the Supreme Court decision in Terry, an officer may stop and search an individual based on less than probable cause. A "Terry stop" is a reasonable search under the Fourth Amendment when two conditions are satisfied. First, the officer must have reasonable suspicion, based on specific and articulable facts, that the individual is engaged in criminal activity in order to stop the person. The officer may then question the individual. In order to search the person, the officer must have reasonable

suspicion, based on specific and articulable facts, that the person is armed. This is reasonable because if the person is armed, the officer is in possible danger.

Seizure

A seizure occurs when an officer restricts the freedom of movement of a suspect such that the individual would not be free to leave the officer's presence. The court will take into account all of the circumstances, including the officer's language and tone and the setting in which the confrontation took place. However, merely being in a physically confined area (such as a bus) will not make the officer's interaction with a person into a seizure. If the officer orders the individual to stop, the seizure does not occur until the person complies with the officer's instructions and his movement is actually restrained.

Here, Officer Prowl ordered Dan to stop while he was running down the street. He did not approach Dan and ask him to voluntarily speak with him. Rather, ordering "stop" would be interpreted by a reasonable person to be a use of police authority to restrain Dan's movement such that Dan could be subject to penalty if he refused. Dan complied with Prowl's order and actually stopped. Thus, a seizure occurred.

Reasonable Suspicion to Stop

The seizure of Dan will be reasonable under the Fourth Amendment, per Terry, if Prowl had reasonable suspicion to stop Dan. In order to satisfy the Fourth Amendment, Officer Prowl must have reasonable suspicion that Dan is engaged in criminal activity. This must be more than a mere hunch or an anonymous tip that the officer has no reason to trust. The officer must be able to identify specific facts that demonstrate objectively the reasonable suspicion to stop the person.

Here, Dan was running down the street wearing a fully buttoned-up heavy winter coat on a summer afternoon. It is objectively unusual to see someone wearing such a coat during the summer, and Prowl's experience would likely indicate to him that people use such coats to conceal contraband, such as stolen property or drugs. Further, Dan was running. Because of the coat, it would seem unlikely that Dan was running for exercise, since he would be overly hot during the summer.

Because these facts, taken together, indicate that Dan was acting objectively suspiciously, Prowl had reasonable suspicion to stop Dan.

Search

A search occurs when an officer infringes upon an individual's reasonable expectation of privacy. The individual's person is always an area in which the person has a reasonable expectation of privacy unless that expectation has been reduced for some reason, such as in prisoners and parolees. We do not have any indication that Dan was a parolee or on probation. Thus, when Officer Prowl patted Dan down, a search occurred.

Reasonable Suspicion to Perform Pat-Down

Under Terry, Prowl's search of Dan will be reasonable if he had reasonable articulable suspicion that Dan was armed. Although Dan's activity was objectively suspicious, he did not do anything and we have no indication that Prowl had prior knowledge that would make it objectively likely that Dan was actually armed. Prowl did not even speak with Dan after ordering him to stop, but immediately began a pat-down. Prowl would argue that Dan's bulky coat could easily have concealed a weapon, and Prowl's search was thus for self-protection. However, a physical search based on no independent facts suggesting that the person is armed is only reasonable following an arrest. Here, Dan was not arrested when Prowl performed the search.

Prowl's search of Dan was not based on reasonable articulable suspicion and was therefore a violation of Dan's Fourth Amendment rights.

Exclusion of Evidence

Evidence seized in violation of an individual's Fourth Amendment rights will generally be excluded in any subsequent criminal prosecution of that individual. The exclusionary rule operates as a deterrence mechanism to discourage police officers from committing constitutional violations. Although there are some circumstances in which the Supreme Court has concluded that the deterrent effect of the exclusionary rule is too inadequate to justify exclusion (such as knock-and-announce violations), the

exclusionary rule operates in the Terry stop circumstances. Any contraband that was discovered as a result of an illegal search subject to the exclusionary rule will be excluded from evidence.

Here, Prowl violated Dan's Fourth Amendment rights when he unreasonably searched Dan. Therefore, the court should order that the radio be suppressed.

Motion to Suppress Dan's Confession

Fourth Amendment

First, Dan would argue that the Fourth Amendment violation directly led to his confession, and thus the confession should be excluded under the "fruit of the poisonous tree" doctrine discussed above. However, the Fourth Amendment exclusionary rule operates to exclude physical evidence rather than statements. Thus, Dan's confession would not be excluded by the Fourth Amendment.

Fifth Amendment Protections

The Fifth Amendment right against self-incrimination protects suspects from being compelled to make statements against their own penal interests. The Supreme Court in Miranda interpreted this protection to require the police to effect certain warnings to individuals who are subject to custodial interrogation at the hands of police to offset the inherently compelling pressures of police interrogation.

Miranda Warnings

Police officers must give each suspect warnings about his rights once he is subject to custodial interrogation. The warnings must inform the suspect of his right to remain silent, his right to an attorney, and that the attorney will be provided for him if he cannot afford to pay.

Custodial

The "custodial" element is satisfied if the person is subject to police custody at the time of questioning. Once the individual is arrested, he is generally understood to be

in police custody. Even before an arrest, the suspect may be subject to custody if he is being restrained in a formal setting, such as a police station, and is not told that he is free to leave at any time. The suspect need not have been indicted or charged for the custody element to be satisfied.

Here, Dan had been arrested and taken to the police station, where Query began questioning him. Because Dan was in a formal setting and had actually been arrested, the custodial element is satisfied.

Interrogation

The "interrogation" element requires that the police actually be asking the defendant questions that would be reasonably likely to lead to an incriminating response. A question such as whether the suspect would like a drink of water or whether he was comfortable would not constitute interrogation.

Here, once Dan was in custody, Query began asking him questions specifically about the radio. Thus, Dan was being interrogated.

Because both elements of Miranda are satisfied here, Query violated Dan's Fifth Amendment right against self-incrimination by failing to read him Miranda warnings.

Dan's Statement That He Did Not Want to Talk

Once an officer has read the suspect his Miranda rights, any express invocation of those rights must be strictly honored by the officers, who must then stop interrogating the suspect.

Here, Query should have read Dan his rights. Dan's explicit statement that he "did not want to talk" likely qualifies as an invocation of his right to remain silent. Because Query continued to interrogate Dan following Dan's express invocation of his right to remain silent, Query violated Dan's Fifth Amendment rights.

Exclusion of Statement under Fifth Amendment

The remedy for a Fifth Amendment violation is an exclusion of the improperly obtained confession. However, generally speaking, any physical fruits of the confession,

such as evidence seized in reliance on statements made in the confession (such as the location of contraband) are not excluded. Further, the statement may still be used to impeach the suspect if he were to testify in the criminal case.

Here, Dan confessed that he stole the radio. Because Dan's Fifth Amendment rights were violated, the statement should be excluded from the prosecution's case-in-chief, although it may still be used to impeach Dan.

Voluntariness

The Fifth and Fourteenth Amendments of the Constitution also protect individuals against compulsory statements. A statement is compulsory if it was made involuntarily. An involuntary statement could be made as a result of legal compulsion (such as a subpoena to testify before a grand jury) or by improper police tactics, such as physical violence, threats, or promises that the suspect will not be prosecuted if he confesses. Although Calvin did not move to suppress the statement on voluntariness grounds, Dan would be wise to do so, since exclusion on voluntariness grounds would prevent the statement from being used against Dan on cross-examination.

Here, Query told Dan that he "could not tell the District Attorney that Dan was cooperative" if he refused to speak. Although this statement does not explicitly promise Dan that he would not be prosecuted based on the statement, Dan would argue that Query suggested that he could guarantee different penal consequences based on whether Dan confessed. Query would say that he merely suggested a statement he could make to the prosecution, not that the prosecution would react in any specific way.

Because Query did not make any actual promise that Dan's penal outcome would be different, the statement was likely voluntarily made.

Exclusion of Statement for Voluntariness

If Dan's statement were involuntarily made, the statement itself would be excluded for all purposes, including impeachment. Further, any physical fruits of the statement would be excluded as well. Thus, because Dan wants to testify at trial, he should still argue that the statement was involuntary, even if this argument is likely to fail.

Motion to Prohibit Dan from Testifying

Defendant's Right to Testify

Each defendant has a constitutional right to testify in his own trial. Although an attorney has a professional ethical obligation to counsel his client not to lie on the stand, the lawyer cannot prevent the client from doing so. Under the ABA authorities, the attorney must seek to withdraw from the representation if he knows that the client intends to perjure himself. The court could then grant leave to withdraw, but may also decide that efficiency and justice require continued representation.

Thus, the court should rule against Calvin's motion to prevent Dan from testifying. However, it would be proper under the ABA rules for Calvin to seek to withdraw from representing Dan.

2. Dan's Request to Represent Himself

Sixth Amendment Protections

The Sixth Amendment right to counsel protects a criminal defendant's right to be represented by an attorney in all critical stages of prosecutory action by the state. The Sixth Amendment right includes the right to counsel of choice or to decline the right of representation if the defendant is competent to refuse.

Right of Self-Representation

The Sixth Amendment includes a right of self-representation. The court must grant the right if the defendant is competent.

Competence to Stand Trial

The general rule is that if the defendant is competent to stand trial, he will be found competent to represent himself. To be competent to stand trial, the defendant must understand the nature of the proceedings against him and be aware of the consequences of the proceedings.

Here, we have no facts suggesting that Dan has a mental defect that would affect his competence. Thus, the competency to stand trial is satisfied.

Competence for Self-Representation

The Supreme Court has stated that competence for the purpose of self-representation does not require the defendant to be legally sophisticated or be able to do an objectively good job representing himself. Although the Court has recognized that most defendants would be better served by counsel than by self-representation, the Sixth Amendment guarantee requires the court to allow the defendant to represent himself, regardless of whether the court finds that his action is in his own best interest.

Thus, although Dan does not appear to have any particular legal knowledge or skills, such knowledge is not required to trigger the constitutional right to self-representation. Therefore, the court must allow Dan to represent himself.

Advisory Counsel

The court may require that the individual be assigned advisory counsel to assist him. The role of advisory counsel is to provide the defendant with legal advice and information, but advisory counsel is not allowed to make the strategic decisions that appointed or retained counsel may, such as choosing to call only certain witnesses (other than the defendant) or present certain evidence. The advisory counsel role serves as a layer of protection for a self-representing defendant in order to protect the integrity and efficiency of the judicial process.

Thus, although the court must allow Dan to represent himself, it could choose to appoint Calvin or another attorney as Dan's advisory counsel.

QUESTION 4: SELECTED ANSWER B

1. HOW SHOULD THE COURT RULE ON EACH OF CALVIN'S MOTIONS

(1) Suppressing the Radio as Evidence

Exclusionary Rule

Where evidence is obtained unlawfully under the Fourth, Fifth, or Sixth Amendments, that evidence is generally inadmissible against the accused. In Mapp v. Ohio, the Supreme Court held that the exclusionary rule is incorporated against the states. Moreover, under the fruit of the poisonous tree doctrine, all evidence obtained as a result of an invalid search or confession is also suppressed unless the government can prove (i) an independent basis; (ii) inevitable discovery; or (iii) an intervening act of free will.

Fourth Amendment Search and Seizure

The Fourth Amendment provides that a person be free from unreasonable searches and seizure of their persons, homes, papers, or effects. To that end, Dan (D) should be able to successfully argue that he was unlawfully seized and that the radio must be excluded as the fruit of an invalid seizure.

(1) State Action

The Fourth Amendment is only triggered by state action. Thus, a state or federal police officer or a private officer that has been deputized by the city or state must be the actor in order to render the Amendment applicable. Here, Officer Prowl (OP) appears to be a state police officer and hence the state action requirement is satisfied.

(2) Search / Seizure

A "seizure" occurs under the Fourth Amendment where the circumstances of the encounter are such that a reasonable person would not feel free to decline the encounter. A "search" under the Fourth Amendment only occurs where the D has a

reasonable expectation of privacy in the area and thing searched, or where there is a government intrusion into a constitutionally protected area.

Seizure. Here, D was ordered to stop by OP. A police officer may ask a person if they are willing to talk, at which point the person is free to decline and is not seized. However, where an officer commands a person to stop, their authority as a police officer is such that a reasonable person does not feel free to decline the encounter. Thus, D was seized by OP when he was commanded to stop and he did, in fact, stop.

Search. Here, D does not have a reasonable expectation of privacy in his movement on the streets. OP is free to follow him as much as he wants. However, D does have a reasonable expectation of privacy in the things he keeps out of public view, hidden under his coat. Merely stepping out onto the street does not render everything in D's possession "public." In this case, OP also intruded upon a constitutionally protected area, i.e., D's person. By patting down the outer clothing that D was wearing, OP intruded on his person and searched him under the Fourth Amendment.

Thus, if there is not a valid basis under the Constitution for this search and seizure, the evidence was obtained in violation of the Fourth Amendment and must be suppressed.

(3) Warrant Requirement

A search or seizure is generally unreasonable unless the police have a warrant, or an exception to the warrant requirement applies. A warrant must be founded on (i) probable cause; (ii) state with particularity the persons and places to be searched; and (iii) be executed in a valid manner. Where a warrant that is otherwise invalid is relied upon in good faith by the arresting officers, the search or seizure will be upheld as long as the warrant was not: (i) so lacking in probable cause or particularity as to render reliance unreasonable; (ii) obtained by fraud on the magistrate; or (iii) the magistrate was impartial.

Here, there was no warrant to arrest or search D. Thus, the search and seizure are unconstitutional unless an exception to the warrant requirement applies.

(4) Warrant Exceptions

Terry Stop. An officer may engage in what is known as a temporary "investigative detention" under the Supreme Court's Terry framework, provided the officer has reasonable suspicion of criminality on the part of the D which is based on "articulable facts."

Here, the only facts that are given is that D was running down the street one summer afternoon wearing a fully buttoned, heavy winter coat. The fact that it was summer and D was wearing a fully buttoned up winter coat is certainly suspicious. Indeed, a reasonable person would almost have to assume that the purpose of wearing such a coat would be to hide evidence of contraband. If it is warm outside, as it usually is in the summer, a coat would be unnecessary. On the other hand, D may live somewhere like San Francisco where summers can be quite cold; D may have had a cold or some condition that makes him cold; or D may have been training for a sporting event such as wrestling where people force themselves to sweat more. The Court has held that headlong flight from an officer after seeing the officer is evidence sufficient to help support reasonable suspicion, but merely running has never been held to be reasonable suspicion absent additional facts.

Nevertheless, given that D was running down the street and wearing a coat that was fully buttoned during the winter, a court would likely find that the officer had reasonable suspicion--but certainty not probable cause--to detain D for a short period of time to investigate the potential criminality.

Terry Search. An officer that has reasonable suspicion of criminality based on articulable facts may also conduct a Terry search of the D, provided he has reasonable grounds for believing that the D is armed and dangerous. A Terry search must be

limited to a pat-down of the outer clothing of the D, and must be limited to a search for weapons. In order to remove evidence that is not a weapon, the officer must have probable cause to believe the other evidence, e.g., drugs or a car stereo, is illegal.

Here, there is no real evidence that D is armed and dangerous. He was running wearing a coat, which--as discussed above--is sufficient to find reasonable suspicion that D just committed some type of theft offense and is trying to conceal the contraband in his coat. However, D will argue there is really no reason to believe that he was armed at this point. OP cannot simply claim he thinks D is armed because he seemed sketchy. On the other hand, OP might be able to convince a court that many theft offenses are committed with a weapon and hence that D could reasonably have been carrying a weapon. The fact that D was not actually carrying a weapon will not undermine this argument. While this is a close call, a court would likely permit OP to conduct a Terry search here.

The scope of the search seems permissible in this case, as OP merely patted down D's outer clothing. As he did so, a car radio fell out. The car radio is not a weapon, but may be admissible under the plain view doctrine, discussed below. In any event, the search and seizure itself was not unconstitutional.

Plain View. The Plain View doctrine applies where (i) the police have a right to be where they are viewing; and (ii) they see evidence and it is immediately apparent the evidence is contraband. Here, as discussed above, OP had the right to stop D under Terry, and hence he had a right to be where he was viewing the radio as it fell from D's coat. Moreover, it was immediately apparent to OP that the car radio was contraband. Indeed, D was running down the street, in a coat, in the summer, with a car radio hidden inside his coat. The radio was quite apparently stolen and hence admissible under the plain view doctrine.

Consent. While D has a constitutional right not to be searched or seized, the right is subject to waiver, i.e., the search or seizure is not unreasonable if D consents to the

search or seizure. Consent must be knowing and voluntary. However, it is not required that one know they have the right to decline the encounter.

Here, D is not likely to be deemed to have consented to either the seizure or the search by OP. Indeed, as discussed above, he was seized. A defendant is not deemed to consent when seized. Moreover, with respect to consent to search, OP just started patting down D's outer clothing. Consenting to questioning is not within the scope of consenting to search. Thus, even if D were deemed to consent to questioning he would not be deemed to consent to the search. In any event, the search and seizure are valid under Terry.

Conclusion

The evidence of the radio is admissible given that the search and seizure were valid under a Terry stop and frisk and the radio fell out of D's coat and was in plain view.

(2) Suppressing Dan's Confession to Officer Query

The Fifth Amendment protects a person from being compelled to be a witness against his or her self. Due to the inherent risks of coercion in police custodial interrogations, the Supreme Court has held that a defendant must be given Miranda warnings before any confessions by the defendant are admissible against the defendant, unless used to impeach.

Miranda Warnings

Miranda is triggered where the D is: (i) in custody; and (ii) interrogated.

Custody. For purposes of Miranda, custody is defined as a place where a reasonable person would not feel free to leave. Moreover, custody is assessed by looking to whether the situation involves the same inherently coercive pressures as stationhouse questioning.

Here, D was arrested and taken to a police station where he was then met by Officer Query (OQ). D had no ability to leave, and no reasonable person would feel free to leave in this situation. Moreover, this is stationhouse questioning, so the inherent pressures that Miranda is meant to protect against are at their pinnacle here. Thus, D is in custody.

Interrogation. Interrogation is defined as any line of questioning that a reasonable officer would find likely to illicit an incriminating response. Here, OQ was asking D questions about the radio. This is clearly questioning that is likely to generate an incriminating response. Thus, D was interrogated.

As both elements of Miranda are met, D was required to receive Miranda warnings. OQ ought to have told him he had the right to remain silent; that anything he said could be used against him in court; that he had the right to an attorney; and that he had the right to have an attorney appointed if he could not afford one. Since D was not warned, his confession is inadmissible against him (unless it is used to impeach him).

Invoking Miranda

D was not warned, but in this case it even seems that he attempted to invoke his Miranda rights. To invoke the right to remain silent, the D must clearly and unequivocally indicate his intent to invoke. Here, D stated to OQ that he "did not want to talk." That may not use the word "remain silent" but no reasonable officer could think that "not want[ing] to talk" means anything other than remain silent. After having said that, OQ tried to coerce him into talking. This is not permitted. OQ must honor D's request and stop talking. By badgering him after he invoked, any later confession is in violation of Miranda. In this case, since D was not even Mirandized, his is irrelevant. However, even if D were Mirandized, the fact that OQ failed to honor his request to remain silent is a separate basis for excluding this statement.

Conclusion

The confession must be suppressed (except for purposes of impeachment). Thus, the court should grant the motion in part, subject to use for impeachment.

(3) Prohibiting Dan From Testifying At Trial

Constitutional Right to Testify in Defense

All defendants have a constitutional right to testify in their defense at a criminal trial. This right trumps any ethical obligation that Calvin (C) has to the court or the profession. Indeed, neither C nor the court can prohibit D from testifying in this situation.

[NOTE: The proper response by C would have been to inform D that he cannot testify falsely and persuade him to testify truthfully. If that failed, C should have tried to withdraw from the representation. If the court failed to allow him to do so, under the ABA C should have then informed the tribunal and allowed the tribunal to take the necessary steps. Under the California rules, no disclosure is permitted. Instead, C should have let D testify and questioned him up until the point he knew he was going to testify falsely, then, at that point, allow D to testify in the narrative and in no way rely upon D's narrative in closing. Under any ethical rule and the Constitution, the prohibition on D testifying is not permitted.]

Conclusion

The court should rule that D be permitted to testify, as a criminal defendant has a constitutional right to testify. The tribunal may take necessary steps to remedy the false testimony, such as requiring narrative testimony.

2. HOW SHOULD THE COURT RULE ON DAN'S MOTION TO REPRESENT HIMSELF

Faretta Motion

The right of a criminal defendant to be represented by counsel was held to require the right of self-representation in Faretta. Where a Faretta motion is timely made, and the court is satisfied that the defendant is competent enough to represent himself, the court is required to respect the dignity of the defendant and allow him to have the right to choose for himself and represent himself. A court may also appoint back-up counsel to assist (but not actually control) the representation, but that is not constitutionally required.

Competence. The Supreme Court recently held that a defendant may be competent to stand trial but nevertheless incompetent to represent himself.

In this case, we have very little information on whether D is capable of representing himself. It appears he was found competent to stand trial, or at least that no such hearing has been conducted to this point. Thus, given no facts indicating that D cannot represent himself, he would likely be deemed competent to stand trial. The judge would have to verify that D was able to understand the charges and the legal issues, but--again--there is nothing in the facts indicating D cannot handle this. The court would also look to the issues between D and C and use this as a further justification for allowing D to represent himself.

Timeliness. A court need not allow a defendant to represent himself if doing so would cause an undue delay in the case. The request must be timely.

Here, D made the request to represent himself after an attorney was appointed and various pretrial motions were made. Indeed, the motion came just a week before trial. To allow D to testify would likely require giving D extra time to prepare the case himself, which would mean that the trial would have to be pushed back. That would interfere with availability of witnesses and with the efficiency of the court and the ability for the prosecution to put on its case. D might also win sympathy from the fact C is not permitting him to put on his case. However, that is more of a reason to substitute

counsel than to let D represent himself. In this situation, D would need to show he was immediately prepared to go to trial. Delay of any sort would be sufficient to permit the court to deny his Faretta motion.

Conclusion

Although D is likely competent to represent himself, but the court is likely to deny the motion as untimely, given that the trial date is set for only one week from the date of the motion and given that D would likely need a good amount of time to fully prepare himself for trial.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

QUESTION 3

Owen, a police officer, had a hunch that Dora might be selling methamphetamine from her house in the country. To learn more, Owen drove to Dora's house with a drug-detection dog and waited until she left.

Owen first walked the drug-detection dog around Dora's house. At his direction, the dog jumped up on the porch, sniffed the front door, and indicated the presence of methamphetamine.

Owen then propped a ladder on the back of the house, climbed to the top, and peered into a second-story bedroom window. He saw a small box on a bedside table, but could not read the label. He used binoculars to read the label, and saw that it listed ingredients that could be used to make methamphetamine.

Owen went back to his car, saw Dora return home, and then walked back to the house and crouched under an open window. He soon overheard Dora telling a telephone caller, "I can sell you several ounces of methamphetamine."

Dora was arrested and charged with attempting to sell methamphetamine.

Dora has moved to suppress evidence of (1) the drug-detection dog's reaction, (2) the small box, and (3) the overheard conversation, under the Fourth Amendment to the United States Constitution.

How should the court rule on each point? Discuss.

QUESTION 3: SELECTED ANSWER A

The Fourth Amendment of the US Constitution - incorporated to the states by the Due Process Clause of the 14th Amendment - protects citizens from unreasonable search and seizure. The touchstone of a search and seizure is reasonability. This means that to conduct a search, the police officer or agent of the state must have a valid search warrant. Where there is no warrant, the search will be unreasonable unless one of the valid warrant exceptions exists.

Exclusion Rule - Suppression Remedy

Evidence seized in violation of the fourth amendment will be suppressed at trial. Further, under the **fruit of the poisonous tree** doctrine, all evidence gathered as a result of an unlawful search will be suppressed as well unless the government can show that the taint of the unconstitutional activity has been sufficiently attenuated.

State Action

A "search" requires government action. Here, Owen is a police officer; thus, this requirement is met.

"Search"

A search only occurs where the government physically intrudes on the person's person, property or effects, or when the government intrudes on a person's "reasonable expectation of privacy" (REOP).

Because there is no indication that Officer Owen had a warrant for any of the activity discussed below, his actions are unreasonable if they constitute a "search" and if no valid warrant exception applies.

1. The Dog's Reaction

The issue here is whether the use of the drug-sniffing dog at the front porch was a search.

Government Action

As discussed above, the fourth amendment is only triggered by state action. Action by a police officer is sufficient. Here, Owen is a police officer. Thus, there is state action.

"Search"

A search exists where the government interferes with a reasonable expectation of privacy (REOP) or where there is a physical trespass into constitutionally protected space (persons, places or effects).

Trespass Theory

The Supreme Court recently held that bringing a drug-sniffing dog to the front porch of a home for the purpose of searching for drugs is a "search" under the fourth amendment. Although the front door is typically held open under implied consent doctrine, the use of a drug-sniffing dog exceeds this consent and is therefore a trespass. (Note: this is unlike the case of using a drug-sniffing dog at a traffic stop, which is reasonable under the fourth amendment.)

Here, Owen brought the drug-sniffing dog to the porch for the purpose of checking for drugs. He did not have a warrant to do so. Because Dora did not consent to this, this is a search under the trespass theory of the 4th amendment.

REOP

Dora could also argue this is a search under the REOP theory of the 4th amendment. A search occurs where state actors intrude on one's reasonable expectation of privacy. AN REOP exists where the person holds a subjective expectation of privacy and the expectation is objectively reasonable. There is always an REOP in one’s own home. Here, the home belonged to Dora. Thus, Dora could argue that a person has an REOP in her front door in regards to drug-sniffing dogs.

The government would point out that the front door is a place where we have no REOP. This was not a search of the home per se. However, even if this is true, Owen also took the dog into the curtilage, where Dora does have an REOP.

Curtilage vs. Open Fields

Curtilage is the area immediately around a home and is intimately tied with the activities of the home. The Court has found an REOP to exist there. Areas that are not curtilage are considered "open fields" and there is no REOP in open fields.

The government will argue that the front door is not part of curtilage. However, the dog also walked around the house immediately next to it. This is likely considered curtilage, where the court has found REOP.

Sensory Enhancing Technology

However, even in the open fields, the government action is a "search" if they use "sensory enhancing technology" not available to the general public. Here, a drug-sniffing dog may meet this test (a plurality of the Supreme Court feels it does). Thus, even if the dog were kept in open fields, the use of a drug dog would still constitute a search.

Conclusion

Because there was a trespass in a constitutionally protected area without a warrant, and alternatively, because the drug-sniffing dog at the front door violated Dora's REOP, the court will find that a "search" occurred without a warrant and the evidence of the dog's reaction should be suppressed.

2. The Small Box

The legality of this evidence will turn on whether a search occurred and whether there was a warrant exception.

Government Action

There was government action (see rule statement above).

"Search" - REOP

The government will argue that no search occurred because the officer was in the open fields and only used binoculars. Dora will argue that the officer's presence in her back yard was an intrusion in the curtilage.

Open Fields vs. Curtilage

See rule statements above. Dora will argue that the officer was in the curtilage of her home because the ladder was propped against her home and he peered into the window. Not only was he in the back yard, but he was also peering into the second story window. This is not open fields because we do not expect people to be propped on a ladder in our backyard. This is clearly curtilage instead of open fields.

Sensory Enhancing Technology

Dora will also argue that the use of the binoculars constituted a search even if the government was properly in the window. The government will argue this was not a search because this technology is available to the public.

The Court has found that a search occurs where the government, even standing in open fields, uses sensory enhancing technology not available to the general public. This covers using heat-detecting technology, for example. Here, the officer used binoculars, which are available to the public. Because binoculars are readily available, the court will likely find that this, alone, will not transform this action into a search.

However, the court will likely find that a search occurred because of Owen's presence in the curtilage. Because it was a search, the evidence should be suppressed unless a warrant exception applies.

Plain View

The government will argue that even if a search occurred, a warrant was not required under the plain view exception. Plain View means that a warrant is not required when officers find evidence in "plain view". We do not require the police to close their eyes to incriminating activity (when walking by an open window, for example). For a search to fall within plain view, two elements must be met: (1) the officer must be lawfully in the place where he made the observation, and (2) the incriminating nature of the evidence must be readily apparent.

Lawfully in the Place

Here, Dora will argue that the officer could not be in the curtilage of her home. The government may argue first that Owen was merely in the curtilage, and so his presence was lawful (see discussion above). Additionally, the government could argue that the dog's reaction at the door provided probable cause for the officer to take a closer look at the house. The court will likely find that without a warrant, this presence in the window on the second story was not proper. The officer needed a warrant to come this close to the house. Thus, he was not here lawfully.

Incriminating Nature of Evidence

If the officer is there lawfully, the criminal nature of the evidence must be readily apparent to qualify under plain view. Here, the box could not be read from the window where Owen saw it - he required binoculars to see that the box contained ingredients used for methamphetamine. However, because binoculars are generally available, the court may find that this meets the "apparent" requirement. On the other hand, the fact that it had ingredients alone may not make it incriminating, unless those ingredients themselves are illegal. The court could find there was nothing apparently incriminating about this evidence.

Thus, the plain view doctrine does not apply.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine suppresses evidence seized as a result of an unlawful search, unless the taint of the illegality has been attenuated. Here, even if the plain view exception applies, Dora could argue that it should be suppressed because it was the result of the illegal use of the drug-sniffing dog at the front door. The government will argue that the taint has been attenuated.

Attenuation

Fruit of the poisonous tree can be admitted if the government can show the taint of illegality has been attenuated. This is often shown where sufficient time has gone by between the illegality and the discovery of the evidence, or where there is an independent source for the evidence, or where it would have been inevitably discovered.

Here, very little time went by. Owen went straight from using the dog to going to the backyard. Further, there is no independent source or reason for inevitable discovery. Thus, the evidence cannot be saved by attenuation and should be suppressed as poisonous fruit.

Conclusion

The court will find that the officer's activity constituted a search when he went into the curtilage of the home and that the plain view exception to the warrant requirement does not apply because the officer was not lawfully in the place where he made the observation and because even if he was, the incriminating nature of the evidence was not immediately apparent. Thus, the evidence of the small box should be suppressed.

3. The Overheard Conversation

State Action

See rule statement above. There is state action here.

"Search"

See rule statement above. Whether or not there was a search will turn on whether Dora had a reasonable expectation of privacy in her conversation with the window open.

Eavesdropping

Generally, there is no REOP in a conversation held in public. There is also no REOP for conversations held in private with another person. The theory is that when one speaks to another person, you assume the risk that that person may be a police informant. Police may not use electronic methods to eavesdrop on phone calls, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations. The court has held that there was not a search where officers stuck their ear to a wall to eavesdrop on conversations overheard in the next apartment over. There would be a search, however, if the officers used sensory enhancing technology, or wiretapping to overhear these conversations. Police may not use electronic methods to eavesdrop on phone calls, however, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations.

Here, the government will argue there was no search because the officer merely overheard the defendant making incriminating statements. She had her window open and made them loud enough for passers-by to hear. Even though the statements were made over the phone, the conversations were not overheard via electronic wiretapping. Nor was there sensory enhancing technology used. Thus, the court will find that Dora had no REOP in her conversation that was overheard outside.

Curtilage

Dora will again argue that this was a search because Owen was in the curtilage. However, the court has held that merely being on another's property is not curtilage. The are under the window in the front yard is probably not sufficiently connected to the intimate activities of the home to constitute curtilage (compared to peeping in the back,

second-story window, for example). We routinely allow officers to walk around the home.

Here, Owen was merely in the front yard and under an open window. We allow officers to make reasonable inquiries around the home. This will likely not be found to be curtilage. Thus, the court will find that Owen was only in the open fields, not the curtilage.

Warrant Exception?

If the court were to find that a search had occurred, the government would have to argue that a warrant exception applied. No warrant exceptions apply.

Fruit of the Poisonous Tree / Attenuation

Dora will argue this should be suppressed anyway as fruit of the poisonous tree. See rule statement above. The government may argue that even if the earlier search were unconstitutional, this evidence should not be suppressed because it was independently discovered by Owen overhearing in the front lawn. His overhearing had nothing to do with the drug-sniffing dog.

However, if the court finds that the earlier search was unconstitutional, and that Owen would not have been in front of the window but for that illegal search, then the criminality has not been sufficiently attenuated and should be suppressed.

Conclusion

Because there is no reasonable expectation of privacy in one's conversations overheard in public, the court will find that there was no search here and therefore the 4th Amendment was not implicated. Evidence of the conversation should not be suppressed. However, the court may find that it should be suppressed as fruit of the earlier unconstitutional use of the drug-sniffing dog.

QUESTION 3: SELECTED ANSWER B

Dora ("D") was arrested and charged with attempting to sell methamphetamine following several questionable search tactics implemented by police officer, Owen ("O"). D has moved to suppress the evidence under the Fourth Amendment to the United States Constitution. Despite Dora's involvement in rather exploratory drugs (meth), it appears she will prevail in the suppression of all evidence obtained against her by Owen.

FOURTH AMENDMENT RULES

The Fourth Amendment protects against unreasonable searches and seizures, and is incorporated against the states pursuant to the 14th Amendment due process clause. Here, the drug dog's reaction, the small box spotted with binoculars, and the conversation heard through the window all trigger issues with respect to unreasonable searches and the exclusionary rule.

<u>Expectation of Privacy in the Home</u>

A "search" occurs anytime that a police officer or state actor invades an area that a person has a reasonable expectation of privacy (e.g. home, automobile, or a bag in one's possession). The Supreme Court has long held that persons retain their expectation of privacy in their home; it is a sacred place. Conversely, the government's authority to conduct searches is at its zenith at the border. Here, the facts indicate that O conducted several searches at D's house in the country. Thus, Dora's expectation of privacy is very high in the areas search.

<u>Unreasonable Searches and Seizures and the Exclusionary Rule</u>

As a general rule, a search is unreasonable absent the existence of a warrant and probable cause. However, several exceptions to the warrant requirement exist (e.g. contraband items in plain view; persons committing a crime in plain view). If an exception applies, a search may be reasonable even absent a warrant. However, where no exception applies, any evidence discovered pursuant to an illegal and

unreasonable search should be excluded from evidence under the exclusionary rule. Finally, where an illegal search reveals subsequent incriminating evidence, that subsequent evidence discovered may also be excluded as evidence that is "fruit of the poisonous tree" - i.e., evidence that would not have been discovered but for the initial 4th Amendment violation. The only way such subsequent evidence may be admitted is if there is an independent source for that evidence (independent of the illegal search), or the evidence would have been inevitably discovered (despite the illegal search).

The aforementioned rules are applied below, but not restated.

(1) Suppressing Evidence of the Drug-Detection Dog's Reaction

No Warrant

Unless exigent circumstances arise (hot pursuit of a criminal; destruction of evidence), police need a warrant to conduct a home search. The warrant must clearly state facts on which the requesting officer has made a determination of probable cause, and approved by a neutral magistrate. Here, the facts do not indicate that O obtained a warrant before investigating D's house. Thus, the searches are presumptively unreasonable and violate the fourth amendment.

Probable Cause

The facts indicate that O drove to Dora's on a "hunch" that D might be selling methamphetamine, and further that O brought his drug-detection dog. The Supreme Court has held that probable cause, while need not be definitive, must be "more than a hunch." Instead, probable cause must be based on some "reasonable articulable suspicion" that criminal activity is likely afoot. Since no facts indicate what O's hunch was based on (and none are provided in a warrant application), the requirement for probable cause is not met.

Impermissible Dog Search

As stated above, a search occurs whenever police invade an area where a person has a constitutional expectation of privacy. The use of a drug-detection dog has been found to constitute a search by the Supreme Court, which has held that persons have an expectation of privacy both in their home and the surrounding curtilage. Thus, while dog searches are permissible in the automobile context (assuming no unreasonable delay), such searches are not permissible in the context of a home search without a warrant or probable cause.

Here, O walked the dog "around Dora's house." If O stayed off Dora's property, there is likely no 4th Amendment violation. For instance, O could have the dog sniff Dora's trash that was set out on the curb. Further, since D's house is "in the country," O might even have some leighway to search any open fields surrounding D's property, since such fields do not carry the same privacy interests as a residence. However, the facts indicate that O directed the dog to jump up on the porch, at which point the dog sniffed the front door, and indicated the presence of methamphetamine.

This clearly constitutes a search under the 4th Amendment. O brought the dog in proximity to Dora's actual place of dwelling, and ordered the dog to jump on the porch (technically, a trespass - which the court recently found to be one means of determining a search in the GPS car case). Thus, by violating Dora's privacy interests and property interests, and conducting a search without a warrant or any identifiable probable cause, the drug dog's reaction constituted an unconstitutional search.

Under the exclusionary rule, the drug dog's reaction thus cannot be admitted as evidence.

No Consent or Exceptions

It should be noted that warrant and a probable cause are not required where an officer obtains consent to search an area. Even then, any search is limited in scope by the degree of consent. Here, the facts clearly show that Owen "waited until [Dora] left"

before commencing the dog search. Thus, the absence of consent is apparent and does not apply. Similarly nothing in the facts indicates that O was in hot pursuit or that there was a risk of imminent destruction of evidence - to the contrary, it appears nobody was home when D left the house.

(2) Suppressing Evidence of the Small Box

Owen propped a ladder on the back of D's house, climbed to the top, and peered into a second-story bedroom window. After seeing a small box on a bedside table with a label he could not read, O used binoculars to determine that the listed ingredients could be used to make methamphetamine.

Unreasonable Warrantless Search

As discussed above, O had no probable cause or warrant and thus was not legally on the property. His action of using a ladder and placing it against the house is clearly a violation of Dora's property interest in her home (whether the ladder was his or Dora's) and by subsequently looking in her window, from the vantage point offered by the ladder, he effectively conducted a search. Similar to the facts discussed above, the fact that O did not physically enter D's house does not preclude the court finding an unreasonable search. Here, both Dora's property interest (to not have ladders placed against her home) and privacy interests (to not have cop's snooping in her second floor window from ladders they placed on her house) have been violated. Thus, the search was unconstitutional because, as discussed, no warrant or probable cause existed.

Dog's Search Did Not Create Probable Cause or Exigent Circumstances

The Prosecution may argue that following the dog's bark, the officer had probable cause with respect to the house containing methamphetamine. Even so, no exception to the warrant requirement applies and thus the search remains constitutionally impermissible. As noted, Dora was not at the house and the facts do not indicate that anyone else was present in the home. Further still, Dora apparently does not know about officer's presence on her property (otherwise she likely would not be gabbing so loud about a

drug deal through an open window). Thus, even if the dog-sniff were not illegal, the absence of a warrant would preclude O from searching D's home, where her expectation of privacy is at its highest.

Binocular Search

As a general rule, law enforcement's use of technology does not inherently transform police action into a search. However, police use of technology not widely available to the public may result in a search even where a person's physical interest in property was not violated (compare: thermal imaging vs. binoculars). Here, the officer used binoculars to look in D's window in order to read the ingredients of a small box on her bedside table. The use of binoculars in and of itself does not appear to be problematic - this is an item generally available to the public.

However, for the reasons stated above, O only got to a point where he could assess the need to look into the box in D's window by conducting an impermissible search (putting a ladder on the back of the house). Thus, O's "search" - vis-a-vis his use of binoculars to read the ingredients in the box - and the subsequent discovery of that information constituted either an illegal search, or the fruit of the initial illegal search. As such, this evidence should also be excluded.

NOTE: If Officer looked through Dora's window from a tree off of her property, police may have an argument that such a search was permissible and within "plain view." However, this is questionable given the reverence with which the Supreme Court has treated a person's expectation of privacy in his home.

(3) Suppressing Evidence of Overheard Conversation through Open Window

Reasonable Expectation of Privacy in Phone Call In House Made While Window Open

After D returned home, O "walked back to the house and crouched under an open window." He subsequently heard D make incriminating statements to a caller that she

could sell several ounces of methamphetamine. This is the closest call with respect to the three pieces of evidence offered.

On the one hand, while Dora made the comment in her home, and thus retained an expectation of privacy, the facts also indicate (1) that she made the comment to someone else on the other line and (2) that her window was open. While police may not generally use wiretapping as a means to conduct a search without a warrant, persons are said to assume the risk whenever they disclose information to a third party. Thus, if the overheard conversation is introduced by obtaining the person on the other end as a witness, no constitutional issue would arise (except that O only knew about the call via a potentially illegal search, which would not have been discovered but for that search). In any event, the fact the statement was made to a third party slightly reduces Dora's expectation of privacy.

The second important fact is that Dora's window was open. Officer will argue that the window was open, and Dora likely assumed the risk of her conversation being overheard. Thus, Officer will contend that no impermissible search occurred. However, Dora will argue that she lives "in the country," where houses are presumably far apart and foot traffic is minimal. Thus, she would say her expectation of privacy is not altered by an open window. Further, Dora will argue that the officer intentionally "crouched under an open window" and thus conducted an illegal search by being physically on her property and concealing his presence. Finally, Dora will argue that officer would not have even returned to her house but for the illegal searches discussed in items 2 and 3.

Given the clear violations of the first two illegal searches and subsequent chicanery by officer, it is likely that Dora will once again be able to prevail in the exclusion of this evidence, both as the product of an illegal search or as fruit of the poisonous tree (even if no search occurred - O would not have returned to the window but for the initial illegal searches).

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 6

Ivan, an informant who had often proven unreliable, told Alan, a detective, that Debbie had offered Ivan $2,000 to find a hit man to kill her husband, Carl.

On the basis of that information, Alan obtained a warrant for Debbie's arrest. In the affidavit in support of the warrant, Alan described Ivan as "a reliable informant" even though Alan knew that Ivan was unreliable.

Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.

Bob called Debbie, told her he was a friend of Ivan and could do the killing, and arranged to meet her at a neighborhood bar. When the two met, the following conversation ensued:

Bob: I understand you are looking for someone to kill your husband.

Debbie: I was, but I now think it's too risky. I've changed my mind.

Bob: That's silly. It's not risky at all. I'll do it for $5,000 and you can set up an airtight alibi.

Debbie: That's not a bad price. Let me think about it.

Bob: It's now or never.

Debbie: I'll tell you what. I'll give you a $200 down payment, but I want to think some more about it. I'm still not sure about it.

When Debbie handed Bob the $200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I'm in real trouble now."

Debbie has been charged with solicitation of murder and possession of cocaine.

1. How should the trial court rule on the following motions:

    a) To suppress the cocaine under the Fourth Amendment? Discuss.

    b) To suppress Debbie's post-arrest statement under *Miranda*? Discuss.

2. Is Debbie likely to prevail on a defense of entrapment at trial? Discuss.

QUESTION 6: SELECTED ANSWER A

SUPPRESSION OF COCAINE

The Fourth Amendment prohibits unreasonable searches and seizures, and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. For a search by a state actor to be valid, it must be conducted pursuant to a valid warrant issued by a neutral magistrate or an exception to the warrant requirement. In this case, Bob, who arrested and searched Debbie, was an undercover police officer, and therefore a state actor, so his search needed to comply with the Fourth Amendment.

Bob did not have a warrant to search Debbie. While the facts state that Alan obtained an *arrest* warrant, there was no warrant specifically for the search. That said, pursuant to a valid arrest, police can search the arrestee, including the arrestee's person and anything within the person's wingspan. Such searches are meant both to protect officer’s safety and to ensure that the arrestee does not destroy any evidence with reach. The search must be at the same time and place as the arrest. Because, in this case, Bob found the white, powdery substance on Debbie's person - her front pocket - at the same time and place as her arrest, the search was lawful as long as the arrest was lawful.

Valid Search Warrant?

The first possible basis for the arrest was the arrest warrant that Alan obtained. The Fourth Amendment itself requires that warrants describe with particularity the place to be searched and the people or things to be seized. The warrant that Alan obtained appeared to satisfy this requirement, because it named Debbie as the person to be "seized," i.e., arrested.

That said, a warrant must be based on probable cause, which is defined as a fair

probability that the searched place will contain contraband or other evidence of crime, and that the arrested person has in fact committed the crime of which they are suspected. In this case, the arrest warrant was not supported by probable cause. It was based only on one statement by Ivan, an informant who had often proven unreliable. Probable cause is determined by examining the totality of the circumstances. While each determination is necessarily very fact-specific, the say-so of one unreliable informant cannot be enough to satisfy the probable cause requirement. Courts have held that a tip from an anonymous informant, while relevant to probable cause, cannot by itself establish probable cause. A tip from an unreliable informant is no more reliable than a tip from an anonymous one, so Ivan's statement did not provide probable cause for the arrest.

Good Faith Exception?

An officer can nonetheless rely on an invalid warrant if the officer relied on it in good faith, meaning the officer did not know that the warrant was lacking in probable cause. This exception is not available, however, when any of the following is true: (i) the warrant, on its face, is so lacking in probable cause that no reasonable officer would rely on it, (ii) the warrant, on its face, is so lacking in particularity that no reasonable officer would rely on it, (iii) the affiant officer misled the magistrate in issuing the warrant, or (iv) the magistrate was so biased against the object of the warrant that he could be said to have given up all neutrality.

Here, the warrant probably appeared, on its face, to be supported by probable cause. Alan had told the magistrate that Ivan was a reliable informant, and a tip from a reliable informant is enough to establish probable cause. Bob, who executed the warrant after Alan gave it to him, therefore fell outside the first two exceptions to the warrant requirement. However, the third exception clearly applies. Alan misled the magistrate by telling him that Ivan was a reliable informant, when in fact Ivan had often proven unreliable. Police cannot obtain a warrant through deception, but then take advantage of the good-faith exception by having an officer who doesn't know about the deception

execute the warrant. Debbie's arrest was therefore not permissible under the good-faith exception to the warrant requirement.

Valid Warrantless Arrest?

Police almost always need a warrant to conduct an arrest in a home or other private place, unless they are pursuing evanescent evidence, where they either have reason to believe that evidence in the house is being destroyed, or they are within 15 minutes of a suspect in hot pursuit. That said, Bob did not arrest Debbie in a private home; he arrested her in a neighborhood bar where they had arranged to meet. Police can generally effect a warrantless arrest in a public place whenever they have probable cause to believe that the person has just committed a crime. The validity of Debbie's warrantless arrest by Bob thus turns on whether he had probable cause to think she had just committed a crime.

Bob did in fact have probable cause. Just seconds earlier, Debbie had paid him $200 as a down payment for committing murder. This gave him probable cause, at the very least, to think that Debbie had just committed a crime. Murder is the intentional killing of another person with malice aforethought. In most states, premeditated murder is first degree murder, but murder is committed even by acting with reckless indifference to an unjustifiably high risk to human life. Hiring a hit man probably satisfies the former standard, and it certainly satisfies the latter. When she paid Bob, Debbie arguably committed solicitation. A person is guilty of solicitation where they urge, request, or pay another person to commit a substantive offense. By paying Bob an advance, Debbie was arguably soliciting his commission of the murder of her husband, Carl. Because she had just committed this crime in front of him, Bob had probable cause to arrest Debbie. The arrest was therefore lawful.

Debbie may argue that she did not actually commit solicitation in front of Bob, because she made clear that she was not yet sure she wanted him to kill Carl, and that she still needed some more time to think about it. It is not clear that this defense would work at

trial, because Debbie still paid money as consideration for keeping open the promise of committing the crime. Bob had said she needed to pay him now or never if she wanted him to commit the murder, and she did pay him, albeit not the entire amount. That said, it does not matter that Debbie might win this argument at trial, because the arrest only required probable cause - again, a fair probability that the person had committed the substantive offense. By paying money to a hit man, Debbie at least came within a fair probability of committing solicitation, such that the arrest was lawful.

Furthermore, Bob had probable cause to think that Debbie had committed solicitation by offering Ivan $2,000 to find a hit man to kill her husband. While Ivan's unreliable testimony might have not established probable cause on its own, Debbie corroborated his report by saying "I was," by showing interest in Bob's offer when she said "not a bad price," and by ultimately offering him the $200 to keep the offer open. This earlier solicitation could also be the source of probable cause.

As mentioned above, a search can occur incident to a valid arrest. The officer can search the arrestee's person and everything within her wingspan, as long as time and place are contemporaneous. Bob's search was at the time and place of the arrest, and did not go beyond Debbie's person. It was therefore a lawful search pursuant to arrest. Once such a search is carried out, any evidence found is not subject to suppression, even if it is not evidence of the same crime for which the person was arrested. Thus, although the white powder was not evidence of the crime for which Debbie was arrested - solicitation of murder - it is not subject to suppression.

The judge should therefore deny Debbie's motion to suppress the cocaine.

SUPPRESSION OF POST-ARREST STATEMENT

Debbie's post-arrest statement, on the other hand, is subject to suppression. Under the Self-Incrimination Clause of the Fifth Amendment (and the *Miranda* case implementing it), incorporated against the states by the Due Process Clause of the Fourteenth

Amendment, police must warn people of their rights to remain silent and to an attorney before commencing a custodial interrogation. The warning need not be verbatim, but it must convey that (1) the person has the right to remain silent, (2) anything they say can be used against them at trial, (3) they have the right to speak to an attorney, and (4) that if they cannot afford an attorney, one will be provided. The trigger for these warnings is custodial interrogation. An interaction is "custodial" any time a reasonable person would not feel free to leave, and would expect that the detention will not be of relatively short duration, as with a routine automobile stop or a *Terry* stop. Another test for whether the interaction is custodial is whether it presents the same inherently coercive pressures as a station-house questioning. The interaction is an "interrogation" any time the police act in a way that they know or should know is likely to elicit an incriminating response. They need not actually conduct a formal interrogation, as long as this likelihood exists. Violations of a suspect's *Miranda* rights provide grounds to suppress any incriminating statements, though they will not necessarily lead to the suppression of the investigatory fruit of such statements.

Here, Debbie was clearly subject to a custodial interrogation. She was in custody because she was being arrested. Bob had just identified himself as a police officer, handcuffed her, and begun searching her. No reasonable person would feel free to leave such an arrest, and any questions asked while being handcuffed and arrested are just as coercive as questioning at a police station-house. Moreover, Debbie was subject to interrogation, because Bob, upon finding the cocaine, asked her "What have we got here?" Bob should have known that this question, asked by a police officer about a suspicious substance found on Debbie's person in the course of an arrest, was likely to elicit an incriminating response. Therefore, Debbie's incriminating response identifying the substance as cocaine is subject to suppression. So is her statement about being in trouble, which has the tendency to incriminate her by demonstrating her awareness of culpability.

The court should therefore grant her motion to suppress her post-arrest statement under *Miranda*. That said, the physical evidence itself - the bag of white powder - need not be suppressed, because *Miranda* suppression applies only to testimonial

statements like Debbie's verbal statement, not physical evidence. Because the powder was not obtained in violation of *Miranda*, the police are free to test it and introduce it as evidence at trial if it proves to be cocaine. Debbie might argue that the nature of the bag's content is the fruit of an illegal interrogation, because Bob only knew what was inside because Debbie told him. This argument will fail for a number of reasons. First, Bob had an independent source for knowing that the bag might be cocaine - namely, his own eyesight and common sense. A bag of white powder carried around in a person's pocket is sufficiently likely to be drugs that a reasonable officer would have it tested no matter what. Second, and relatedly, the police could claim that discovery of the powder's chemical makeup was inevitable, because all suspicious powders found on arrestees are tested as a matter of course (assuming this is true, which it should be). Third, the fruit of the poisonous tree doctrine does not apply to evidence whose discovery can be traced back to a statement suppressible under *Miranda* - only the statement itself is subject to suppression. The Supreme Court has determined that the evidentiary value of such down-the-line evidence outweighs the deterrent effect of suppression, unless the officer's failure to give *Miranda* warnings occurred in bad faith. Here, there is no indication that Bob acted in bad faith, withholding a *Miranda* warning so that he could gather evidence from Debbie to be used to further an investigation. It appears that, in the heat of the arrest and subsequent search, he simply forgot to give the warning. That said, even if this third argument against suppression failed, either of the first two would be enough to make the cocaine admissible at trial.

ENTRAPMENT

The defense of entrapment requires a defendant to show (i) inducement and (ii) a lack of predisposition. Inducement occurs when a criminal design originates with the police. A lack of predisposition occurs when the defendant was not otherwise intending to commit the crime, but only did so because the police applied pressure or some sort of other unfair deceit. The defendant must establish both elements by a preponderance of the evidence in order to make out the defense of entrapment.

If Debbie is found to have committed solicitation, it is unlikely that she will be able to establish an entrapment defense. As to predisposition, while the specific plan - to have Bob kill Carl - may have originated with the police, the underlying idea to kill her husband through a hit man was Debbie's. She had already taken a major step to achieve the underlying crime by paying Ivan $2,000 to find a hit man - a fact that she confirmed when she said that she "was" considering it. (While she may argue withdrawal, from discontinuing her plan, the entrapment defense assumes that she has otherwise been convicted.) She will thus struggle to show that she was not already predisposed to commit the crime. The plan originated with her, and she had already put significant money toward showing that it was not a mere fancy, but in fact a serious plan.

As to inducement, Debbie would have a slightly better argument. When she told Bob that she had changed her mind because her original plan was too risky, Bob applied pressure in several ways. He told her that her change of heart was silly, because the plan was not risky at all; he tried to persuade her that her alibi would be "airtight"; he offered her a presumably unnaturally low price; and he told her that she needed to accept on the spot. These all show police attempts to induce the crime through a combination of emotional and financial pressure.

That said, mere precatory language like this is rarely enough to establish inducement, or to negate predisposition that otherwise appears to exist. Generally the government must apply more forceful pressure - like an affirmative threat - to reach entrapment. For drug stings, these elements can be satisfied by offers to buy or sell drugs at a price that is grossly more favorable to the defendant than the defendant could obtain in the real world. But for solicitation of murder, the fact of offering a discount is probably not enough to show inducement or lack of predisposition. A person who does not otherwise intend to engage in murder is generally not induced to solicit murder by being offered a low price. Debbie's entrapment defense is therefore not likely to prevail at trial.

She may have slightly better luck at sentencing, by offering either a sentencing entrapment argument or a sentencing factor manipulation argument. These typically

allow a judge to reduce a sentence, even to go below the guidelines, based on police conduct that is unfair or pressuring, but that does not rise to the level of entrapment. Bob's pressuring statements might satisfy these sentencing defenses, if Debbie can convince the sentencing judge that she in fact had decided not to carry out her plan, and indeed would not have carried it out, but for the officer's pressure. This may reduce her sentence, but it will not excuse her from criminal liability.

QUESTION 6: SELECTED ANSWER B

Suppression of Cocaine Under the 4th Amendment

4th Amendment

Under the 4th Amendment to the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, the government must not conduct unreasonable searches and seizures.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment is to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 4th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Search and Seizure of the Cocaine

As provided above, the 4th Amendment bars police from conducting unreasonable searches and seizures. There are a number of steps that we must go through in order to determine whether the seizure of the cocaine violated Debbie's 4th Amendment rights.

(1) We first need to determine whether this is government conduct. Government conduct occurs when the publicly paid police, or private police that are deputized with arresting power, conduct an action. Here, it appears as though it was government/police conduct. Alan was a detective and Bob was an undercover police officer. Accordingly, there was police/government action.

(2) Next, we need to determine whether Debbie had a reasonable expectation of privacy in the area searched or the item seized. Put another way, we need to determine whether she has standing to complain about this particular search. Standing is always present when (1) an individual owns a premises; (2) an individual is the possessor/leasor of the premises; or (3) the individual is an overnight guest at a premises. These do not apply to Debbie's particular situation. A defendant sometimes has standing if they have a reasonable expectation of privacy in the area searched. Here, the search took place on Debbie's person, in her pockets. Debbie undoubtedly has a reasonable expectation of privacy in her pocket. As such, the government/police must have had a valid warrant or a valid excuse for not having a proper warrant when they searched Debbie.

(3) As stated above, we next must determine whether Bob and Allan had a valid warrant for the search and arrest of Debbie. A valid warrant has two specific requirements: (1) particularity; and (2) probable cause. Particularity requires the warrant to state with relative specificity the items to be recovered, the person to be arrested, or the areas to be searched. Probable cause is the reasonable belief that contraband will be found in the area to be searched or reasonable belief that the individual to be arrested committed a crime. Here, there appears to be serious problem with the arrest warrant in this case, specifically with the probable cause requirement.

The particularity requirement appears to be satisfied because it is a warrant for the arrest of Debbie. This is a specific person and particular enough to satisfy the first prong of the valid warrant requirement. The problem arises with regards to the creation of probable cause. Alan obtained the warrant on the basis of an informant's information.

There are many circumstances where an informant's information may be used to establish probable cause. That being said, whether the informant may be trusted is based on the totality of the circumstances. This includes the informant's previous reliability, whether there is independent evidence to support the informant's testimony and, most importantly, whether the informant's testimony can be corroborated. Here, there does not appear to be any sort of corroboration of Ivan's testimony. Furthermore, it is made clear that Ivan has often proven unreliable. As such, there is no reason to believe Ivan's information without any additional corroborating evidence. Because probable cause is not based on sufficient information, there is a good argument to be made that the warrant was invalid to begin with.

(4) Even if a warrant is invalid, a search/arrest may still be considered legitimate if the arresting/searching officer uses good faith in the execution of the warrant. Here, there is no indication that Bob knew of the lack of probable cause, and appears to rely on the warrant in good faith. That being said, there are a number of situations where the arresting/searching officer's good faith does not excuse an invalid warrant: (1) when the warrant is so lacking in particularity that no reasonable officer could believe in good faith that the warrant is valid; (2) when the warrant is so lacking in probable cause that no reasonable officer could believe in good faith that the warrant is valid; (3) when the magistrate judge who issued the warrant is biased; or (4) when the officer who obtained the warrant lied in the warrant application. Here, there is nothing on the face of the warrant to demonstrate that it is so lacking in particularity or probable cause such that no officer could reasonably believe it valid. There is also no indication that the magistrate judge who signed the warrant is biased. There is, however, evidence that Alan lied in the warrant application in order to obtain the warrant. The facts indicate that Alan described Ivan as "a reliable informant" even though he knew that was not the case. Had the magistrate judge been aware that the warrant was solely based on information provided by an unreliable informant, they would probably not have issued the warrant because there is not sufficient probable cause to support the warrant. Accordingly, the warrant was invalid and the officer's good faith reliance on the warrant does not overcome that deficiency.

(5) If a warrant is invalid and the officer's good faith is not enough to overcome that deficiency, there are still some instances where a search and/or arrest is not required to be conducted pursuant to a valid warrant. Some such instances include, but are not limited to: (1) the plain-view doctrine; (2) searches incident to a valid arrest; (3) exigent circumstances; and (4) the automobile exception. Here, Bob may be able to validly argue that the search and seizure of the cocaine was valid pursuant to a search incident to a valid arrest. When an officer validly arrests an individual, they are allowed to search the clothes/body of the person, as well as any area around the person within their wingspan. Any contraband/evidence of crime that is obtained as a result of the search conducted pursuant to a valid arrest is admissible, despite the absence of a proper warrant. Here, Bob will argue that his search of Debbie and seizure of the cocaine was valid pursuant to a valid arrest. He will argue that he personally witnessed Debbie commit a crime (solicitation of a murder - which is discussed in greater detail below) and therefore was allowed to arrest her and entitled to search her person. Debbie will undoubtedly have a different view of the situation.

Debbie will argue that she committed no crime and that the search and seizure was not done pursuant to a search incident to a valid arrest. Solicitation requires (1) the defendant to request or ask another person to commit a crime; and (2) an intent that the requested crime be committed. Solicitation is a specific intent crime. If there is an agreement between the parties to commit the crime, solicitation merges with conspiracy and is no longer alive for purposes of prosecution. Here, it is unclear whether or not Debbie manifested the intent to commit the murder. If she did not have the requisite intent, she did not commit the crime of solicitation. Debbie used words such as "let me think about it," "I've changed my mind," and "I'm still not sure about it." While she did give Bob a down payment, she does not seem to express the necessary intent for Bob to commit murder against her husband. Her argument will be that no crime was committed, therefore there was no valid arrest and the search incident to the arrest was also improper.

Conclusion - Here, it appears a close call as to whether the court should suppress the

cocaine pursuant to the 4th Amendment. As an initial matter, there was not a valid warrant and the conducting officer's good faith reliance on the warrant does not save it because Alan lied in obtaining the warrant. There does appear to be a valid reason for the search conducted by Bob, but Debbie will argue that she did not commit the crime of solicitation because (1) she never expressly asked Bob to commit the crime of murder; and (2) she did not express the intent for Bob to commit murder. The government will counter that the down-payment was meant to obtain the services and the exchange of money was enough to establish solicitation.

Ultimately, it appears as though Debbie does not commit the crime of solicitation because she did not expressly ask Bob to commit the murder and she did not have the necessary intent. While she did provide money, there was no agreement to commit the murder or express request to commit it - it appeared to simply compensate Bob for his time spent during their meeting. If Debbie had called back later and said to apply that money towards the commission of the crime, then the money would have been given with intent for Bob to commit the murder. Accordingly, it seems as though no crime was committed and the search that Bob conducted that uncovered the cocaine was not incident to a valid arrest. Therefore, the cocaine should be suppressed.

Suppression of Debbie's Post-Arrest Statement Under Miranda

5th Amendment and Miranda

Under the 5th Amendment of the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, individuals are entitled to Miranda warnings prior to "custodial interrogation." Miranda warnings include (1) the defendant has the right to remain silent; (2) anything the defendant states can be used against them in the court of law; (3) the defendant has a right to an attorney; and (4) if the defendant is indigent and can't afford an attorney, one will be supplied to her. The warnings need not be verbatim. As previously stated, the trigger for Miranda warnings is "custodial interrogation." "Custody" means any situation in which an individual would not feel able to leave on their own volition. While this may be in a jailhouse, it can also

occur in any other situations where police conduct does not leave a reasonable belief that the person can wilfully leave. "Interrogation" occurs when the police can foresee that the line of questioning may elicit an incriminating response. Once there is custodial interrogation, the individual being questioned must be given the Miranda warnings. If not, the exclusionary rule and fruit of the poisonous tree doctrine may apply.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment are to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 5th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Custodial Interrogation of Debbie

In order to determine whether Debbie's post-arrest statement violates Miranda and is thus entitled to suppression, we need to determine whether she was in a state of custodial interrogation. After receiving the $200 from Debbie, Bob identified himself as a police officer, handcuffed her, and searched her. During the course of the search, Bob found a vial of white, powdery substance and asked "well, well, what have we got here?" Based on the facts of this particular case, it appears as though Debbie was in custody at the time Bob made this statement. She was handcuffed and being searched by Bob. Accordingly, no reasonable person would believe that they have the right to leave on their own free will at that point.

Next, we need to determine whether Bob's question qualifies as "interrogation" under the meaning of "custodial interrogation" defined above. Bob's question is "What have we got here?" While this seems relatively innocuous, it is most definitely intended to elicit an incriminating response. When the police ask someone what the contents of a vial suspected to be contraband are, they are undoubtedly attempting to obtain a response that can incriminate the defendant.

Debbie was in "custody", as defined by Miranda, because no reasonable person would feel able to leave when they're handcuffed and searched by the police and she was being "interrogated" because Bob asked a question that is foreseeable to elicit an incriminating response, it appears as though she was entitled to her warnings under Miranda prior to Bob's questioning. Because Bob's questioning was a violation of Miranda, Debbie's response should be excluded pursuant to the 5th Amendment.

Debbie's Defense of Entrapment

As stated above, Debbie was charge with solicitation of murder. Solicitation requires (1) defendant to ask or request someone to commit a crime; and (2) specific intent that the requested crime is to be committed. Murder, the crime that Debbie supposedly wanted to commit, is defined as the unlawful killing of another human being with malice aforethought, expressed or implied. There are multiple "degrees" of murder - first and second degree. First degree is premeditated murder, with intent to kill, and knowledge, or felony murder (murder in the commission of a dangerous felony independent from the murder itself). Second degree murder is any other kind of murder. The intent required for murder is (1) intent to kill; (2) intent to commit serious bodily harm; (3) intent to commit a felony; or (4) depraved heart/reckless indifference.

While there is some question about whether or not Debbie manifested the intent necessary for solicitation, the defense determined that the defense of entrapment was a viable defense. In order to bring a successful entrapment defense, a defendant must show (1) the government unduly encouraged/enabled/aided the defendant in the

commission of the crime; and (2) the defendant would not have committed the crime but for the government's actions. This is an extremely difficult defense to establish and Debbie may have trouble succeeding in its presentation.

Initially, we must determine whether the government encouraged and/or enabled Debbie to commit the crime in question. Here, Debbie's actions seem to indicate that she was predisposed to committing the crime of solicitation of murder. First, Debbie agreed to meet Bob at a neighborhood bar when the only information he provided was that he was a friend of Ivan and could do the killing. When they met, Debbie stated "I was [looking for someone to kill my husband], but I now think it's too risky. I've changed my mind." This statement seems to suggest that Debbie is not withdrawing because she doesn't want to commit the crime, but that she is afraid of getting caught. Bob does not force her to continue, but states that "it's not risky at all" and gives her a price quotation. At this point, Debbie states "let me think about it." When Bob states that he needs an answer now, Debbie proceeds to put a down payment and states "I'm still not sure about it." Based on Debbie's statements and behavior, it does not seem that Bob unduly coerced her to commit the crime of solicitation. Bob merely provided her with the opportunity to do so. Debbie's statements seem to suggest that she has the desire to do it, but is simply afraid of getting caught. Bob's assurances that she won't get caught do not rise to the level necessary for the first prong of entrapment.

We also must determine that Debbie would not have committed the crime but for the government's actions. As established in the preceding paragraph, Debbie has the intent to commit the crime, but is simply afraid of being caught. The government will argue that the provision of money was a down payment to commit the murder and Debbie had the necessary intent to commit the underlying crime necessary for solicitation. Debbie will claim that she would not have given the money, but for the assurances made by Bob that she would not be caught. That is not enough to establish the second prong necessary for entrapment. If a separate/non-governmental actor had provided the same assurances, Debbie appears to have been likely to react in the same manner.

Because (1) the government did not unduly encourage or enable Debbie to commit the

crime of solicitation, and (2) Debbie would have still committed the crime without the government's interference, the defense of entrapment does not appear to be a valid defense for Debbie.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 4

Claire, a four-year-old girl, went missing. Ike, who regularly provided reliable information to Officer Ava, told her that he had recently overheard Don planning to kidnap a child to raise as his own daughter. Officer Ava's partner, Officer Bert, hurried to the courthouse to apply for a search warrant for Don's house. Meanwhile, Officer Ava rushed to Don's house and knocked on the door. Don answered. Officer Ava told him, "I heard that a missing child might be here," and asked, "Can I come in and look for her?" Don replied, "No." Officer Ava said, "A life is at stake. I am searching your home, whether you want me to or not." Don stepped aside and allowed Officer Ava to enter.

Officer Ava searched the home thoroughly. In a closet in the bedroom, she found a bomb, measuring about 2 feet by 2 feet. In a medicine cabinet in the bathroom, she found several vials of cocaine. While looking under the bed, she found a plain sealed envelope, which she opened, that contained a map with a highlighted route from Don's house to Claire's house. She did not find Claire. Immediately after she completed the search, Officer Bert arrived with a warrant authorizing the "search of Don's home for Claire." Not long afterward, Claire turned up elsewhere unharmed.

Don was charged with: (1) possession of a bomb; (2) possession of cocaine; and (3) attempted kidnapping.

Don filed a motion, under the Fourth Amendment to the United States Constitution, to suppress evidence of the bomb, the cocaine and the map.

1. How should the court rule on the motion to suppress regarding:

    a. the bomb? Discuss.
    b. the cocaine? Discuss.
    c. the map? Discuss.

2. Can Don be found guilty of attempted kidnapping? Discuss.

QUESTION 4: SELECTED ANSWER A

MOTIONS TO SUPPRESS

Under the Fourth Amendment of the U.S. Const., which applies to states via the Due Process Clause of the Fourteenth Amendment, all *unreasonable* searches and seizures of persons, properties, and papers are unlawful. Where an unlawful search has taken place, the exclusionary rule generally applies -- that is, the evidence wrongfully obtained will not be allowed in as evidence, although it can typically be used for impeachment and other limited purposes. Similarly, evidence *derived* from wrongfully obtained evidence is deemed "fruit of a poisonous tree" and will not be admitted unless there has been attenuation. All that said, courts will follow the "harmless error" rule and not overturn a conviction unless the admission of the wrongfully obtained evidence was material and affected the final judgment.

Reasonable Expectation of Privacy

In order to bring a suppression claim under the 4th Amendment, a person must have a reasonable expectation of privacy in the place searched. Here, Don's house was subject to a search. Don, who answered the officer's knock, undoubtedly has a reasonable expectation of privacy in his home.

Warrant Requirement

The Supreme Court has upheld a warrant requirement under the 4th Amendment. The warrant must describe in reasonable specificity the places and persons to be searched, and the types of things to be searched for. Therefore, barring certain exceptions to be discussed, an officer must have a warrant to search someone's house. There are six exceptions to the warrant requirement: (1) Search Incidental to Arrest, (2) Consent, (3) Hot Pursuit and Exigent Circumstances, (4) Automobiles, (5) Plain View, (6) Stop and

Frisk.

Here, the prosecution will argue that Officer Ava had both consent to search D's house and was compelled to search his house given the exigency of the situation.

Consent

An otherwise unlawful search is permitted if the searched party voluntarily consented to the search. The person need not have known that he was free to decline consent; however, officers cannot utilize coercive methods in obtaining such consent or else it will not be deemed voluntary.

Here, Ava asked D for permission to search the house but was flatly told, "No." Thus, D can, likely successfully, argue that there was no consent here. Prosecution will respond, however, that when Ava told D that "[a] life is at stake" and that she is therefore searching the house, D's stepping aside was implicit consent. That is unlikely to be a successful argument with a court, especially when it comes at the heels of being denied consent. A court will likely conclude that D felt that he had no choice but to allow the officer in -- indeed, the officer said she would search the home "whether you want me to or not."

Thus, consent is unlikely to provide the exclusion from warrant in this case.

Exigent Circumstances

There is also an exception to the warrant requirement where emergency circumstances require that the officer not wait for a warrant. Such circumstances exist where, say, a felon is fleeing or an officer is worried that defendant will destroy the evidence or instrumentality of the crime in the time it would take to obtain a warrant.

Here, prosecution would argue that Ava had just such a concern. After having sent Bert to obtain a warrant, Ava was worried (given the reliability of Ike) that it might be too late by the time the warrant came -- D might already have concealed or transported Claire by then. D, however, will respond that that does not qualify as an exigent circumstance that would warrant a non-consented, unwarranted search of a person's home. D would

argue that Ava, if she was so concerned about Claire's kidnapping, could have waited *outside* Don's house after he was refused consent -- that would have prevented Don from transporting anyone he had kidnapped. But that might have still given Don time to conceal a small four-year-old girl or perhaps even cause her harm.

Ultimately it will be upon the court to decide whether the "totality" of the circumstances are in favor of allowing the exigent circumstance exception. But even if the court chose not to do so, the government can rely on the inevitable discovery doctrine (discussed below) to argue in favor of admission.

Officer Bert's Search Warrant / Inevitable Discovery

The obtaining of a warrant *after* a search has been performed does not provide immunity to the unlawful search carried out. Thus, if Ava was unjustified in searching D's home, the warrant would not, by itself, render the search lawful.

Nonetheless, whether Bert's warrant was a valid one is important because, if the warrant was valid, it could render the search harmless under the inevitable discovery doctrine, which provides that evidence that otherwise should be excluded can be included where it would have been inevitably discovered by lawful means.

Here, first, the warrant was a valid one (nothing to the contrary in the facts; moreover, officers are allowed good faith reliance on a warrant they believe valid). Assuming Ava had waited to conduct the search until the warrant arrived, the warrant would have allowed her to then go ahead and conduct the same search that she did (that said, we discuss below how Ava exceeded the scope of her search under either the warrant or exigent circumstance theory).

Thus, between the exigent circumstance and warrant, the court will likely deem the search itself to be lawful, though that brings us to the specific search itself and how it might have exceeded its *lawful scope*.

Scope of Search

Under both exigent circumstances exception, whereby Don would be searching for a

little girl or other evidence of kidnapping, or under the explicit terms of the warrant, Ava's search was limited in scope to the "search of Don's home for Claire" and, perhaps under the former exception, also of evidence of kidnapping.

Bomb

Ava discovered the bomb in a closet in the bedroom. A closet, arguably, *is* a good place to hide a kidnap victim. Thus, Ava's search of the closet was proper. Once she had opened the closet, of course, the large 2'x2' bomb was in plain view, another exception to the warrant requirement which allows the search (and thus confiscation) of items found in plain sight in a location where the officer is lawfully present. Here, Ava was lawfully in the closet and the bomb was in her plain view. Thus, the court should deny the motion to suppress evidence of the bomb.

Cocaine

The cocaine was found in a medicine cabinet, which is probably too small to hide a child, even a little girl who is four. Prosecution would argue that, at least under exigent circumstance exception where evidence of kidnapping (and not just of Claire physically) would be allowed, Ava looked to find clues to any kidnapping. That, however, is likely to fail because under that theory almost every aspect of the house would be searchable -- courts find warrant exceptions to be narrow in scope. Under the express warrant itself, of course, Ava's search was limited to Claire, who could not have been found in the medicine cabinet. Thus, the court should grant the motion to suppress evidence of the cocaine.

Map

The map was found whilst Ava was looking "under the bed." Like the closet, under the bed is a location where a kidnapping victim might be tied or placed. However, the map was in an envelope that the officer had to open in order to access the map. Under the warrant, that is clearly beyond the scope. Even under the exigent circumstances exception, this is likely to come closer to the finding of the cocaine than the bomb. Unless the map was visible from the outside (facts do not state), Ava would be beyond her authority to search inside it. Thus, the court should grant the motion to suppress evidence of the map.

In conclusion, the court should admit the bomb, but not the cocaine or the map.

2. ATTEMPTED KIDNAPPING OF CLAIRE

Whether Don can be found guilty of Claire's attempted kidnapping.

Kidnapping

Under common law, the prosecution for kidnapping must prove the following elements beyond a reasonable doubt (the first two elements are essentially those involved in the lesser crime of false imprisonment): (1) confinement or restraint, (2) to a bounded area, (3) and victim was either moved or concealed. The confining or restraining must be of such a nature that the victim does not feel that she is free to leave. Similarly, the bounded area must prevent, at least in the victim's knowledge, her from escaping without harm. The confinement or the bounded area need not be physical -- being threatened with a gun on a porch could satisfy the requirements. In addition, kidnapping requires that the victim either be concealed or moved during her state of false imprisonment.

Attempted Kidnapping

Attempted kidnapping (AK) is an inchoate crime and would merge with the actual crime of kidnapping, if that were charged. AK is a specific element crime, which means that D must have had the particular intent to satisfy the elements of kidnapping as described above. In addition, attempt requires the presence of an overt act. Under common law, this meant that D had to be "dangerously close" to committing the actual crime. Modern courts have relaxed that rule some, although they still require more than mere preparation, which is what is needed to prove the overt act in a conspiracy. Typically, they require a "substantial step" in furtherance of the actual crime.

Here, a jury would be able to impute specific intent from both the actual and circumstantial evidence. Assuming Ike testifies, he will be able to tell them what he overheard regarding Don's plan to kidnap a child and the map found in Don's house

(assuming it is admitted) will confirm that the child to be kidnapped was in fact Claire. It is unlikely that the bomb and cocaine, assuming that they are admitted into evidence, will inform the charge of attempted kidnapping. Perhaps the bomb was going to be used to threaten or restrain Claire, but the facts do not say anything in that regard. Whilst the evidence is relatively slim, a jury could nonetheless reasonably find that D had the specific intent to commit the kidnapping of C.

The overt act is a closer question, and likely to ultimately resolve in D's favor. While the map is certainly an overt act that at least satisfies the "mere preparation" requirement of a conspiracy, it likely is *not* a "substantial step" in achieving the crime (and far from coming "dangerously close" to achieving it). The jury would perhaps have to rely on other circumstantial evidence to reach that conclusion, but the facts as presented do not state what other evidence might exist. Without the map, there almost certainly is no overt act.

Thus, under the circumstances and without more evidence of steps taken by D, D is unlikely to be found guilty of attempted kidnapping.

Defenses

According to the prompt, it does not appear that D has any valid defense to his specific intent crime, such as voluntary or involuntary intoxication, duress, entrapment, or insanity.

QUESTION 4: SELECTED ANSWER B

1. DON'S MOTION TO SUPPRESS

The issue is whether the evidence of the bomb, cocaine, and the map were obtained in violation of Fourth Amendment to the US Constitution.

FOURTH AMENDMENT

The Fourth Amendment of the US Constitution protects citizens from unreasonable search and seizures.

Government Conduct

The Fourth Amendment applies to conduct by the government. There must be conduct by a publicly paid police or a person acting in the direction of the police.

Officer Ava (A) is a publicly paid police officer.

Therefore, there was government conduct.

Reasonable Expectation of Privacy

In order to have standing to challenge a search or seizure, the person must have standing. Standing exists where the person has a reasonable expectation of privacy over the place or item to be searched or seized. A person has a reasonable expectation of privacy over his home.

A searched Don's (D) home, so D had a reasonable expectation of privacy.

Therefore, D has standing to challenge the search and seizure.

WARRANT

A search and seizure are reasonable if it is based on a valid warrant. A warrant requires probable cause and particularity. Probable cause requires a fair probability that evidence of a crime will be found in the place or item to be searched. Particularity requires a description of the items that can be searched and seized. Probable cause may be based on information obtained from a reliable and credible source.

A had probable cause to believe that Claire (C) would be at D's home. A reliable informant, Ike, told A that she overheard D planning to kidnap a child to raise as his own, and C, a four-year-old girl went missing. Additionally, B obtained a warrant to search D's house for C, so the warrant contained particularity. However, even though Officer Bert (B) obtained a warrant, A did not have a warrant to search D's house when she conducted the search.

Therefore, the search was not based on a warrant. Since the search was not based on a warrant, the evidence of the bomb, the cocaine, and the map was obtained in violation of D's Fourth Amendment right.

WARRANT EXCEPTION

Absent a warrant, evidence obtained from a search and seizure will be inadmissible at trial unless the search falls within an exception to the warrant requirement.

Consent

A police officer may search an item or place with consent so long as the consent is voluntary and the person has apparent authority to consent.

A knocked on D's door and asked D if she could come in and search for a missing girl. D responded, "No." Although D stepped aside and allowed A to enter and search, D's consent was not voluntary because A told him that he had no choice, indicated by the fact that she said she would search whether D wanted her to or not.

Therefore, the search was not based on consent.

Exigent Circumstances

Under exigent circumstances such as emergency aid, a police officer may enter the home of another and conduct a search without a warrant.

C, a four-year old girl went missing and A had reliable information to believe that D had kidnapped her. The fact that a young child may have been in D's home and likely needed help to escape could constitute an exigent circumstance, which allowed A to enter D's home to render aid to C.

Assuming exigent circumstances exist, the next step is to analyze whether each item found in D's house was obtained through a valid warrant exception.

Plain View

Evidence may be seized without a warrant if (1) the police officer was legitimately on the premises, (2) the item was contraband or evidence of a crime was in plain sight, and (3) the police officer had probable cause to believe that the item was evidence of a crime or contraband.

A. THE BOMB

A searched D's home and found a bomb in a closet in the bedroom. Because there were exigent circumstances, A had a legitimate right to be in D's house. Additionally, A had reason to believe that C could be hidden in the closet, so A was legitimately in the closet, the bomb was in plain sight since A saw the bomb when she opened the closet, and the bomb was about 2 feet by 2 feet. Additionally, given the fact that A is a police officer and the bomb was clearly visible, A had probable cause to believe that the bomb was evidence of a crime.

Therefore, evidence of the bomb was not obtained in violation of D's Fourth Amendment rights.

B. THE COCAINE

It is unlikely that C could be found in the medicine cabinet in the bathroom, but A searched the medicine cabinet and found several vials of cocaine. Since A was searching for C, she did not have a reasonable belief to search D's medicine cabinet. Since A opened the cabinet, the cocaine was not in plain sight.

Therefore, the evidence of the cocaine was obtained in violation of D's Fourth Amendment rights.

C. THE MAP

A had a reasonable belief that C could be under the bed because she is a four-year-old girl and could fit there, so the envelope was in plain sight. However, A did not have probable cause to believe that the envelope was evidence of a crime, since C could not fit inside of it. Since A opened the sealed envelope that contained the map, the map was not in plain sight.

Therefore, the evidence of the map was obtained in violation of D's Fourth Amendment rights.

EXCLUSIONARY RULE

Evidence obtained in violation of a person's constitutional rights is inadmissible at trial. Additionally, evidence obtained from an illegal search and seizure will also be inadmissible as fruit of the illegal search and seizure. However, evidence that would be subject to the exclusionary rule may be admitted at trial if the prosecution can remove the taint of the evidence. The prosecution has the burden of showing by a preponderance of evidence that (1) the evidence would have been obtained through an independent source, (2) the evidence was inevitably discoverable, or (3) intervening acts broke the causal chain between the illegal conduct and the evidence obtained.

Because the map and cocaine were obtained in violation of D's Fourth Amendment right, the map and cocaine should be suppressed at trial unless the prosecution can remove its taint.

The prosecution cannot show that the evidence would have been inevitably discovered. Although A conducted an illegal search, B obtained a warrant to search D's home for Claire and arrived immediately after A had completed the search. The warrant authorized search of D's home for C and since C could not be found in the medicine cabinet or the envelope, A and B would not have been able to search those areas. Because the medicine cabinet and map exceeded the scope of the search warrant, the

cocaine and map would not have been inevitably discovered. Additionally, because D did not consent to the search, there were no intervening acts that broke the chain of illegality. Furthermore, it is unlikely that the cocaine and map would have been discovered from an independent source because they were in D's home and in his possession.

Therefore, the evidence of the map and cocaine should be suppressed.

Alternatively, if the court finds that exigent circumstances did not exist and the evidence of the bomb was obtained in violation of D's Fourth Amendment rights, the evidence of the bomb would have inevitably been discovered through the search warrant because the police officers would have had a reasonable belief that C could be hidden in the closet.

Therefore, the court should grant the motion to suppress regarding the cocaine and the map, but should deny the motion to suppress regarding the bomb.

2. ATTEMPTED KIDNAPPING

The issue is whether D can be found guilty of attempted kidnapping.

KIDNAPPING

Kidnapping is the act of confining another person with movement or in a concealed place. Kidnapping is a general intent crime and requires an intent to perform the proscribed conduct or an awareness of the circumstances of one's conduct or that a proscribed result may occur.

ATTEMPT

Attempt is an act to commit a proscribed crime, that falls short of the completed crime. Under the majority view, a defendant is guilty of attempt when he takes a substantial step in committing the proscribed crime. Under the minority view, a defendant is guilty

of attempt when he is dangerously close to completing crime. Attempt is a specific intent crime and the defendant must act with the specific intent to commit the crime. Attempted kidnapping requires an act with the intent to kidnap another person.

A searched D's home and found a map that contained a map with a highlighted route from D's home to C's house. Additionally, Ike overheard D planning to kidnap a child to raise as his own daughter. The prosecution will argue that D had the intent to kidnap C because he had a plan to kidnap a child, which shows that he intended to commit a kidnapping. However, D had not taken a substantial step in committing the kidnapping. Although D had the map, D was not in the course of a kidnapping. D was in his home when A arrived and C had already been kidnapped. D had not taken a substantial step to kidnap C and the map was an act of preparation that does not amount to a substantial step in the course of completing the crime. Additionally, D was not dangerously close to committing the kidnapping since he was at his home alone when A arrived.

Therefore, D cannot be found guilty of attempted kidnapping.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

QUESTION 3

Delia entered a coin shop, pulled out a toy gun that appeared to be a real gun, and pointed it at the owner, Oscar. Oscar handed her a set of valuable Roman coins and she fled. Neither said a word.

Subsequently, the police received an anonymous email that stated, "Your coin robber is Delia, and she is trying to sell the stolen coins." Detective Fong followed Delia and saw her using a payphone in a public alley. The payphone was not in a phone booth. As he walked past her, he heard her say softly, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight."

Detective Fong then bought a "Bird Song Microphone" from a pet store, a parabolic microphone that promised to enable a listener to hear the chirping of birds from a distance of 150 feet. He went to Nell's house, which had a deck that overlooked the alley, and lied to Nell saying that he needed to go on the deck because he was investigating a terrorist plot and "lives are at stake." Nell let him onto the deck at 9:00 p.m. that night. He aimed the microphone at Delia, who was using the same payphone in the alley, and heard her say softly, "Fine, call your buyer and let me know if we have a deal for the hot coins."

The next day, Detective Fong put all of the above information into an affidavit for a search warrant for Delia's house, obtained a signed search warrant from a judge, searched Delia's house, and recovered the coins. Delia was arrested and charged with robbery.

Prior to trial, Delia filed a motion under the Fourth Amendment to the United States Constitution seeking to suppress her statements and the coins.

1. What arguments may Delia reasonably raise in support of her suppression motion, what arguments may the prosecution reasonably raise in response, and how should the court rule with regard to

   a) Delia's statement, "I have a set of 'hot' Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight." Discuss.

   b) Delia's statement, "Fine, call your buyer and let me know if we have a deal for the hot coins." Discuss.

   c) The Roman coins. Discuss.

2. Is Delia guilty of robbery? Discuss.

QUESTION 3: SELECTED ANSWER A

Delia's Motion to Suppress

OF = Officer Fong.

State Action

For a motion to suppress based on constitutional rights, there must be state action. All the actions here were undertaken by Fong, a police officer, so there was state action.

The Fourth Amendment

The Fourth Amendment states "the right of the people to be secure, in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, except upon probable cause, supported by oath and affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

The requirements of particularity and probable cause facially apply only to searches which are conducted pursuant to a warrant. However, the Supreme Court has held that, because it would not make sense for a warrantless search to be conducted to a lower standard than a search conducted with a warrant, the same requirements of particularity and probable cause apply both to warrantless searches and searches conducted pursuant to a warrant. Probable cause is slightly more stringent for a warrantless search, and in a marginal case, a warrantless search will be found not to be based on probable cause *(US v. Ventresca).* A warrantless search is presumptively unreasonable, unless an exception to the warrant requirement applies.

a) Delia's First Statement

The statement made by Delia was overheard by Officer Fong without a warrant. Therefore, *assuming that a search took place,* it would be presumptively unreasonable. I analyze this issue below.

Standing

Standing is a threshold inquiry which is not jurisdictional, but may nevertheless bar a defendant from arguing a suppression motion. A defendant must show that their own reasonable expectation of privacy was violated (that they have standing) in order to bring a constitutional claim.

Delia here has standing - the words she seeks to suppress are her own.

Probable Cause Based on Informants

In *Illinois v. Gates*, the Supreme Court relaxed the relatively strict constraints placed on information obtained from the informants which previously was codified in *Aguilar/Spinelli.* Originally, under *Aguilar/Spinelli*, information from an informant was evaluated on a two prong test: first, corroborating circumstances confirming the information contained in the warrant was required, and secondly, the informant's reliability, as well as the reliability of the information, would be evaluated. Probable cause could not be established unless the state could meet both prongs. *Illinois v. Gates* modified this test, holding that a strong showing on one of the prongs could compensate for a poor showing on the other. Furthermore, the facts would be evaluated

based on the totality of the circumstances, rather than in a prong-specific manner.

Here, OF's investigation was undertaken based on an informant's anonymous, uncorroborated tip. This would fail both *Aguilar/Spinelli* and *Illinois v. Gates* because, at the time the tip was received, there were no corroborating circumstances available to OF, other than the fact of the robbery. Presumably, Oscar would have provided a description of the robber which could be matched with Delia's appearance, but the facts are silent on whether this was actually available to OF. Regardless, the informant's reliability was not established, nor was the accuracy of the information ascertainable on anything other than innuendo.

However, *Illinois v. Gates* only governs whether probable cause could be established based on an informant's tip. It does not govern whether police may *investigate* based on the tip when there is no probable cause, in order to follow up on information that may or may not be true. Therefore, the information from the tip would not support probable cause by itself, but it is completely admissible to support further action by OF which does not violate any constitutional provision - which is, in fact, what happens.

Delia's Use of the Payphone

Is *Katz* Implicated?

In the seminal case of *US v. Katz*, the Supreme Court ruled on the constitutionality under the Fourth Amendment of police using technology to overhear a

conversation *inside a telephone booth*. The relevant holding, in Justice Harlan's concurrence, stated that action under the Fourth Amendment is a search if it 1) violates a subjective expectation of privacy by the defendant 2) which society is prepared to recognize as reasonable.

OF's actions here took place without a warrant. Therefore, *if the actions were a search*, it would be presumptively unconstitutional. We must therefore determine whether a search took place at all.

Subjective Expectation of Privacy

Delia will certainly argue that she has a subjective expectation of privacy in the contents of her own conversation. She certainly did not want her conversation to be overheard by OF. However, subjective expectations of privacy are based on the conduct of the parties, not their subjective thoughts. Delia's speech was in an alleyway which was "a public alley", where anybody could go. The payphone she used was not enclosed. Delia could argue that her actions manifested an intention on her part to be especially careful about being overheard (she spoke "softly"). But this will not be enough to establish a subjective expectation, given that the conversation took place in a public space.

Objective Expectation of Privacy

Furthermore, Delia's conduct is not one which society is prepared to recognize as reasonable. It took place in a public thoroughfare, and the law is settled that police officer may conduct investigations from locations where they have a right to be.

Furthermore, it is unclear whether Delia has a recognizable expectation of privacy in her conversations in the first place. When a party speaks to another, they run the risk that the other party will disclose the contents of their conversation (*Hoffa v. US*). However, it could be argued that this only applies to disclosures from that party, such as when the party wears a wire. In this case, Delia's conversation was overheard by a third party, OF. If OF had taken special measures to overhear the conversation (considered in Part II) it might be argued that Delia had an objectively reasonable expectation of privacy, but against this will be held the fact that the entire conversation took place in a public space. Although, in some cases, courts have been willing to hold that an objective expectation of privacy was violated when listening devices were surreptitiously placed in a public space, this is not the case here - OF simply walked past Delia. Therefore, there is no objectively reasonable expectation of privacy, and OF's overhearing Delia was *not a search at all*.

Because OF's behavior was not a search, it does not matter that the informant's information could not establish probable cause. Nor does it matter whether the overhearing of the conversation was a "fruit" of the original informant's tip. Because there was no action subject to the Fourth Amendment at all, there can be no constitutional challenge to OF's action here.

Conclusion

The motion will fail with respect to the first statement.

b) The Second Statement

The second statement raises a number of different issues from the first.

Standing

Rules above. Delia has standing; the statements are her own.

Use of a Listening Device

OF uses a "Bird Song Microphone" to listen in on Delia's conversation, presumably because Delia might be suspicious if he listens in on her again.

The Supreme Court precedent most closely on point, with respect to technology assisted searches, is *Kyllo v. United States*, which holds that when police use technology which is not in general public use, to obtain information from the interior of a home which they would otherwise not be able to obtain unless they made a physical intrusion, then there is a search.

However, *Kyllo* is not entirely on point here. The technology here is in general public use, because it was purchased from a pet store. Furthermore, there was no intrusion into a constitutionally protected area through the use of the bird microphone, because

Delia was not at home when she used the payphone. (It is possible that there was a search, however, and that there was a reasonable expectation of privacy. I consider this below).

Another relevant precedent is *Dow Chemical*, which considered the constitutionality of an aerial search using a high powered camera. The Supreme Court in that case did not hold that a search had taken place at all, although it was willing to grant that the use of the camera in that case could, in some cases, transform action which did not otherwise violate the Constitution into a constitutional search.

Since the microphone here was in general public use, it is likely that the use of the microphone would not transform the search into a constitutional violation by itself. Persons in a public space can generally be held to assume the risk that other private individuals, using generally available technology, might listen in on their conversations. Therefore, the use of the microphone, by itself, will likely not raise a constitutional violation.

Pretextual Entrance Into Nell's House

A different issue is raised by the location from which OF conducted the search.

Consent

Consent, for purposes of the Fourth Amendment, is governed by *Schneckloth v. Bustamonte.* A court will evaluate the totality of the circumstances in determining whether consent was voluntary or not. However, consent is not a waiver - it need not be

knowing or intelligent in order to be valid.

Here, two separate issues are raised by OF's entry into Nell's home. First, Delia will need to argue that the consent was invalid because it was procured by a lie on the part of OF. It does not matter that OF stated that he was "investigating a terrorist plot" or that "lives were at stake" - although these raise issues of exigency, the entry here would not be justified by exigency, but rather by consent. Besides, entry based on exigent circumstances is only unconstitutional when police gain entry via an actual or threatened violation of the Fourth Amendment, and there was no violation here because *Nell's* house was not searched by OF.

Rather, Delia will argue that the consent was not voluntary because it was procured falsely. Police are allowed to lie when they obtain consent, however, so the entry here will likely not be held to be have been obtained through involuntary consent. It is possible, however, that the egregiousness of OF's assertions to Nell could change this result.

A larger problem is raised, however, by standing. Even if Delia were to argue that the entry into Nell's house is somehow improper, Delia does not have standing to object to an entry into Nell's house because only Nell can assert a possessory interest in her own home. Therefore, for purposes of challenging the later search, Delia will likely have to presume that OF was where he had a right to be, and that when he aimed the microphone at Delia, Delia's rights with respect to OF are the same as if Nell had aimed the microphone at her.

Subjective Expectation of Privacy

I next turn to whether, given a police officer on the deck of a nearby house aiming a device which is in general public use at the defendant, such action constitutes a search.

The rules are the same as before (*Katz*).

The analysis for the subjective expectation is before. Delia will argue that she "spoke softly", but this alone cannot establish a subjective expectation of privacy, given that the conversation took place in a public alley.

Objective Expectation of Privacy

The analysis for an objective expectation of privacy differs here, however. The listening in on Delia's conversation took place not through OF listening to her as he walked by her, but through his use of a microphone at a distance of 150 feet. This could change the objective analysis.

Courts have sometimes been willing to hold that action by the police transforms activity which would not be a search in one context into a search in a different context. For example, installing a listening device in a public area can be held to violate an objective expectation of privacy, on the theory that an individual who has a conversation in a public place may assume the risk that bystanders will be listening to him, but if the conversation takes place in the public space when no bystanders are nearby, the expectation of privacy may be different.

In this case, the conversation which was overheard was still taking place in a public alley, but Delia was presumably not aware, at the time of the call, that any individual

was in the vicinity. This presents a slightly more difficult argument than before, but a court will still likely hold that OF"s activity here was not a search.

If OF's activity was a search, however, it would be presumptively unreasonable, because there was no probable cause based on the informant's tip. There is no exception which applies here - there was no consent, nor was this a search incident to arrest or a search justified by exigency.

Fruits

As before, whether probable cause can be based on the informant's tip need not be considered if the activity in question by the police is not a search at all, since police are entitled to investigate wrongdoing even on the basis of speculative tips. However, if OF's action is considered a search, the fruits doctrine may apply.

The fruit of the poisonous tree doctrine bars evidence which was obtained as the result of an earlier illegal action if the "taint" from the previous illegality is not held to be cleansed. Assuming that probable cause could not be established from the informant's tip, then the "taint" from the tip would extend to any searches which were conducted as a result. It would not matter whether the actual listening in by Fong was reasonable or not.

There are three exceptions to the Fruits doctrine: attenuation, independent source and inevitable discovery. Because Fong’s actions depend entirely on the tip, there is no independent source, and there is no argument that Fong would eventually have discovered Delia's wrongdoing. There is no argument for attenuation, either, since there

is no intervening event or large lapse of time between the tip and Fong's action. Therefore, if Fong's action is considered a search, then the fruits doctrine could result in suppression.

Conclusion

It is likely that Fong's activity was not a search, and, thus, suppression will fail. There is a very weak argument that a search took place; if one did take place, then the statement could be suppressed.

c) The Roman Coins

***Leon* - Searches Pursuant to a Warrant**

The doctrine of *United States v. Leon* holds that a search conducted pursuant to a warrant will not be held unconstitutional if the warrant is later held to be unsupported by probable cause. There are some exceptions to *Leon*, such as where the police knowingly uses false information to support the warrant, or if the magistrate abandons their neutral and detached role.

Here, it could be argued that the information from the informant did not support probable cause. However, the subsequent actions by OF did not depend on the warrant, because they were arguably not searches, and they *do* support probable cause (which is that quantity of suspicion which would justify a reasonable person, using nontechnical standards, to conclude that evidence of wrongdoing can be found, for a search, or that the defendant has committed a crime, for an arrest.)

There is no bad faith underlying the warrant here, and no facts indicate that the

magistrate was biased. Therefore, *Leon* will bar the suppression of the Roman coins.

II. Delia's Liability for Robbery

Robbery

Robbery is aggravated larceny - a trespassory taking (caption) and carrying (asportation) of the personal property of another, from the person's presence, by force or fear, with the intent to deprive the owner of it permanently.

Here, Delia entered the shop and took Roman coins from Oscar. There was, thus, a taking and carrying away of the property, and Delia can be presumed to have had the intent to deprive Oscar of the coins permanently, since she was making arrangements to sell the coins. The primary issue is whether the coins can be held to have been taken via force or fear.

Delia pointed a gun at Oscar. Although this was a toy gun, it "appeared to be a real gun", and there are no facts indicating that Oscar subjectively knew that the gun was false (otherwise he would not have given the coins to Delia). Furthermore, it was objectively reasonable for a person in Oscar's position to believe that the gun was real. Therefore, Delia used a threat of force to take the coins, and meets this requirement. It does not matter that the threat was not verbalized - pointing the gun would reasonably have been understood to mean a threat of force, without words being used.

Delia is, therefore, guilty of robbery.

QUESTION 3: SELECTED ANSWER B

1. Suppression Motion

4th Amendment

The 4th Amendment protects the person, property, and effects of individuals from unreasonable and unlawful searches and seizures. The 4th Amendment has been incorporated to apply to states through the 14th Amendment. The remedy for a violation of the 4th Amendment is suppression of the information received that is a fruit of the invalid search and seizure, known as the fruit of the poisonous tree. There are exceptions to when the remedy applies.

Here, Delia (D) is alleging that three pieces of evidence were collected in violation of her 4th Amendment protections and is seeking suppression.

State Action

State action is when the state or an agent of the state acts. Here, the action taken is by a police and a detective; thus all are employees of the state and state action is met.

A. "I have a hot set..."

Standing - Reasonable Expectation of Privacy

A person must have standing to bring a suppression claim. They must have a reasonable expectation of privacy (REP) in the item searched or they must be subject to a seizure. A person can have a reasonable expectation in a private conversation. Persons do not have a reasonable expectation of privacy in Open Fields or for information in Public View.

Here, Fong (F) follows D into a public alley. Persons do not have a reasonable expectation in alleys that are public. There is no evidence that this alley is within the curtilage of P's home, which a person does REP for, because it is public.

The Supreme Court (SCOTUS) has found that person does have REP for a conversation in a public telephone booth if the booth is enclosed and the conversation could not otherwise be heard. In that case, the dispositive fact was that the police bugged the telephone booth and the person was attempting to keep the conversation private. Here, the facts are very different, the payphone was not in a phone booth, but was out in public view and anyone passing by could hear. The fact the conversation was spoken in low tones does not matter for this determination.

Thus, there is no REP and the remedy of Suppression is unavailable for the comment "I have a set of hot Roman coins...."

Warrant Requirement

In the unlikely event SCOTUS expanded the definition of REP to include this case, the police would only be able to collect this information through a valid warrant (discussed below) or warrant exceptions. Exceptions include searches made incident to valid arrest, searches for weapons in a Terry stop, and searches in plain view.

There is no warrant here, so F would need an exception.

Plain View

An officer may search and seize evidence that is in plain view when they are lawfully present, the item is in plain view, and its illegality is readily apparent.

Here, the officer could argue that the conversation was in plain view, anyone in the alley

could hear it. The officer was legally in this public place. And the illegality of the conversation was readily apparent.

Thus, this exception would apply.

Conclusion: There is no REP in this public conversation in a payphone without a phone booth, thus suppression is not merited.

B. Fine, call your buyer...

REP

See rule above. A person does not have a reasonable expectation of privacy in the home of another when they are not an overnight guest. A person does not have REP when they consent to a search. A person does have a reasonable expectation of privacy from searches to an otherwise private place when the search is effected through technology not available to the public and which enhances natural senses (Kyllo).

N's Home

Here, the first issue is that F is on the property of Neil's house. He gained access to this property by lying, however, an officer is permitted to lie in order to access a premise through consent so long as the lie is not based on a show of authority. For example, an officer is not permitted to lie about having a warrant. But they are permitted to pretend to be a drug buyer to gain consent and enter the home of a drug dealer. Here, it is unclear if F's lie is a lie based on authority. However, regardless of the validity of the consent, the officer is on N's deck. D has no expectation of privacy in a home that is not her own (See Rakas).

Thus, she has no REP based on this objection.

The Bird Song Microphone

Here, the second issue is that F uses a Bird Song Microphone from a pet store to listen to the conversation of D in the public alley. In Kyllo, the court found that the use of a thermal heat detector was impermissible when it was used to access the movement of people in a home. Here, D will say that like in Kyllo, F is using an object that enhances his natural perception to search D. The microphone is parabolic and enables a listener to hear birds (and all things) from a distance of 150 feet. However, this argument will fail because the microphone is readily available to the public.

Furthermore, unlike in Kyllo, the microphone is being used to search D in a place she has no REP. Kyllo was a search in a home. See discussion above. D is in the same alley as the first comment and because it is in public and there is no booth, she has no expectation of privacy for the conversation she puts out into the public.

Thus, there is no REP.

Warrant Requirement

See rule above.

In the unlikely event SCOTUS finds this is a search, there is no warrant and an exception must be applied.

Plain View

See rule above.

For similar reasons, F will argue that they validly heard the conversation. However, in this instance, D may be able to challenge the lawfulness of F's presence when he heard

the conversation because he was on N's property. See discussion above under N's Home, because this is likely a consensual permission to enter the property of N, and F is likely validly on the premises when he sees the conversation.

Thus, Plain View would likely work.

Exigence

A officer may make an otherwise unlawful search when there is an emergency or a hot pursuit of a felon.

Here, there is no emergency. F lied about the terrorist plot and the fact that lives are at stake.

This exception will not apply.

Conclusion: no REP for this conversation, thus it is not suppressible.

C. Roman Coins Physical Evidence

REP

See rule above. A person has REP in their home. The home is sacred under the 4th Amendment.

Here, F searches D's home. Thus the search must be pursuant to a warrant or an exception.

Warrant Requirement

See rule above. A warrant must be supported by probable cause, a signed affidavit, state the place and items to be seized with particularity, and it must be approved by a neutral magistrate.

There is an affidavit, and the warrant is signed by a judge. If they are a neutral magistrate, this is valid. The items to be seized and place searched are particular. The search identifies D's home and identifies that the coins should be seized.

Probable Cause

Probable cause requires sufficient facts that would lead a reasonable officer to believe that the commission of a crime was probably happening or has happened. The officer can use their own personal knowledge, lawfully obtained evidence, and the evidence of a reliable and verifiable informant to have grounds for probable cause. Facts alone may not be enough, but taken together, can lead to probable cause.

Here, the police received an anonymous email that stated D is the coin robber and she is trying to sell stolen coins. The informant is anonymous so the reliability and verifiability of the information are hard to obtain. SCOTUS has allowed such informants when the information is particular and the officer verifies it through independent investigation. Here, this is likely a valid tip, as F follows up on the tip by following D in public and overhearing her conversation which confirms the tip.

Furthermore, F has the other evidence, that was validly obtained as described above. F has the phone conversation that was in public about the "set of hot Roman coins for sale that need to go to a discreet collector. I will call back at 9..."and "Fine, call your buyer and let me know if we have a deal for hot coins." Both are likely independent grounds for a warrant as they are strong evidence of the crime of possessing and selling stolen goods, as the "hot coins" indicate. An officer may use their experience and expertise; thus, an officer who knows that hot coins may be a sign of stolen goods can rely on this information.

There is probable cause.

Thus, the search of D's home was pursuant to a lawful and valid warrant. The search does not appear to exceed the scope of the warrant.

Exceptions

Good Faith Reliance on Warrant

In the event that the court finds the statements to be collected in violation of the 4th Amendment, the probable cause would be undercut as the information would be fruits of the poisonous tree of suppressed evidence. However, an officer may rely on a warrant if a reasonable officer would not find that there is no reasonable belief, but that there is probable cause. An officer may not rely on this exception if they acted in bad faith.

Here, as described above, all of F's conduct is within the bounds of the 4th Amendment; thus if new law makes the searches invalid that support the warrant, the officer will still be relying in good faith upon a warrant that a reasonable officer would believe is not wholly lacking probable cause. There is no indication that F acted in bad faith, even the fact that he lied is something that officers routinely do as part of investigations, although this lie seems more egregious.

Thus, this exception would apply.

Conclusion: The roman coins are not suppressible, because they were collected pursuant to a valid warrant.

2. Robbery

Robbery is the crime of larceny by physical force or threats of imminent physical force to

the person of another.

Threats of Force to the Person of Another

The threats of force must be imminent and create the apprehension of the fear of physical force; economic force is not enough. The force must be directed at another person's person.

Here, D threatens O with a gun. It is a toy gun, but a reasonable person would have the fear of imminent physical force because it appeared to be a real gun. D did not use words to threaten, but actions are sufficient and pointing a gun at someone would certainly be threatening. The gun was directed at the person of O because D points the gun at him.

Thus, the larceny was achieved through threats of force to O's person.

Larceny

Larceny is the trespassory, taking, carrying away, the property of another, with the intent to permanently deprive.

Trespassory

Trespassory is the interference with another's property; it does not request permanent deprivation like conversion does.

Here, D enters a coin shop and takes the valuable Roman coins. Thus, D is interfering with the coin shop’s ownership of the coins by taking them without permission. The

owner Oscar (O), only gives them in response to the threat of violence.

Thus, the taking is trespassory.

Taking and Carrying Away

The D must physically take the personal property and carry it away, the slightest movement suffices as carrying away, including putting it in one's purse or taking something from a shelf.

Here, D takes the coins and leaves the stores.

Thus, she takes it and carries it away.

The Personal Property of Another

Personal property is a removable object and includes objects and money.

Here, D takes a valuable set of Roman coins. Coins are tangible objects and they belong to another, to O.

Thus, this element is satisfied.

Intent to Permanently Deprive

A D must specifically intend at the time of the taking to permanently deprive the true owner of their property. This intent may be later negated and still be found to be intent so long as the intent was held at the time of the actus reas. Intent may be inferred from the circumstances.

Here, D entered the shop, pulled out a toy gun and pointed it at O, takes the coins and then flees. These facts create the inference that she intends to permanently at the time. Furthermore, there is subsequent evidence from the telephone booth conversation that

she has a set of hot coins that she wishes to sell. This is strong evidence that at the time of the taking she meant to permanently deprive.

Thus, all of the elements of larceny are met.

Conclusion: D is guilty of robbery

The State Bar of California

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Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

QUESTION 4

Needing money and willing to do anything to get it, Don, who is tall, and Al, who is short, set out for Vic's house around midnight to steal from him. On the way, Al said that he did not want to get involved, but Don slapped Al's face and responded: "If you don't come along now, I will break your legs tomorrow." At Vic's house, Don opened the unlocked front door and he and Al went inside. Don took a wallet on a table in the foyer, and he and Al ran away.

Wanda, who happened to be walking in front of Vic's house at the time, caught sight of both men running out of the house. That night, Wanda described the taller man to police as clean-shaven with short hair, but couldn't describe the shorter man.

Don and Al were soon arrested. The next day, a newspaper printed a recent photo of Don, showing him with a large beard and long hair. When Wanda saw the photo in the newspaper, she immediately went to the police station and told Officer Oliver that she was concerned that Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Before Don was arraigned, Officer Oliver arranged for Wanda to view a lineup of six bearded men with long hair, including Don. After viewing the lineup for 20 minutes, Wanda identified Don as one of the men she saw running out of the house. At trial, Al stipulated that he had run out of Vic's house with Don.

1. With what crime or crimes, if any, may Al reasonably be charged; what defenses, if any, may he reasonably assert; and what is the likely outcome? Discuss.

2. Under the Fifth and Fourteenth Amendments of the United States Constitution, on what basis, if any, may Don move to suppress evidence of Wanda's identification at the lineup, and what is the likely outcome? Discuss.

QUESTION 4: SELECTED ANSWER A

Al's (A) crimes

Conspiracy

There is a conspiracy when two or more people agree to commit a crime with the specific intent to commit the crime. Under the common law, there must bilateral conspiracy, whereby both parties to the agreement specifically intend to commit the crime. There is also no overt act requirement under the common law. However, more recently, the MPC, federal law and majority of jurisdictions all require that there be an overt act in addition to the agreement for a conspiracy to be found. The MPC also allows for there to be unilateral conspiracy, when a party can be guilty of conspiracy for a crime even though the other party did not actually want to commit the act (i.e. in the case of an agreement with an undercover police officer.) Conspiracy does not merge with the actual crime committed -- and thus, even if the substantial crime is performed, a person could also be guilty of conspiracy of that crime.

Here, the facts indicate that D and A intended to commit the crime of stealing from V. D and A agreed to steal from V and "set out for V's house" together at midnight to steal from him. Thus, under the common law, A was guilty of conspiracy for <u>larceny and burglary</u> (the substantive crimes will be analyzed in more detail below), when A agreed with D to steal from V.

Then under the majority/federal/MPC rule, there was also arguably an <u>overt act</u> performed when D and A set out for V's house. A could argue that simply going towards V's house was insufficient to constitute an overt act. A could argue that they didn't have

special equipment or tools on them with the intent to break in. However, here, D and A set out towards V's house around "midnight." Heading to someone's home at midnight (well passed reasonable hours) would probably be sufficient to show that there has been an overt act sufficient to find conspiracy.

Pinkerton

Under the Pinkerton Rule, all co-conspirators are responsible for all substantive crimes that are committed by co-conspirators that are foreseeable and are in furtherance of the crime.

So, here, A would also be liable for all substantive crimes that D committed in the process of committing the theft crime that they intended to commit together. Therefore, even though it was D who opened the unlocked door and then took the wallet on the table in the foyer, A would also be liable for those crimes, even if A argued that he himself did not commit those crimes. Opening a door and taking a wallet are all foreseeable crimes in furtherance of the crime of stealing from someone's home.

Accomplice Liability

Accomplice liability will attach when an accomplice aids a principal in performing a crime with the specific intent that the crime be performed. (Note: under the common law, the accomplice needs to only aid intentionally and knowingly.) An accomplice will also be liable for all the substantive crimes that the principal has done.

Here, A may try to argue that he wasn't a principal in the crime because he didn't commit the actus reus for the crimes. However, based on the facts, the court would likely find that he was very much a principal to these crimes -- given that he went to V's

house and also entered the property.

Larceny

Larceny is the taking and moving of another person's property without their consent with the intent to deprive them of it permanently.

Here, D took and moved the wallet from the table on the foyer, with the intent to deprive V of the wallet permanently. After D took the wallet, both D and A ran from the home. And there is no indication that D or A intended to return the property. In fact, quite to the contrary, at least D intended to keep the money given that he was in need of money and "willing to do anything to get it."

As such, absent any defenses (discussed below) D and W would both be guilty of larceny here.

Robbery (no threat of force)

Robbery is larceny from another person's presence or person through threat or intimidation. Though the taking of the wallet happened in the person's home (and maybe arguably in the person's presence if V were there) -- there was no threat or intimidation and thus, there was no robbery here.

Burglary

Burglary is the breaking and entering into a dwelling at nighttime with the intent to commit a felony inside. The requirements for dwelling and nighttime have been relaxed in many jurisdictions.

Here, D broke and entered into V's home at nighttime with the intent to steal from V. All the elements are met. They "broke" into the house when they unlocked the door. Even

though the door was unlocked, this was not a place open for the public (but someone's home) and thus the court would find that there was a breaking. Then, they entered into the place of the home ("entering"). The building they broke into was indeed V's home (and thus a dwelling). And then broke in with the intent to steal from V (and thus commit a felony inside).

As such, there was burglary here. And thus, A could be charged with burglary.

A's defenses

Withdrawal

A co-conspirator could withdraw from a conspiracy depending on the jurisdiction. Under the common law, a co-conspirator cannot withdraw from a conspiracy because the conspiracy occurs when the agreement is made. However, even under the common law, a co-conspirator could withdraw from the conspiracy even after the agreement is made so as to not be held responsible for future crimes. However, such withdrawal must be made clearly to the other co-conspirator or also typically requires informing the police.

Under the majority rules, a co-conspirator can withdraw from a conspiracy provided that it is before an overt act has taken place -- and the co-conspirator either makes an affirmative declaration of intent to withdraw to the co-conspirator or alternatively, informs the police. Under the MPC/minority rule, a co-conspirator could withdraw even after the overt act, provided that they take actions to thwart the crime.

Here, A would argue that he properly withdrew from the conspiracy. He would argue that he withdrew from the conspiracy when he told D that he did not want to get

involved. However, the court is unlikely to be receptive to his argument in any jurisdiction. Under the common law, he could not withdraw at that point because he had already agreed to the commit the crime with D. And under the majority rule, he had already committed to the overt act of walking to V's home at midnight D and thus could not withdraw at that point. Even under the minority rule, A could not have effectively withdrawn because he did nothing to thwart the crime. Instead, he actually "went inside" the home after D had unlocked the front door.

Duress

Duress is a defense whereby the defendant argues that they had to commit a crime because they or a third party were under an imminent threat that threatened serious bodily harm or death.

Here, A would argue that he was forced to commit these crimes because of duress. He would argue that D slapped him on the face and told him that he would "break [his] legs" if he didn't come along. However, A is unlikely to win on this defense. For a defense of duress, the threat must be imminent. In this case, D did threaten A but said that D would break his legs tomorrow. Also, there is no indication that A, if he wanted to, couldn't have run away or left the scene after he decided that he did not want to get involved. As a result, the court is unlikely to find for A on his defense for duress.

For these reasons, A could reasonably be charged with the substantive crimes of larceny and burglary and with conspiracy to commit those crimes. His defenses for duress and withdrawal are unlikely to be successful in any jurisdiction.

Question 2

State Action

The 5th and 14th Amendment of the US Constitution protects people against state action. In this case, there is clear state action. The issue here involves police action and thus there is state action.

Exclusionary Rule

Under the exclusionary rule, all evidence that is obtained in violation of the 4th, 5th, or 6th amendments must be excluded from evidence. There are a few exceptions to the exclusionary rule (i.e. knock and announce, attenuation and the causal chain, etc.) but they are not relevant here.

Lineup

D's strongest argument would be to move to suppress the evidence of Wanda's (W) identification on the basis that it was impermissibly suggestive. Under the rules concerning lineups, police cannot use lineups that are impermissibly suggestive that have a substantial likelihood of resulting in misidentification.

Impermissibly Suggestive

D could present a strong argument that the lineup was impermissibly suggestive. He would argue that by the time the W was shown the lineup, she had already seen his picture in the newspaper. Moreover, he would argue the lineup was impermissibly suggestive because when W went to the police after seeing his picture in the newspaper, the police confirmed that they had the correct person because they had found V's wallet on D. As a result, not only had W seen his picture in the newspaper, but

also had confirmation from the police that the person in the picture was the person who had committed the crime.

Substantial likelihood of resulting in misidentification

D would then argue that the above caused a substantial likelihood of resulting in misidentification. He would argue that, in fact, had W not seen the picture (and had the picture not been confirmed by Officer Oliver) she would still be looking for a taller man that was "clean-shaven with short hair." He would argue that it was only because she had seen the picture and heard the police officer's statement that she identified him.

In response, the police would argue that they ensured that the lineup was not impermissibly suggestive. They would argue that they purposefully only chose six bearded men with long hair (presumably, all tall too) -- and that they provided W a lot of time to inspect each. Indeed, they would argue that W only identified D after 20 minutes.

Despite the police's efforts, D could probably successfully move to suppress evidence of W's identification at the lineup on the basis that it was impermissibly suggestive. Even though the police had chosen other tall, bearded men -- the police had already prejudiced W by confirming that the person in the newspaper picture was the person who had committed the crime.

QUESTION 4: SELECTED ANSWER B

1. Al's Crimes

<u>Crimes</u>

Principal and Accomplice

Al may be liable for Don's crime as an accomplice to his crimes as the principal. The principal of a crime is the one who performs the actus reus of the crime, the perpetrator of the crime in other words. Here, Don is the one who actually opened the front door and picked up the wallet and took it with him. Therefore, Don is the principal of the crime. An accomplice is one who aids or abets the principal in the completion or cover-up of a crime. An accomplice is liable for all crimes he aided and abetted the principal in. Here Al went along with Don, entered Vic's house, watched Don take the wallet, and ran away with Don. Presumably, Al was serving as a lookout for Don and not merely tagging along. Therefore, to the extent any of Don's actions while Al was there are crimes, as discussed above, Al will be liable for them, unless he can claim withdrawal as discussed below.

Conspiracy

A conspiracy is an agreement between two or more persons to commit an unlawful act. Although at common law, an overt act was not required for the agreement to be a conspiracy, the modern law also requires an overt act. The agreement for a conspiracy may be written or oral and may be assumed from circumstantial evidence if there is a common plot or scheme among the potential co-conspirators. Here, although the facts are silent as to any written or oral agreement between Al and Don, the evidence

suggests there was a common scheme. Al and Don were both desperate for money and willing to do anything to get it and they set out together to enter Vic's house and steal from him. Therefore, unless Al can argue that he withdrew from the conspiracy, as discussed below, Al will be liable for conspiracy. He will also be liable for the substantive crimes committed in furtherance of the conspiracy and any additional crimes if they were the foreseeable result of the conspiracy under the majority Pinkerton rule.

Larceny

Larceny is the trespassory taking and carrying away of another's personal property with the intent to permanently deprive them of it at the time of the taking. Don likely committed larceny and therefore under accomplice and conspiracy liability, Al will also be guilty of larceny, subject to the defenses below.

Trespassory

In order to be trespassory, the taking must have been without the owner's permission. Here, Al and Don took Vic's wallet from his house without his knowledge at night. Therefore, it seems very unlikely that they had Vic's permission to take the wallet and no facts suggest that they did. Therefore, this element is met.

Taking

The taking is any action that removes the personal property from the possession of the owner. Here, the wallet was in Vic's house and therefore in his possession before the time of the taking. When Don picked it up, he satisfied the taking requirement by removing it from the possession of the owner into his own possession. Therefore, this

element is satisfied.

Carrying

Carrying away is any movement even slight movement away from where the property was taken. Here, this element was clearly met because Don took the wallet and ran out of the house and away from the house.

Another's Personal Property

The property must also be in the possession of another. Here, the wallet was in Vic's possession before the taking and therefore this element is met.

Intent to Permanently Deprive

The person committing larceny must have the specific intent at the time of the taking to permanently deprive the owner of the property. Here, Don and Al were desperate for money. Therefore, it is unlikely that Don took the wallet with the intent to give it back to Vic and therefore likely intended to permanently deprive Vic of the property. Therefore, this element and all elements required for larceny have been met.

Robbery

Robbery is larceny from the person of another by force or intimidation. Here Don's actions did not amount to robbery and therefore Al will not be liable for robbery even through accomplice and co-conspirator liability.

Larceny

As discussed above, larceny has been committed by Don.

From the Person of Another

Here, the wallet was taken off a table in the foyer not off of Vic's person. There is no evidence that Vic was even aware or present when the wallet was taken and therefore this element is not met.

By Force or Intimidation

To be a robbery, more force than is necessary to effect the taking is necessary or there must be intimidation through threat of imminent bodily harm. Here, neither of these is met. Don took the wallet off the table with only the force necessary to take the wallet and Vic was nowhere to be found so there was no intimidation through threat. Therefore, because the taking was not from the person of another or by force or intimidation, Don did not commit robbery and therefore Al cannot be liable for it as an accomplice or co-conspirator.

Burglary

Burglary is the breaking and entering into a dwelling at night with the intent to commit a felony at the time of the entering.

Breaking

Breaking is use of force, for example breaking a window or kicking down a door. The force used must be more than required to enter. Here, Don opened an unlocked front door. This is sufficient to be considered a breaking because there was more force than necessary to enter, ie the door was not wide open and force was used to open it, however slight.

Entering

Entering is physically crossing the plane into the dwelling. Here, Don and Al both entered the house by going inside.

Dwelling

A dwelling is a structure regularly used for habitation. It does not have to be currently inhabited, but it cannot be abandoned. All states have statutes now that expand the common law definition to other structures and buildings and some to cars. Here, this was a dwelling because it was Vic's house. It is unclear whether Vic was home at the time, but he is not required to be at home if it is a place he regularly inhabits. Thus, this element is satisfied.

Night

Night is the time between sunset and sunrise. Modern statutes eliminate the need for a burglary to be at night but may impose higher penalties when it is at night. Here, Al and Don went at midnight to steal from Vic's house so the nighttime element is clearly met.

Intent to Commit a Felony

At the time of the breaking and entering, the person must have had the specific intent to commit a felony inside to be a burglary. Here, Al and Don went to Vic's house with the clear purpose of stealing from him. This is a felony and therefore at the time of the entry, they had the requisite intent. Therefore, Don is guilty of burglary and Vic is guilty as his accomplice or co-conspirator unless one of the defenses below applies.

Defenses

Duress

Duress is an improper threat that meaningfully deprives a person of actual choice. In the criminal context, the threat must be of imminent serious bodily injury or death to the person asserting duress or to another person that the person knows. Here, Al will argue that when Don slapped his face and said "If you don't come along now, I will break your legs tomorrow" that he was deprived of any meaningful choice and can assert the defense of duress. However, the threat to Al was that Don would break his legs *tomorrow* not at the time. Therefore, the threat was not imminent and Al cannot assert duress as a defense. Al will also argue that the fact that Don slapped him was an imminent threat; however, Don slapped him before he made the threat and a slap is not imminent serious bodily injury or death and it was done before the threat so it was not a threat of serious bodily injury or death.

Withdrawal as Accomplice

The common law did not allow any withdrawal when a person had already aided and abetted a principal. The modern law allows withdrawal and therefore relief from liability only when the accomplice clearly states that he does not want to help anymore and attempts to thwart the principal in the commission of the crime. Here, Al will argue that he withdrew from the accomplice liability when he said he did not want to get involved anymore. However, Al still went along with Don and served as a lookout and therefore he cannot escape accomplice liability.

Withdrawal from Conspiracy

Al will also try to argue that he withdrew from the conspiracy. At common law the conspiracy was achieved when there was an agreement to commit a crime without an overt act. Under this standard there is no withdrawal from the conspiracy once the agreement has been made. Here, Al has already set out with Don to steal from Vic so the agreement has already been made. Under the modern law an overt act is required before there is conspiracy liability. An overt act may be lawful or unlawful. Setting out at midnight to go somewhere may be lawful, but in this case it was an overt act in furtherance of the conspiracy to steal from Vic. Therefore, Al had already committed conspiracy before he said he did not want to get involved. In addition, he continued aiding Don and finished carrying out the crime so he will still be liable for conspiracy. A conspirator may be able to escape liability for substantive crimes, but only if he attempts to thwart the success of the conspiracy. Here, Al did not do that so he will also still be liable for the underlying crimes.

2. Don's Motion to Suppress

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a court will take two steps in deciding whether a police lineup violates the defendant's rights. First, the court will decide whether the lineup was impermissibly suggestive. Second, the court will decide whether even if the lineup was impermissibly suggestive if the identification is still nonetheless reliable.

Impermissibly Suggestive

A lineup is impermissibly suggestive if the form or substance of the lineup unduly biases the person making the identification. Here, Wanda described to the police that the taller man, presumably Don, was clean-shaven with short hair, but could not describe the shorter man. When Don was arrested with a large beard and long hair, Wanda thought Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocked when he was arrested. Officer Oliver than arranged for lineup of six bearded men with long hair including Don. After 20 minutes, Wanda identified Don as the man.

Four aspects of this lineup are impermissibly suggestive. First, Wanda saw Don's picture in the newspaper before the lineup. Thus, she already knew that he was the man that the officers thought was the one who came out of the house. Second, Officer Oliver told Wanda that the man they had arrested, Don, had Vic's wallet in his pocket. In addition to having seen the picture in the newspaper, now Wanda has been told Don had the wallet on him. These facts would make Wanda seriously doubt her description the night of the crime that the taller man was clean-shaven and had short hair. Third, the police lineup only included long haired and bearded men. Wanda believed the man she was looking for had short hair and was clean shaven, but Officer Oliver only provided her options with long hair and beards to choose from. As such, Wanda may have felt limited to those choices that were impermissibly suggestive.

Still Reliable

If it nonetheless is still reliable, then it can be used still. Here, it is likely not reliable because it is inconsistent with what Wanda said when the identification was fresh the night of and because it took her 20 minutes to identify Don.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Professional Responsibility
3.	Torts
4.	Criminal Law and Procedure
5.	Wills and Succession / Community Property

QUESTION 4

Detective Anna was about to subject David, who was lawfully in custody, to interrogation because she had received a tip from an anonymous informant that David was involved in transporting heroin. Detective Anna advised David of his *Miranda* rights and asked him if he knew anything about heroin shipments. David replied, "I am not sure if I need a lawyer or not." Detective Anna next asked David how he was transporting the heroin. David responded, "If I had anything to do with it, I would use my car." Detective Anna released David from custody when he refused to answer any more questions. Detective Anna then sent a message to all police officers, describing David's car, stating that it was believed to be involved in transporting heroin.

Later that day, Officer Baker, who had heard Detective Anna's message, saw the car described in the message. Officer Baker decided to follow the car to see if the driver would do anything that could justify stopping the car. When the car ran a red light, Officer Baker stopped the car and ordered the driver, who was in fact David, out of the car. Officer Baker then did a pat-down search of David and found a cell phone in his pocket. Officer Baker turned on the cell phone, saw a text message icon, clicked on the icon, and found a message to David stating, "The heroin is in the trunk; deliver it to the warehouse." Officer Baker then searched the trunk of the car, where he found 30 pounds of heroin. He arrested David and arranged for the car to be taken to the police impound lot for processing.

David is charged with transportation of heroin. David moves to suppress:

1. His statement, "If I had anything to do with it, I would use my car";

2. The text message that stated, "The heroin is in the trunk; deliver it to the warehouse"; and

3. The heroin found in the trunk of the car.

How should the court rule on each of the motions to suppress? Discuss.

QUESTION 4: SELECTED ANSWER A

The defendant in a criminal case may bring a motion to suppress evidence asserting a violation of his Fourth, Fifth or Sixth Amendment rights. These amendments are incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The exclusionary rule provides that evidence obtained in violation of these constitutional rights in inadmissible in the state's case-in-chief against the defendant, unless an exception to the exclusionary rule applies. The purpose of the exclusionary rule is to deter illegal police conduct and the Supreme Court has decided there are certain exceptions to the exclusionary rule where the social costs to society outweigh the deterrence value in prohibiting illegal police conduct. The exclusionary rule prohibits the admissibility of all evidence directly obtained in violation of a defendant's constitutional rights and evidence later derived from such evidence as "fruit of the poisonous tree."

1. Statement, "If I had anything to do with it, I would use my car"

Fifth Amendment

At issue is whether David had a viable argument for suppression of his statement under the Fifth Amendment. The Fifth Amendment protects the right of defendants to be free from compelled self-incrimination. The Supreme Court has decided that *Miranda* warnings are necessary to protect this right so that a defendant is made aware of his right to invoke his privilege against self-incrimination and his right to counsel. Waivers of a defendant's *Miranda* rights must be knowing and voluntary. *Miranda* attaches at "custody." A defendant is in custody based on the

"freedom of movement" test, or when a reasonable person would not feel that he is free to leave police custody. Here, the facts state that David was "lawfully in custody," so we must accept that David was in custody for *Miranda* purposes, and we will not analyze whether that custody was lawful.

Miranda only applies to interrogations. Interrogations include express questioning by police officers as well as any statements or conduct by the police that may reasonably lead to inculpatory statements by a defendant. However, statements that are spontaneous or voluntary by the defendant are not obtained in violation of *Miranda.*

In analyzing whether a defendant has properly invoked his *Miranda* rights, the critical question is whether he did so *unequivocally*. To assert his right to maintain silent, the defendant must unequivocally state that he wishes to maintain silent; even sitting there in silence for long periods is insufficient to expressly invoke. To assert his right to counsel, a defendant must unequivocally assert his right to speak to a lawyer.

Here, it appears that David was lawfully in custody and was about to subject David to interrogation, so both prongs of *Miranda* apply. Detective Anna properly advised David of his *Miranda* rights so there was no problem with the advisement. Once she did that, she did not need to wait for David to invoke his rights; she could ask him a question and then in response, David could waive or assert his right to silence or counsel. Therefore, asking David if he knew anything about heroin shipments was valid. David then replied, "I am not sure if I need a lawyer or not." While it is possible to suggest that David was uneasy about engaging in interrogation, that was almost certainly insufficient to invoke his right to counsel, because it was an equivocal statement. He would have needed to

say something like, "I would like to speak to a lawyer" or even "I'm not sure it's a good idea to speak to you so let me talk to a lawyer first." Detective Anna then properly asked him another question because she was allowed to do so since David had not yet asserted his right to counsel or silence and thus waiver was still in effect. David then made the inculpatory statement at issue here. Therefore, because David had waived his *Miranda* rights and not asserted his right to counsel or silence unequivocally, the statement is inadmissible both in the prosecution's case in chief and for impeachment purposes. (Evidence obtained in violation of *Miranda* is still admissible for impeachment purposes but that's not at issue here since it's admissible in the prosecution's case in chief, too).

The fact that David *then* said he did not want to answer any more questions does not retroactively make his earlier inculpatory statement involuntary or inadmissible and so it is still properly admissible in court. The court should deny the motion to suppress the statement.

Sixth Amendment

A defendant has the right to counsel at all critical stages of the criminal case. The Sixth Amendment right to counsel attaches when a defendant is formally charged with a crime. Here, the facts state that David was only in custody and do not suggest that he had been charged with a crime at the time that he was interrogated. Therefore, even though interrogations are a critical stage, the right to counsel only applies to interrogations conducted *after* formal charges have been filed against the defendant, and so no Sixth Amendment rights were violated here.

2. Text message, "The heroin is in the trunk, deliver it to the warehouse"

At issue is whether the text message that Office Baker saw on the cell phone was admissible against David.

At the outset, we will note that any possible fruit of the poisonous tree argument that the stop was actually made as a product of the knowledge Detective Anna earlier obtained illegally should be denied because a) the police did not violate David's rights earlier in the interrogation and so it was totally proper for Detective Anna to tell her fellow police officers about the car and the information concerning it and b) the Supreme Court has actually said that information obtained in violation of *Miranda,* unless the police do so intentionally, is not subject to the fruit of the poisonous tree doctrine.

Stop of car

The first issue is whether the stop of the car was valid. A stop of a car is a "seizure" under the Fourth Amendment, because a reasonable person under the circumstances would not feel free to leave when he is pulled over by the police, generally until the police tell him he is free to go. The Fourth Amendment protects the right to be free from unreasonable searches and seizures. The warrant requirement is the heart of the Fourth Amendment and the Supreme Court has held that warrantless searches and seizures are presumed to be unreasonable unless an exception to the warrant requirement applies.

To begin, we must note that a defendant only has standing to assert violations of his own constitutional rights in a suppression motion. When a car is stopped by the police, the driver (and actually the passengers, too) will have standing to challenge the validity

of the stop. Here, David is the driver of the car, so he has standing to challenge the stop.

One of the canonical exceptions to the warrant requirement is that the police may pull over a car without a warrant provided they have at least reasonable, articulable suspicion that an offense has been committed or is being committed. This can include any traffic violation. The point of this exception is that cars freely move throughout the world and so it would be wholly impractical for the police to obtain warrants to stop and search cars of automobiles. That is the rationale behind the basis for stops of cars as well as searches for cars that we will get to shortly.

Under *Whren*, a police offender's subjective intent for conducting a search or seizure is irrelevant; as long as the officer had an objectively reasonable basis for the search or seizure, whatever subjective motivation he had in addition, would not make it unreasonable. Additionally, people do not have a reasonable expectation of privacy when they drive around the world in their cars, so David can't claim that Officer Baker tailing him for some time already violated his right to privacy.

Here, Officer Baker heard Detective Anna's message and then saw the car described in the message. He therefore decided to follow the car for as long as it took for the driver to commit some kind of violation that would justify it. This is a pretext stop and as mentioned is completely valid provided that the officer had an objectively reasonably basis for the stop. Here, the car ran a red light, which is obviously an objectively reasonable basis for stopping the car, giving rise to far more than reasonable suspicion that an offense had been committed (in fact, probable cause). Therefore, the stop was

reasonable.

Search of David

The next question is whether the pat-down search of David was reasonable. Again, David has standing to assert a violation of his rights here because he personally was searched. Officer Baker had a right to order David out of the car, so that is okay. The facts suggest that Officer Baker then did a "pat-down search of David." Under the *Terry* doctrine, a *Terry* stop is valid if the officer had reasonable suspicion that the person has committed a crime or is committing a crime or is about to commit a crime. The pat-down search is only valid if the officer had reasonable suspicion based on specific, articulable facts that the defendant was armed and dangerous. Here, the facts that are known to Officer Baker are that 1) there is an anonymous informant who said that David was involving in transporting heroin. Tips of anonymous informants alone do not give rise to reasonable suspicion unless they are corroborated by other evidence indicating their reliability. 2) That corroboration was likely sufficient because of the inculpatory statement David made about the transportation of heroin which indicated that he probably had something to do with transporting heroin and that if he did, he would use his car. So, there was reasonable suspicion that David was transporting heroin at the time and it was possible that that heroin or some other illegal material may have been contained in his pockets. The bigger problem is that the officer may not have had reasonable suspicion that David was armed and dangerous. There are no specific facts about guns here. The best the officer can likely say is that heroin traffickers are very likely to carry guns in their pockets because drug trafficking is a violent industry.

That may be sufficient for some courts and maybe not for others.

The even bigger problem for the officer is that a *Terry* frisk only allows the officer to seize material that he "immediately" recognizes as contraband or evidence of a crime. The officer here simply felt a cell phone, which would clearly not be immediately recognizable as contraband. Therefore, it was likely illegal to take the phone at all at this point.

An alternate theory for which this search could be justified is a search incident to an arrest. An officer may search the person's body and the area within one lunge of his body, but the search incident to arrest exception only applies when the officer has actually made an *arrest*. Here, the officer actually could have arrested David at this point under *Atwater* because he's got probable cause that David just ran a red light. But he clearly did not arrest David at this point so that is not a valid basis for justifying the search. Therefore, the pat-down exceeded the scope of *Terry,* which means the evidence obtained thereafter would be illegally obtained, too.

No other exception to the warrant requirement applies so far.

Search of phone

Even if the officer's conduct so far had been reasonable, what he did next violated David's rights. David has a reasonable expectation of privacy in his phone because he is the owner of the phone and it was on his person at the time of the search.
Under *Riley*, officers need to get a warrant to search the electronic contents of a cell phone because people have an astonishing amount of private information stored on their cell phones and thus have a reasonable expectation of privacy in them. Warrants

must be based upon probable cause, or sufficient facts to convince a reasonably prudent person that a crime has been committed by the defendant and that evidence or instruments of the crime will be obtained in the place to be searched. However, officers do not need to get a warrant to simply physically handle the phone or to analyze the physical properties of the phone; e.g. an officer could pull off a phone case and see if there was any cocaine hiding in between the phone and the case. But here, Officer Baker did far more than that: he turned on the cell phone, saw the text message icon, clicked on the icon, and then found the message at issue here. That went far beyond physical examination of the phone because he began to scrutinize the electronic contents of the phone.

David did not consent to this, so that would not be a basis for searching the phone.

Therefore, the statement obtained on the phone was obtained illegally and should be suppressed under the exclusionary rule.

3. Heroin found in the trunk of the car

At issue is whether the officer could validly search the car after finding the text message. David has standing to challenge the search of the car because it's his car - he owns it.

Automobile exception

If the search of the phone had been legal, there is no doubt that the search of the car would then be legal. Under *Carroll*, a core exception to the warrant requirement is that cars may be searched based upon probable cause, or sufficient facts to convince a reasonably prudent person that evidence of a crime or contraband will be found within

the car to be searched. The parts of the car that can be searched depend on what the probable cause is for, analogous to the "particularity" requirement of the warrant requirement: PC to search for machine guns will not justify opening up a tiny container in the car because machine guns can't fit in tiny containers. There is no doubt that once the officer has seen the text message he has probable cause to search the trunk; the text message says that heroin is in the trunk. It's hard to get much more probable than that.

However, under the fruit of the poisonous tree doctrine, evidence obtained from an illegal search cannot then be used to find other evidence of a crime, subject to certain exceptions. Various exceptions to this rule under *Wong Sun* include attenuation (where the illegal police conduct that led to discovery of the originally illegally obtained evidence is very far removed in the causal chain from the subsequent search or seizure at question) or independent source, where the police could have independently obtained the evidence from a different source. Those do not apply here because the search of the phone was immediately followed by the search of the trunk. Additionally, there is no independent source for the information that would give rise to searching the trunk.

Search incident to arrest

Another possible exception here would be search incident to arrest. Under *Gant,* when a police officer searches a car after arresting a defendant, the police officer may also search the passenger compartment of the car if 1) the defendant is unsecured and capable of reaching into the car or 2) the officer believes that evidence of the offense of

arrest may be found in the car. Here, though, the exception does not apply because David again was not arrested; he was only arrested after the heroin was found. Additionally, the search incident to arrest exception only applies to the passenger compartment of the car, not the truck, which is where the heroin was found. So that exception is not valid either.

Inevitable discovery / impound search

Because the search of the car was likely illegal based on the above arguments, the prosecution could argue that the heroin found in the car would have been inevitably discovered by the police. The police arrested David after finding the heroin and then the car would have been taken to a police impound lot for processing. When cars are taken to police impound lots, the police conduct an "inventory search" which is meant to protect the police from allegations that any material that has gone missing was done by the police. The police look through the car and write down the items found in the car on an inventory search. Inventory searches are valid as long as they are conducted according to routine, they are based on valid authority to actual impound the car in the first place, and they are not actually abused by the police in a "pretext" to search for evidence.

Here, the car would have inevitably been subjected to an inventory search, where the police would have almost certainly found 30 pounds of heroin in the truck. Therefore, the prosecution could argue that evidence would have been inevitably discovered. The problem for the prosecution is that there likely was not probable cause to search the car until the illegal search of the phone, and so it was not inevitable that the evidence would

have been discovered. However, if a court found that there was probable cause to search the car for heroin even before the text message was discovered, that would be a basis for not suppressing the evidence under the inevitable discovery rule.

If a court did not reject the suppression motion on that basis, the heroin found in the trunk of the car should be suppressed as it was obtained in violation of David's Fourth Amendment rights.

QUESTION 4: SELECTED ANSWER B

1. David's Statement "If I had anything to do with it, I would use my car."

Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment of the US Constitution guarantees people the right against self-incrimination. Miranda is a judicially-made doctrine that requires certain warnings when a defendant is in a situation of custodial interrogation. The Sixth Amendment guarantees criminal defendants the right to assistance of counsel and attaches at the time a defendant is formally indicted or charged. Here, David (D) can challenge the introduction of his statement on Fifth Amendment grounds, but the facts do not indicate that he has been formally charged with transportation of heroin. A only has an anonymous tip that he was involved in transporting heroin, which does not suffice for probable cause. Moreover, the facts do not indicate that he has been formally arrested, but rather that he is simply in lawful custody of the detective agents. Therefore, D must look to the Fifth Amendment when seeking exclusion of the elicited statement.

Miranda Rights

Miranda warnings must be given when a defendant is (1) in custody and (2) being interrogated by police or government agents. Custody is given a functionalist definition: a court will ask whether a reasonable person under the circumstances would have felt his freedom of movement restricted to the degree we associate with a formal arrest. Interrogation is the deliberate elicitation by the government of incriminating information. Here, D was "lawfully in custody" at the time that Detective Anna (A) was about to subject him to interrogation. These facts are sufficient to trigger Miranda. A discharged

her Miranda duties when she advised D of his Miranda rights, and then proceeded to ask him if he knew anything about heroin shipments.

Invocation of Miranda Rights

After a defendant is Mirandized, he must either invoke his Fifth Amendment right to silence or his Fifth Amendment right to an attorney. Invocation must be clear and unambiguous, as the Supreme Court held in *Davis*, and must clearly indicate that the defendant intends to either (a) remain silent, or (b) seek counsel.

Invocation of Edwards Right

If the defendant clearly and unambiguously invokes his right to counsel, this right must be scrupulously honored under *Edwards*: the interrogation must cease until defendant has an attorney present. If the interrogators fail to scrupulously observe invocation of this right, the interrogation will be the fruit of an Edwards violation, and inadmissible under the exclusionary rule. Here, after D was Mirandized and interrogated, he replied, "I am not sure if I need a lawyer or not." This is an ambiguous statement and is not a clear invocation of the right to counsel. A court will likely find that D did not invoke his Fifth Amendment right to counsel. A's persistence in interrogating D, given the ambiguity of D's statement, was not an Edwards violation. D's response that "If I had anything to do with it, I would use my car, was therefore not the fruit of an Edwards violation. It is admissible against him.

Invocation of Moseley Right

If the defendant clearly and unambiguously invokes his right to silence, this right also must be scrupulously honored. The interrogation must cease unless either the

defendant voluntarily re-initiates contact, or a reasonable break in Miranda custody has occurred such that the coerciveness of the interaction has dissipated due to lapse of time and custody. Here, D refused to answer any more questions only after his statement, "If I had anything to do with it...". Detective A ceased the interrogation at this point. A has therefore not violated D's Moseley rights, and the statement is not the fruit of a Moseley violation, because D said it voluntarily before invoking his right to remain silent.

Waiver of Miranda Rights

A defendant's waiver of Miranda rights must be knowing and voluntary, meaning it must be the product of his free will rather than the coerciveness of the interrogation setting. It is not necessary here to inquire as to whether D waived his Miranda rights, because he failed to clearly invoke his right to counsel or silence at any point prior to giving his statement that he now seeks to exclude. In the "grey space" in between invocation and waiver, interrogation is not prohibited.

In conclusion, A did not violate Miranda, Moseley, or Edwards, and so D's statement is not subject to the exclusionary rule.

2. Text Message Stating, "The heroin is in the trunk; deliver it to the warehouse."

The Fourth Amendment

The Fourth Amendment grants people the right to be secure from unreasonable search and seizure of their person, homes, papers, and effects; and provides that no warrant shall issue except on probable cause, supported by oath and affidavit, and describing

with reasonable particularity the place to be searched and the people or things to be seized. When challenging the admission of evidence on Fourth Amendment grounds, a defendant must show (1) state action; (2) that he has standing to challenge the search; (3) that a Fourth Amendment search or seizure occurred; and (4) that the search was conducted without a warrant and probable cause, and no exception to the warrant requirement applies.

State Action Requirement

The Fourth Amendment requires state action, which is official conduct by the government or governmental agents. Here, the detectives are agents of law enforcement, so the state action requirement is met.

Standing

A defendant has standing to challenge a search when he has a reasonable expectation of privacy in the place searched. Here, the text message was found by means of a pat-down search of David's person. The Constitution confers the greatest protection upon an individual's person (their body), and so D has challenging to challenge this search.

Search or Seizure

Supreme Court caselaw provides two methods of defining a Fourth Amendment search or seizure. The first involves a two-pronged inquiry, set forth in Harlan's opinion in Katz. First, the court asks whether the individual had a subjective expectation of privacy in the place searched. Second, the court asks whether this expectation of privacy is one which society is prepared to accept as reasonable. The second method

is a property-based approach, whereby the court asks whether there was an intrusion into a constitutionally-protected area. Here, there are two searches: Officer Baker's pretextual stop and pat-down of D, and his search of D's cell phone. Each will be analyzed in turn.

(1) Pretextual Stop and Pat-Down

Under the Fourth Amendment, pretextual traffic stops are permissible. A court will not inquire into the officer's subjective motivations when conducting traffic stops and policing traffic violations. Here, Officer Baker (B) saw the car described in A's message, decided to follow the car and conducted a pretextual arrest of D. He had probable cause to stop the car, because he witnessed the car running a red light. This was sufficient evidence of wrongdoing to allow B to pull D over and order D out of the car. D can therefore not challenge the introduction of the cell phone evidence on the grounds that it was the fruit of a pretextual stop.

A pat-down of a person, however, requires reasonable suspicion that the individual has weapons on his person. Reasonable suspicion is articulable facts that would lead a reasonable officer to believe that the person possessed a dangerous weapon, but is a standard short of probable cause. Here, B based his pat down on a message he received from A, describing D's car and stating that it was believed to be involved in transporting heroin. This message in turn was based on an anonymous tip, and D's statement he made in interrogation. These facts likely fall short of probable cause, because they do not suffice to create a reasonable probability that D has been or is guilty of possessing or transporting heroin. However, they do suffice to create

reasonable suspicion for the pat-down. Heroin dealers are often armed due to the nature of the trade. B could point to his personal experience that those who possess and deal drugs often are armed, and justify his pat-down of D on this basis.

Given that B's pat-down of D's person was permissible under the Fourth Amendment, the issue at this point was whether B could seize the cell phone. An officer conducting a reasonable pat-down can seize items that are evidently contraband under the "plain feel" doctrine. Here, however, B felt a cell phone in D's pocket. A cell phone is not contraband, and it feels markedly different from a gun or packet of drugs. The plain feel doctrine therefore does not operate to justify B's seizure of the cell phone. This was a Fourth Amendment violation.

(2) Cell Phone Search

The issue was B's search of the cell phone after he had seized it wrongfully. The Supreme Court held in Riley that certain types of information are entitled to greater protection under the Fourth Amendment. In Riley, the Court held that Cell Site Location Information, obtained by means of cell phone searches by officers, were a type of information that was so broad, of such depth, and of such a personal nature that it was entitled to extra protection under a property-based conception of the Fourth Amendment. Officers need probable cause and a warrant in order to search a suspect's cell phone. Here, Officer B took a number of actions that together constitute a search: he (a) turned on the phone; (2) saw a text message icon, (3) decided to click on the text message icon; and (4) read the message therein. This is the message D now seeks to exclude from evidence. These actions are an unreasonable intrusion on D's Fourth

Amendment rights under Riley, because a cell phone contains a great degree of highly personal information that is entitled to Fourth Amendment protection.

In conclusion, B violated D's Fourth Amendment rights when he wrongfully seized D's cell phone from his pocket, and when he proceeded to search the contents of his cell phone. D has standing to challenge the fruit of this search--namely, the statement found in the text message.

3. Heroin found in trunk of car

D seeks to challenge the evidence of 30 pounds of heroin found in the trunk of his car. We must first ask again whether has standing, and also whether the heroin was the fruit of a Fourth Amendment violation.

Standing

See above rule for standing. D has standing to challenge the search, because he had a reasonable expectation of privacy in the trunk of his car.

Fourth Amendment Violation

When an officer seeks to search an automobile in the course of a lawful traffic stop, he may search the person and "grabbable area" around the driver and passenger compartments, provided that (1) the suspect is unsecured and could reach said areas; and (2) the officer has reasonable suspicion that these areas contain weapons. He may not search other inaccessible areas of the car unless he has probable cause to believe that they contain weapons or evidence of criminal wrongdoing. Here, B proceeded from searching D's person and cell phone to searching the trunk of the car. B will claim that

he had PC at this point to believe that the trunk of the car contained either weapons, or more likely, evidence of heroin. However, this probable cause was based on an unlawful search of D's cell phone (see above). Therefore, even if B had probable cause to search the trunk, which is all that is required for an automobile search (as automobiles are an exception from the warrant requirement), D can challenge the heroin as the fruit of an unlawful search.

Fruits Doctrine

The exclusionary rule is a judicially-crafted remedy that seeks to enforce the Fourth Amendment right against unreasonable search and seizure. Courts have also crafted the "fruits" doctrine. Under this doctrine, fruits of unlawful searches and seizures are to be excluded from evidence. Evidence does not qualify as "fruit" of an unlawful search if (1) it is significantly attenuated from the wrongful search or seizure; (2) there are independent intervening acts, including voluntary acts by the defendant, that cut off the chain of causation; (3) law enforcement would have inevitably discovered the evidence; (4) law enforcement had an independent source to discover the evidence.

Here, D seeks to challenge the heroin found in the trunk as the fruit of the unlawful search of his cell phone. Indeed, but for the search of his cell phone and discovery of the incriminating text message, B would not have had probable cause to search the trunk. However, B may contend that law enforcement would have inevitably discovered the evidence, because it is common practice to impound a vehicle and conduct an inventory search of its contents upon arrest of the driver.

Inevitable Discovery and Inventory Searches

An inventory search is a search done to account for the defendant's property; it must not be conducted pretextually for law enforcement purposes. However, evidence discovered in a lawful (non-pretextual) inventory search is admissible against the defendant. Here, B would have arranged for the car to be taken to the police impound lot for processing, and law enforcement would inevitably have uncovered the thirty pounds of heroin in the trunk. B therefore has a strong argument for the inevitable discovery of the heroin. D therefore will be prevented from invoking the fruits doctrine to exclude evidence of the drugs.

Conclusion

In conclusion, D cannot challenge the first statement because it is not the fruit of a Miranda or other violation. The second statement will be excluded, because it was the fruit of an unlawful Fourth Amendment search. Finally, the third piece of evidence (the drugs) will not be excluded even though they are the fruit of an unlawful search, because of the inevitable discovery doctrine.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 1

Jim and Fred armed themselves with handguns and drove to a store on Avon Street. They both went into the store, drew their guns, and demanded that Salma, an employee, give them the store's money. After Salma handed Jim the money, he nervously dropped his gun. The gun discharged when it hit the floor, and the bullet hit and killed Chris, a store customer. Salma then got a shotgun from under the counter and shot Fred, killing him. Jim picked up his gun, ran out of the store, and drove back to his apartment.

Later that evening, Jim saw Salma while walking down Park Street. Thinking that he could eliminate her as a witness, Jim shot at Salma with his gun, but the bullet missed her. Jim then drove away in his car.

A few minutes later, Police Officer Bakari saw Jim driving down the street. Officer Bakari, who had no knowledge of the events at the store or on Park Street, pulled Jim over because Jim looked nervous. When Jim got out of his car, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found Jim's gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun.

1. With what crime(s) could Jim reasonably be charged regarding the events at the store? Discuss.

2. With what crime(s) could Jim reasonably be charged regarding the incident on Park Street? Discuss.

3. Under the Fourth Amendment to the United States Constitution, can Jim successfully move to suppress Jim's gun from being introduced into evidence at trial? Discuss.

QUESTION 1: SELECTED ANSWER A

1. Jim's crimes at the store

Conspiracy

A conspiracy is an agreement between two or more people to commit a crime. A conspiracy requires 1) an intent to enter into an agreement, 2) an intent to agree, and 3) an intent to carry out the target offense. Most modern jurisdiction also require an **overt act** which sets the conspiracy in motion. A conspiracy punishes the agreement. However, a conspirator will be liable for not only the target offense, but for all substantive crimes that are the natural and foreseeable consequences of the target offense (Pinkerton rule).

Here, Jim(J) will likely be found guilty of a conspiracy with Fred(F) to rob the store. 1) J and F "Armed themselves" with guns and drove to the store. This act of supplying a dangerous weapon, coupled with driving to the store is circumstantial evidence of J and F's intent to enter into an agreement to rob the store. Thus, they intended to enter into an agreement to commit a crime. 2) They both armed themselves and endeavored on this venture **together**. This further indicates that they intended to agree with one another to fulfill their intent. 3) Finally, the fact that they grabbed weapons and drove to the store evidences an intent to commit the underlying offense of robbery (there is no other logical reason for driving to s tore with likely illegal weapons other than for the purpose of committing some crime). Further, the act of driving to the store will amount to an **overt act** which set this conspiracy in motion.

Therefore, J will likely be charged with conspiracy and will be culpable not only for the underlying offense, but for all crimes which were the reasonable and foreseeable

consequences of committing a robbery.

Assault

Assault is either 1) a failed battery (a non-consensual offensive touching), or 2) an intent to cause imminent apprehension in another of an imminent battery.

In this case, J will also likely be guilty of assault because by drawing his gun and pointing it at Salma (S) and demanding that she give him the money, he intended to put S is apprehension that if she did not comply, she might be shot (which would certainly amount to an offensive, non-consensual touching).

Therefore, J committed an assault.

Larceny

Larceny is the 1) trespassory (without consent), 2) taking, and 3) carrying away (the slightest movement is sufficient) of 4) the personal property or 5) another with 6) the intent to permanently deprive that person of their property.

Here, J also committed a larceny because 1) S did not give voluntary consent when she gave J the money (rather, she was under threat of possible death if she did not), therefore making it trespassory, 2) he took the money when S handed it to him, 3) J carried it away when he "ran out of the store," 4) the property was cash (and therefore personal property), which 5) belonged to the store, not Jim, and 6) J intended to permanently deprive the store of this money because he obtained it by force and ran away. Clearly, he had no intention of returning it.

Therefore, J committed a larceny.

Robbery

Robbery is essentially an assault plus larceny. It is the 1) taking of 2) the personal

property 3) from a person's presence, 4) by force of threat of force, 5) with the intent to permanently deprive that person of their property.

Here, J committed an assault and a larceny and thus also committed a robbery. He 1) took 2) the cash 3) from S, who was in charge of safeguarding it, 4) by threat of force by drawing his handgun and making S believe that she may be shot if she did not comply, and 5) intended to permanently deprive the store of its property because he had no intention of returning it.

Therefore, J also committed a robbery.

Burglary

At common law, burglary was the 1) breaking and 2) entering of 3) the dwelling house 4) of another 5) in the nighttime 6) with the intent to commit a felony therein. However, many jurisdictions have eliminated the breaking and nighttime requirements and expanded "dwelling house" to include a multitude of enclosed structures.

Here, J and F did go into the store with the intent to commit a crime. However, there was no "breaking" because they went during store hours and thus had permission to be on the premises.

Thus, there was no burglary.

Murder (Chris)

Common Law Murder

At common law, murder was the killing of one human being by another human being with malice aforethought. The intent to kill--malice--can take several forms: 1) the intent to kill (express malice), 2) killing with reckless indifference to human life (depraved heart murder), 3) intent to cause great bodily injury (GBI), or 4) felony murder.

1. Express Malice

Express malice requires the intent to kill.

Here, J "nervously dropped his gun" and it accidentally discharged. Therefore, J did not intend to kill Chris.

2. Depraved Heart

Depraved heart murder is a killing with a reckless indifference to an unjustifiably high risk to human life.

Here, J did not kill Chris with indifference to a high risk to human life because he dropped his gun. He did not know the gun was discharge and it was completely accidental. Therefore, he probably cannot be convicted of depraved heart murder.

3. Intent to Cause GBI

Malice can be inferred from the intent to cause GBI.

Again, J accidentally dropped his gun and did not intent to harm Chris and thus did not intent to commit GBI. This type of malice thus does not apply.

4. Felony Murder

Under the felony murder doctrine, malice is implied from the intent to kill the underlying felony. However, many jurisdictions have adopted the Redline theory, which states that a co-felon **cannot be guilty of felony murder for the killing of another co-felon during the commission of the felony by a third party.**

Here, J intended to commit a robbery, as discussed above. In all jurisdictions, a robbery is a felony. Therefore, J can be found guilty of felony murder for any killing that occurs during the commission of the robbery. Chris was a store customer, not a co-felon, so the Redline theory would not bar J from being convicted.

Therefore, J can be found guilty of felony murder of Chris.

First Degree Murder

First degree murder is statutory in nature and most jurisdictions have held that it encompasses 1) premeditated and deliberate murder or 2) felony murder during certain inherently dangerous enumerated felonies (including burglary, rape, arson, robbery, and kidnapping).

1. Premeditation and deliberation

As stated above, the killing of Chris was accidental, so it was not premeditated or deliberate.

2. Felony Murder

Here, the killing occurred during the commission of a robbery--a first degree felony murder offense.

Therefore, J will likely be found guilty of first-degree murder.

Second Degree Murder

Second degree murder includes all murders not in the first degree.

Here, J will not be guilty of second-degree murder because he can be found guilty of first-degree murder.

Murder (Fred)

See rule above.

1. Express Malice

Here, S shot F. Therefore, J did not have intent to kill F.

2. Depraved Heart

Again, because S is the one show shot F, J would not have killed F with a depraved

heart.

3. Intent to Cause GBI

J did not intent to cause F GBI because he is not the one who shot him.

4. Felony Murder

Here, the state will argue that J is guilty of felony murder to F because it was a killing during the commission of a felony. However, if this jurisdiction has adopted the **Redline theory**, then J cannot be found guilty of murder of F because a third party---S--killed a co-felon.

Therefore, assuming the jurisdiction has adopted the Redline theory, J will not be guilty of murder of F.

First Degree Murder

See rule above.

1. Premeditation and deliberation

This was not a premeditated or deliberate murder because J did not plan to kill F.

2. Felony Murder

This was a killing during the commission of an inherently dangerous felony. However, assuming this jurisdiction has adopted the Redline theory, J cannot be found guilty of murder of F.

Second Degree Murder

See rule above.

This is inapplicable because J did not intent to kill F.

2. Jim's crimes on Park Street

Attempted Murder (Salma)

Attempt is a specific intent crime which requires 1) the specific intent to commit the underlying offense and 2) a substantial step toward the commission of that offense (the substantial step element requires that the crime come dangerous close to commission).

Here, J will likely be found guilty of attempted murder of S because 1) he thought he could "eliminate her as a witness" and drew his gun at her, thereby evidencing his intent to kill S so that she could not testify against him. 2) There was a substantial step toward the crime because J actually "shot" and fired his gun at S.

Therefore, J will be guilty of attempted murder of S.

Assault

See rule above.

J will also be guilty of assault because he attempted to shoot S (which would be a harmful or offensive touching, i.e., a batter), but he missed her.

Therefore, this was a failed battery and thus an assault.

3. 4th Amendment Claim

4th Amendment

The 4th Amendment protects against unreasonable searches and seizures. A search without a warrant is per se unreasonable unless there is an exception to the warrant requirement.

Here, J was subject to a stop by the police when he was pulled over and this he was searched without a warrant. Therefore, this stop and seizure is per se unreasonable, and thus a violation of J's 4th Amendment rights, unless there is an exception.

Government Conduct

The 4th Amendment only protects individuals from governmental conduct--it does not

govern purely private behavior.

Here, J was pulled over by a police officer--a government employee. Therefore, this element is met.

Search/Reasonable Expectation of Privacy

A search is a governmental intrusion into an area where a person has a subjective expectation of privacy that society is willing to regard as reasonable, or a search into a constitutionally protected area. In order to assert a reasonable expectation of privacy, and thus have **standing** to make a 4th Amendment claim, the person must have had an ownership or possessory interest in the place searched or item seized.

Here, J has standing to object to the search because he was pulled over in his car which he presumably owned, and thus had a reasonable expectation of privacy in his vehicle (although the courts have held that there is a diminished expectation of privacy in one's vehicle, there is nonetheless some expectation of privacy). Furthermore, J's person was searched during a pat-down and the police officer took an item of personal property from him.

Thus, J has standing.

Warrantless Search

As stated above, warrantless searches and seizures are per se unreasonable without a warrant expectation.

Here, the stop and seizure were without a warrant and is per se unreasonable unless there is an exception.

Vehicle Stops: Reasonable Suspicion

A police officer may pull over a vehicle if they have reasonable suspicion, supported by

articulable facts, that criminal activity is afoot. Whether an officer has reasonable suspicion will be determined based on the totality of the circumstances, although the courts have held that it requires more than a mere hunch.

Here, the officer stopped J because he "looked nervous." The officer had no knowledge of any of the preceding events and thus no basis to believe that criminal activity was afoot. A person "looking nervous" is not enough for reasonable suspicion. There must be **facts** which support the officer's basis for concluding that some criminal activity is happening.

In this case, J's mere "nervousness" likely did not amount to reasonable suspicion such that the stop was unreasonable and thus a violation of J's 4th Amendment rights. However, assuming the stop was not unreasonable, the state must further prove that the officer had grounds to search J.

Warrant Exception: *Terry* Stop and Frisk

A stop and frisk, or *Terry* stop, permits an officer to stop a person whenever they have reasonable suspicion, based on articulable facts, that criminal activity is afoot. If the officer also believes that the person is armed and dangerous, then the officer can conduct a pat-down of their outer clothing in order to search for weapons.

Here, if the officer had reasonable suspicion for the stop, then the frisk was likely a permissible *Terry* frisk because the officer noticed a bulge under J's search. Based on his experience, the officer likely had justifiable grounds for believing that "bulge" could be a weapon, thereby supporting his basis for patting J down.

So long as the court finds that the stop was supported by reasonable suspicion, then the pat-down and seizure of the gun will also be permissible.

Exclusionary Rule/Fruit of the Poisonous Tree

The exclusionary rule is a judge-made doctrine that states that any evidence obtained in violation of a person's 4th, 5th, or 6th Amendment rights is inadmissible (subject to a few exceptions not applicable here). Under the fruit of the poisonous tree doctrine, all secondary evidence obtained as a result of an unlawful search will also be excluded. Here, it is more than likely that the stop of J when the officer pulled him over was unreasonable because it was not supported by reasonable suspicion. Therefore, any evidence obtained as a result of the unlawful search, such as the gun, will also be inadmissible as fruit of the poisonous tree.

Conclusion

Because J was stopped in violation of his 4th Amendment rights, J can successfully move to suppress the gun from being introduced at trial.

QUESTION 1: SELECTED ANSWER B

(I) Events at the Store

Jim could be charged with first- or second-degree murder depending on how a jurisdiction codifies those crimes. He can also be charged with robbery and conspiracy to commit robbery.

Robbery

J committed the crime of robbery. A robbery is the taking of property of another with force. Here, J took property of another, i.e., the cash of the store from the store whose property it was. J also used force to take that property. Specifically, he brandished his firearm, threatening the use of force if Salma the store employee did not comply. Thus, J committed the offense of robbery.

Murder

J committed the crime of murder. He could be found guilty of felony murder (which could be first- or second-degree murder depending on the jurisdiction) or involuntary manslaughter.

A. First degree murder is generally codified as one of two things (a) premeditated, calculated murder that occurs in a calm, dispassionate manner or (b) felony murder.

(a) Premeditated murder. Here, Jim (J) and Fred (F) armed themselves with handguns and drove to a store on Avon Street. They both went into the store with their guns drawn and demanded that the store employee Salma (S) give them money. It does not appear that J and F's intent was to murder anyone, nor did they premeditate committing a murder; rather, they were only interested in obtaining the money from the store. J only killed C when he nervously dropped his gun, and the gun fired a bullet. And F was killed

only when S shot him. Thus, J cannot be convicted of first-degree premeditated murder as he did not premeditate either of those deaths.

(b) Felony murder. Some jurisdictions codify felony murders as first-degree murder. If the state where J and F committed this offense is one of those states, then J could be found guilty of first-degree murder. Felony murder is found when a murder occurs during the commission of certain violent felonies, including burglary, kidnapping, robbery, assault, and rape. This is because the commission of these felonies is dangerous on their own, and it is foreseeable that a death could occur in their commission. To find felony murder, it must be first established that one of these underlying crimes occurred. Here, as discussed above, J intended to commit a robbery and did do so. Thus, the deaths that occurred can be considered under the felony murder rule.

Here, two deaths occurred--those of C and F--which we will discuss in turn. First, as to C's death, C was killed when J nervously dropped his gun and when S was handing J the money he demanded. C's death was not really in furtherance of the commission of the crime--J was already getting the money handed to him and probably would have left after that. And J and F did not point the gun at C or ask C for his money or except C to hand them over the store's money. Nonetheless, it was a reasonably foreseeable consequence of the robbery, given how J and F chose to commit the robbery. J and F both brandished firearms at S. Because they have it pointed at someone and clearly there is no safety on, it is reasonably foreseeable that they would use the firearms in the commission of the offense or even that a firearm may accidentally discharge, harming someone. Thus, J could be found guilty of C's death under the felony murder rule.

As to F's death, there are two theories as to whether J would be liable for it. Under the majority theory, a defendant is not liable of a co-conspirator's death by a third party (such as a victim of the offense, here S). This theory believes that F's death is not foreseeable, since a third party took independent action and caused the death. However, under the minority theory, such an action is foreseeable since the defendant was already involved in such a dangerous offense and any resulting death is foreseeable. Thus, under the minority theory, J would be held liable, but J would not be held liable under the majority view. Accordingly, depending on whether the jurisdiction follows the majority or minority rule, J could also be found liable for F's death.

B. Second degree murder is the codification of common law murder. Common law murder has four variations: (a) a malicious intent to murder another (b) a malicious intent to cause substantial bodily harm (c) a disregard for human life, and (d) murder while committing a dangerous offense (i.e., felony murder).

(a) malicious intent to murder another. It does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(b) malicious intent to cause substantial bodily harm. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(c) disregard for human life. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed

towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(d) felony murder. As noted above, J could be found guilty of felony murder of C. And depending on the rules of the jurisdiction, he could also be found guilty of murder of F under this theory.

C. Voluntary Manslaughter. Voluntary manslaughter is the codification of murders committed while the defendant is still under the stress of an event. These murders are often described as heat of the passion murders. The prototypical example is when a husband walks in on his cheating spouse and immediately murders the spouse and/or spouse's lover. Here, the murder of F and C did not occur while J was under the stress of any event--the robbery was a pre-planned event between J and F. Thus, J could not be charged with voluntary manslaughter.

D. Involuntary Manslaughter. Involuntary manslaughter can be thought of as criminal negligence. This charge is generally used to charge drunk drivers when they murder someone. Here, it is possible that J could be convicted of involuntary manslaughter. Here, J, in holding the firearm, had a duty to take the precautions that someone holding a firearm should, i.e., hold it steady, don't drop it, keep the safety on until you are ready to discharge. J did none of those things. He did not have the safety on, he did not hold the firearm steadily, thus breaching his duty of care when he dropped it and it discharged. And his dropping of the firearm caused the death of C--but for him dropping it, C would still be alive. Thus, J could be charged under this theory as well for the death of C.

<u>Conspiracy</u>

Also, J could be charged with a conspiracy. A conspiracy is an agreement between 2 or more persons for a criminal purpose to act in furtherance of that criminal purpose. The modern jurisprudence also requires the commission of an overt act in furtherance of a conspiracy. Under the modern jurisprudence, the crime is committed once an overt act has occurred, and the defendants can no longer withdraw from the conspiracy at that point. Here, although there is no written agreement between the J and F (and a written agreement is not required but would help if you're prosecuting these types of crimes), J and F are clearly in agreement that they were going to rob the store. J and F, prepared with guns, armed themselves with firearms and both drew their guns at the store clerk and demanded money. Here, their actions clearly demonstrate they were acting in concert with one another towards to the same agreed upon goal--the commission of a robbery. They have also clearly committed an overt act, in furtherance of their criminal purpose--they drew their guns and demanded money from the store employee S. Upon completion of the overt act, the crime of conspiracy is completed, and neither could withdraw from the conspiracy.

2. Incident at Park Street.

Here, J could be charged for attempt 1st degree or 2nd degree murder. To be convicted of an attempt, a defendant must have the intent to commit a specific offense and take a substantial step in furtherance of that crime. The substantial step need not be criminal in nature, but it must be in furtherance of the offense (i.e., it takes defendant one step closer) and cannot simply be planning or preparation.

Here, J had the intent to commit 1st or 2nd degree murder. Specifically, he had the

intent to commit a premeditated murder (1st degree) or intent to maliciously murder another or cause substantial bodily injury (2nd degree). As to the premeditated murder, premeditation does not need to be a long-drawn out plan. Premeditation can occur instantly so long as defendant has sufficient time to intend to murder before attempting to do so. Here, upon seeing S, J believed that he should murder her to eliminate her as a witness to his robbery and other offenses. J had enough time to come to a decision to murder S in a cool, dispassionate matter. Alternatively, if J did not form the requisite intent and did not have time to premeditate, he could alternatively be charged with murder in the 2nd degree. As discussed above, murder in the second degree includes a malicious intent to kill or to cause substantial bodily harm. J clearly had both of those intents as he hoped to eliminate S as a witness by killing her. Thus, alternatively, if he did not have time to come to a cool dispassionate decision to murder S while he was driving past her, he did have the requisite intent to commit a second-degree murder.

In addition, Jim took a substantial step towards his offense--he actually fired his gun at S hoping to kill her. Even though the bullet missed her and the substantive, underlying crime (murder) was not completed, J completed the crime of attempt when he took this substantial step.

Accordingly, J can be found guilty of attempt murder.

3. Suppression of the Gun

The Fourth Amendment protects against unreasonable searches and seizures. To trigger the protections of the Fourth Amendment, the search/seizure must have been done by a government actor. Here, the search and seizure were done by Officer Bakari (Off B), who works for some type of government entity (either local, state, or federal

police department). And the search that was done was of Jim's person, thus Jim has standing to challenge the seizure of the firearm.

An unreasonable search/seizure is one that is done where an individual has a reasonable expectation of privacy. Those areas include an individual's person and their home. An individual has a lessor privacy interest in their vehicle.

Here, Off B pulled over J because J looked nervous. Off J had no knowledge of the events at the store or on Park Street. Off B just stopped J because J looked nervous.

An officer can stop an individual for a reasonable period based on reasonable suspicion that that individual committed a crime. The officer must be able to point to specific articulable facts justifying the reasonable suspicion/stop. Notably, a stop can be pretextual *(see Whren*), but there still must be reasonable suspicion for the stop. Here, at a suppression hearing, Off B would testify simply that J looked nervous. That is not sufficient to justify the stop, because nervousness, on its own, does not suggest any evidence of criminal activity. It is totally possible that J is simply a nervous driver.

Accordingly, the stop was in violation of the 4th Amendment. Any evidence that is found in violation of an illegal stop must be suppressed in accordance with the fruit of the poisonous tree doctrine. And accordingly, the firearm would be suppressed. (Also, note that there are no facts that would suggest that the firearm would be found in the normal course in the investigation, negating any exception such as inevitable discovery or collateral source doctrine).

Assuming arguendo that the stop was legal, Off B then did a pat down search of J. It should be first noted that an officer may ask an individual to exit their car during a lawful search. Searches generally need to be done in accordance with a search warrant;

however, there are exceptions to the warrant requirement, including but not limited to a search incident to arrest, exigent circumstances, Terry search, automobile exception, and administrative searches. Here, J was not under arrest at this time, there were no exigent circumstances justifying the search, and there was no administrative search. Off B could try to justify his search under the automobile exception. An individual has a lessor privacy interest in his/her vehicle because vehicles are so regulated. However, to search a vehicle after a lawful traffic stop, an officer must have probable cause that he will find evidence of an offense. (This most commonly occurs when the officer, after a stop, smells drug use or sees drugs/alcohol in plain view). Because Off B did not know of the previous crimes and was only stopping J because he looked nervous, Off B did not have PC that a crime had occurred and could not justify his search. Off B then could alternative try to justify his search as a Terry frisk. A Terry frisk is not a search for evidence of a crime, but a safety pat down to ensure that an individual is not dangerous. TO justify a Terry frisk, the officer must have reasonable suspicion that a defendant is dangerous or trying to flee. Here, Off B would testify that J looked nervous and that he had a visible bulge. There are no facts to suggest that the bulge was in the shape of a firearm or other weapon, however. Also, J looked nervous prior to the stop. Thus, a likely result is that the Terry frisk will be deemed a search without reasonable suspicion and thus found in violation of the 4th Amendment. Thus, the search of J's person was in violation of the 4th Amendment as no exceptions to the warrant requirement apply. Accordingly, because the stop and the search were both in violation of the 4th Amendment, the firearm will likely be suppressed.