

MONTEREY COLLEGE OF LAW
FINAL EXAMINATION
SPRING 2019

CRIMINAL PROCEDURE

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Instructions

1. This examination consists of three sections of equal value. There is a three (3) hour time limit to complete the exam.
2. First there are two essay questions. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing.
3. The essay questions test your ability to apply the law to the facts. Use IRAC. After stating the issue, provide a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts, and a conclusion.
4. There are multiple issues to address in the essay questions. Some issues are straightforward and do not require detailed analysis. Other issues may be more complicated; those issues merit more extended discussion.
5. The final section consists of multiple choice questions. Circle the letter corresponding to the correct answer. Please write your ID number (not your name) and your professor's name on page 1. **NOT AVAILABLE**
6. Bluebook Users/Essays -- Please write your ID number (not your name) on the cover of each of your bluebooks. Write your professor's name. Number your bluebooks. Return every page of this examination along with your bluebooks. Write on only one side of each bluebook page. Your answer must be double-spaced. Make sure your answer is legible. You will get no credit for words or sentences that I cannot read.
7. Computer Users/Essays -- Please type your ID number (not your name) at the beginning and end of your essay. Also type the name of your professor at the beginning. Return every page of this examination along with your answer.
8. This exam has twenty (20) pages including this instruction sheet.

2019 Criminal Procedure Question 1

On the day a residential burglary was committed, Detective Callahan was assigned to investigate. The next day an anonymous caller left a voicemail on the police crime tip line, stating that Debbie Dallas committed the burglary. The caller provided Debbie's name and address but left no other information. Using the name and address, Callahan lawfully obtained Debbie's photograph from a law enforcement database and confirmed her address. Detective Callahan went to Debbie's house and knocked on the door. When Debbie opened the door, Officer Callahan displayed his badge, said he wished to talk to Debbie, entered her home and walked into her living room. Surprised, Debbie followed demanding to know what Callahan wanted. Callahan saw a china vase displayed in Debbie's living room that matched the victim's description of an item stolen in the burglary. Callahan asked where Debbie got the vase. Debbie replied that her deceased mother left it to her. Callahan told Debbie she was under arrest for the burglary of her neighbor's home, and took Debbie to jail.

The next day Debbie, still in custody, was arraigned on the burglary. Later that day, Detective Callahan had Debbie removed from her cell and brought to an interview room. Callahan told Debbie she was free to return to her cell at any time. Debbie said she understood. Callahan then said the burglary victim identified the china vase as stolen in the burglary, and Callahan told Debbie he knew she committed the burglary. Debbie then confessed.

Detective Callahan wrote a search warrant for Debbie's home and in the statement of probable cause included all of the above information. Callahan also included the following new information in the statement of probable cause: Through a routine and unrelated investigation, another officer obtained a video from a neighbor's surveillance system which caught the burglary on video. Callahan related that upon reviewing the video he clearly recognized Debbie exiting the victim's house and loading the stolen property, including the china vase, into her car. A magistrate signed the search warrant and Callahan returned to Debbie's home and executed the warrant, seizing the china vase and other stolen property particularly described in the warrant.

Debbie's defense attorney moved to suppress 1) Debbie's statement that her deceased mother left the vase to her; 2) Debbie's jail confession; 3) The china vase and all of the stolen property seized during the execution of the warrant.

For each item of evidence, what issue(s) should defense counsel raise? What law/rule(s) apply to each issue? For each issue, what argument(s) should the prosecution and defense counsel make applying the facts to the law (analysis)? How should the court rule on each issue? Do not discuss any good faith exceptions to the exclusionary rule.

2019 Criminal Procedure Question 2

In the middle of the day, police responded to a call from an elderly disabled homeowner who reported a strange car in her driveway. When police arrived at her residence in a rural area, they found a vehicle in homeowner's driveway, but no one other than homeowner was there. Homeowner said she had never seen the car before. Immediately upon seeing a backpack in the backseat of the suspect car, police looked inside it and found a sawed-off shotgun and a mask, along with a photo ID in the name of Doug Doolittle. Police ran the license plate on the car and learned it was Doolittle's car. Running Doolittle's name, they also discovered he had an outstanding arrest warrant for failing to pay a court ordered fine.

Police then saw Doolittle walking on the road leading to the elderly homeowner's residence. When Doolittle saw the officers, he quickly turned and walked the other way, ignoring the officer's commands to stop. Doolittle tossed an item into some bushes. Police then pursued D and arrested him using reasonable force, and found a concealed handgun on his person. In the bushes police found a quantity of methamphetamine. Doolittle was properly Mirandized and said he wanted a lawyer. Doolittle was lodged in jail, but made bail.

A week later Doolittle crashed his car and the California Highway Patrol responded to the scene. The officer found Doolittle standing next to the car and after giving him field sobriety tests, lawfully arrested Doolittle. Doolittle was properly Mirandized, said he understood his rights and explicitly waived them, and then in response to questioning admitted, "I got drunk," but denied being the driver of the car. The officer told Doolittle he didn't believe that story and said, "I take liars to jail." Doolittle then admitted he was the driver.

The DA charged Doolittle with attempted burglary, illegal possession of firearms, and driving under the influence. Doolittle's defense attorney moved to suppress: 1) the contents of the backpack; 2) the methamphetamine; 3) the concealed handgun; 4) Doolittle's confession he was drunk; 5) Doolittle's confession he was the driver.

For each item of evidence, what issue(s) should defense counsel raise? What law/rule(s) apply to each issue? For each issue, what argument(s) should the prosecution and defense counsel make applying the facts to the law (analysis)? How should the court rule on each issue?

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HIGH SCORE ON
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1. Debbie's statement about the vase

Was it a search of Debbie's house?

It was the act of a government agent because the act was done by a Detective.

In determining whether a search occurred under the Fourth amendment, we look to Katz and Jones. The Katz test is whether the person has a reasonable expectation of privacy and if that reasonable expectation of privacy is recognized as reasonable by society. The Jones test is a government trespass/physical intrusion with the gathering/getting of information.

Here, under Katz, Given that the search occurred in Debbie's house, it is reasonable that Debbie, the homeowner, would have a reasonable expectation of privacy in her own home, and that that REP would be deemed reasonable by society. It is a fundamental 4A right that people be secure in their own home. Under Jones, a government trespass or physical intrusion with the gathering of information occurred. Detective Callahan entered the house without permission for the purpose of asking questions regarding the suspected crime. It is not a search for an officer to approach a door and knock and identify themselves, and request to answer questions or request to enter the premises. Officers are allowed to knock and announce. However, the Det in this knocked, identified himself, showed his badge, and then walked inside without permission past Debbie and inside. The prosecution would argue that if the Det was not allowed inside or if Debbie

did not want him to, she would have asked him to leave or stopped him. The defense will argue that it is not reasonable for a person to stop an officer from entering their home.

Therefore, it is likely that the court will find that a search occurred of Debbies house.

Was there PC for the officer to enter Debbies Home?

Probable cause is more than reasonable suspicion but less than a preponderance, it is a "fair probability" that a crime has occurred.

Here, Detective was working off of an anonymous tip that only gave name and suspected crime. PC regarding informants looks to the totality of the circumstances by looking at the informant status (Criminal, anonymous, citizen), specificity, reliability and veracity, and corroboration.

Here, an anonymous tip alone is never enough for PC, so the Det looked to corroborative by doing some investigative work by looking up address and picture. Prosecution will argue that this act constitutes corroboration and that the Det then had PC to get a search warrant and enter the home. The defense will argue that the Det was still in the investigative phase, attempting to corroborate the anonymous tip, and had no PC, and no search warrant to enter the home.

Therefore, it is likely that the courts will find the Det had no PC

— WHY DOES IT MATTER? RELATE TO ITEM OF EVIDENCE
Was it a detention by the officer walking inside without permission after displaying his badge and identifying himself *EV - IT POSS NOT*

A detention is determined by the Mendenhall / Drayton / Hodori rule. Mendenhall / Drayton rule is if a reasonable person believe that they were free to go and reject the

encounter? Hodori rule states that to be a detention, there needs to be a show of authority and the suspect needs to submit to it

Here, the defense would argue that Debbie would not reasonably feel free to go after Det knocked on her door, identified himself, showed badge, and then entered the home without permission, and began asking questions. The prosecution will argue that a reasonable person would feel free to leave, in their own home, and that it would be reasonable for a person to ask an officer to leave if they so wanted to. Detentions can occur in the home, and it is reasonable that a person would not feel free to leave after an officer barged into their home and began asking questions about a crime. Defense would argue that by displaying his badge and barging inside, that was a show of authority, and that by D not stopping it, it was a submission to that show of authority, thus making the encounter a detention.

Therefore, it is likely that the courts would find that a detention occurred.

Should Debbie have been Mirandized? Was there Miranda custody with an Interrogation?

Miranda warnings should be given whenever there is Miranda custody with an Interrogation. Miranda custody is a formal arrest, or the functional equivalent of. An interrogation is the asking of questions, or the functional equivalent of, with the intent to gather information. Miranda warnings do not need to be recited word for word. Suspect needs to expressly or impliedly state they understand, and expressly or impliedly waive.

Here, Debbie should not have been mirandized because there was no formal arrest, at most, there was a detention, see above, and suspects do not need to be mirandized during a detention.

Therefore, it is likely that the courts will not find a Miranda violation here.

Should the statement be excluded or was it attenuated?

The exclusionary rule states that any evidence gathered from a constitutional violation cannot be introduced as evidence in the courts. Primary evidence is evidence gathered from the original illegality. Secondary evidence is evidence derived from the primary evidence. The exceptions to the exclusionary rule are the attenuation doctrine, inevitable discovery, independent source.

The attenuation doctrine states that evidence is attenuation if it falls under the three Browns factors: Inevitable, flagrancy of the illegality, temporal proximity. If evidence is attenuated from the primary illegality, the chain has been broken and the derived evidence is not fruit of the poisonous tree and can be admitted as evidence. If it is not attenuated, then the evidence is fruit of the poisonous tree and cannot be brought in.

Inevitable discovery is that the evidence would have been discovered even without the illegal act.

Independent source means that the evidence was also discovered by an independent, outside source, and therefore has a legal means of discovery and can then be used as evidence.

ER applies to the Mirandized Confession, but not to derived evidence. ER applies to 4A primary and secondary evidence.

Here, if the court finds that a 4A violation occurred, by the Det conducted an illegal search of the house without a warrant, then the statement made would not be admissible as fruit of the poisonous tree. There are no factors to show that the statement would be attenuated. The statement was very close in time after the 4A violation, and there is no Good faith exception. A good faith exception would be if the officer acted in a way believing what they did was okay, or if his act was only minorly negligent. But it is not

reasonable to believe that a Detective would believe that they can just walk into someones house based on an uncorroborated, anonymous phone call.

Conclusion

It is likely that the statement made by Debbie inside the home to the Detective would be suppressed due to it being conducted after an illegal search of Debbies home, and being derived from that primary illegality, without an Exclusionary rule exception, no attenuation.

2. Debbie's Jail Confession

Should Debbie have been Mirandized during the interview?

↳ Miranda warnings should be given whenever there is Miranda custody with an Interrogation. Miranda custody is a formal arrest, or the functional equivalent of. An interrogation is the asking of questions, or the functional equivalent of, with the intent to gather information. Miranda warnings do not need to be recited word for word. Suspect needs to expressly or impliedly state they understand, and expressly or impliedly waive.

Here, after indictment and under formal arrest, Debbie is very obviously in Miranda custody. She was brought from a jail cell, after being arrested, after being arraigned. While Det did not formally ask Debbie a question, his statements are the functional equivalent of a question because they were statements made to illicit a response.

The prosecution will argue that because the Det told Debbie that she was free to return to her cell at any time, there was no Miranda Custody and therefore was under no

obligation to Mirandize. The defense will argue that while she was told she could leave. Her condition was that of a person under formal arrest after formal arraignment. After formal arrest and with interrogation, Debbie was in jail, and brought to an interrogation room. So even though the officer told her she was free to return to her cell, it is reasonable to believe that D would not feel free to leave. There was custody with interrogation.

Therefore, it is likely that the court would find that Debbie was in Miranda Custody, and an interrogation occurred, and should therefore have been given her Miranda Rights.

Should Debbie have had her attorney present during the interview under the 6A?

6A Massiah rule states that once formal charges have been filed by the DA (CA Rule), Massiah triggers. The Massiah rule states that after formal charges have been made, Defendant is entitled to have counsel present at all critical stages of the pre-trial proceedings and during the trial. 6A is offense specific

Here, Debbie was arraigned and therefor her Massiah 6A right triggers. Because Massiah triggers, and Debbie was questioned for the offense she was formally charged for, her Massiah right triggered and should have had an attorney present. An interview regarding the charges filed are a critical stage of pre-trial and should have an attorney present.

The prosecution will argue that because the Det told Debbie that she was free to return to her cell at any time, there was no Custody and so there was no need to Mirandize or have her attorney present. However, 6A is offense specific, and once triggers, is required for all critical stages. Being questioned for the crime in question is a critical stage, Debbie did not initiate or waive.

Therefore it is likely that the courts will find that Debbie was entitled to have an attorney present during the interview and that it was a 6A Massiah Violation

Was it a core 5A violation by the Officer lying to Debbie about the facts?

A core 5A violation is when there is police coercion. Police coercion is the when the police overbore the will and illicit a response. Officers of the law are not allowed to lie about legal proceedings and laws, but they can lie about facts,

Here, the officer was well within his right to lie about the facts of the case when he stated that the burb victim identified her and that he knew she did it.

Therefore, it is likely that the court will not find this act to be a core 5A violation.

Is the Confession admissible as evidence or is it excluded?

The exclusionary rule states that any evidence gathered from a constitutional violation cannot be introduced as evidence in the courts. Primary evidence is evidence gathered from the original illegality. Secondary evidence is evidence derived from the primary evidence. The exceptions to the exclusionary rule are the attenuation doctrine, inevitable discovery, independent source.

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Inevitable discovery is that the evidence would have been discovered even without the illegal act.

Independent source means that the evidence was also discovered by an independent, outside source; and therefor has a legal means of discovery and can then be used as evidence.

Here, because there was a miranda violation (see above) it is likely that the court will rule her confession out. Miranda violation means the confession/statement made is always out, but it does nto apply to derivative evidence. There is no inevitable or independent source exceptions to her confession. The confession is not attenuated.

ANY
MIRANDA
IF
MIRANDA
VIOLATION

Here, because it was a 6A violation, the courts will likely find that the confession is out. 6A applies to derivative evidence - CLEARLY NO ATTENUATION - THE CONFESSION IS PRIMARY EV. Therefore, it is likely that the courts will rule that the confession will be suppressed.

Conclusion

It is likely that the courts will find that a Miranda violation and 6A Massiah violation occurred leading to the confession being suppressed.

3. China vase and all stolen property seized during warrant

Was the search warrant valid?

In order for a search warrant to be valid it needs Probable cause, backed by oath and affirmation, and particularity, of place to be searched and persons or items to b searched or seized.

Here, the search warrant was based on an uncorroborated, anonymous source (see above), a statement taken in violation of 4A (see above), and a confession taken in violation of Massiah 6A/Miranda (See above). If the courts find for the above, then there is no valid PC to back the search warrant, making the search warrant invalid. Particularity

is not an issue and is assumed to be satisfied because no facts to contradict have been given.

Therefore, if the court finds for the above, that the search was invalid, making the statement invalid, and if the confession was invalid due to Miranda and/or Massiah violation. Then the court will likely find that the search warrant was invalid, and if the search warrant is invalid, then under the exclusionary rule, the evidence is fruit of the poisonous tree and therefore invalid.

Is there a Good faith exception for the Search warrant?

→ CALL OFF OFFICER'S
APPEALS DIS.
COURT

Under the exclusionary rule, there is the Good faith exception for search warrants. If a search warrant is signed by a neutral magistrate and is believed to be backed by valid PC[<] but turns out not to be valid PC, and the officers act on that search warrant, in good faith, believing it to be valid, the evidence is not suppressed.

Here, it is not likely that the court will find that Det acted in good faith because he was not acting as a reasonable officer would. It is not reasonable to believe that a Detective would commit a 4A violation based of an anonymous, uncorroborated tip, take a statement and make an arrest, and then take a confession in violation of Miranda/6A, and then file a search warrant based off all of that. There is no evidence to show that the officer acted on good faith.

Therefore, it is likely that the evidence would not be allowed based on the good faith exception.

Is there an independent factor to not have the evidence excluded?

The independent exception to the exclusionary rule states that evidence will be admissible and not excluded if it is discovered by an outside, independent source.

Here, it is likely that the courts will find that 4A violation, statement 1 out, and confession out, and warrant not valid based on the statement and confession.

However, the search warrant was also based on a routine, unrelated investigation that resulted in a video of the burglary being committed with Debbie clearly being shown and the evidence being shown. This evidence is an outside, independent source, which gave valid PC for the search warrant which resulted in the evidence being found. The video and the statement and confession are not related or linked, it is not derivative of the statement or confession.

Therefore, it is likely that the court will find the evidence, of the vase and other stolen property, to not be suppressed due to the search warrant being backed by valid PC that was discovered by an independent source.

Conclusion

Therefore, it is likely that the courts will not suppress the vase and the stolen property because of the independent exception to the exclusionary rule. The video was an independent source which gave valid PC for the search warrant that resulted in the discovery of the evidence.

END OF EXAM

QUESTION 1 ANSWER OUTLINE¹

Credit ranges from ½ to ++++; ½ = half of a +

No credit = ∅

I. Debbie's statement her deceased mother left her the vase

++ **Issue 1:** Was Debbie's statement (deceased mother left her the vase) fruit of the poisonous tree of an illegal search under Jones without a warrant?

Rules:

+1. Jones test [U.S. v. Jones (2012)]: The government's physical intrusion on constitutionally protected private property to obtain information is a search ["common law trespassory test"].

+2. The 4th A requires a warrant and probable cause to search a home, or an exigency which excuses the warrant requirement.

+3. PC is a fair probability or substantial chance that evidence of a crime (or contraband) will be found in a particular place; OR a fair probability a particular person is guilty of a crime.

+4. Anonymous tips and confidential informants are not presumed reliable and must usually be corroborated. Anonymous tips by themselves are not PC.

5. Derivative evidence of a 4th A violation/Attenuation Doctrine:

+The exclusionary rule may apply to evidence derived from illegal police conduct (when applied to the 4th A, an unlawful search or seizure) if the evidence is obtained by exploitation of a constitutional violation, but not when obtained by means sufficiently unrelated to, or attenuated from, the constitutional violation. **The attenuation doctrine is a causation test which renders evidence admissible when the connection between illegal police conduct and the evidence is remote or has been interrupted by some intervening circumstance so that the constitutional interest violated would not be served by suppression of the evidence obtained.**

1. + "Fruit of the poisonous tree" is a term used when derivative evidence is not attenuated: Not a "but for" test but this is a causation/balancing test which examines the relationship between the illegality and the discovery of the evidence. **Are evidentiary fruits obtained by exploitation of the illegality? If so, the evidence is excluded unless an exception applies. If evidentiary fruits**

¹ The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. This outline is not a model answer because it may not include model analysis (a complete and thorough application of the law to the facts by both prosecution and defense) and may not offer a conclusion. However, the rule statements are exhaustive and beyond model. Little or no credit will be awarded for rule statements not tethered to their relevant issue. Due to time constraints it may not be possible to obtain all credit available. Better answers address major issues thoroughly where more points are available. Points will be deducted if an answer addresses minor issues without spotting central issues, or for failure to use IRAC.

are obtained by means sufficiently distinguishable to be purged of the primary taint, the exclusionary does not apply. This was the causation language used in *Wong Sun v. United States* (1963).

- a. +Rationale: When evidence is so attenuated from the illegality, the **deterrent effect of the exclusionary rule is equally attenuated.**
 - i. After illegal arrest, Wong Sun released and several days later was Mirandized and questioned. Mirandized confession not poisonous fruit.
- b. +Government has the burden to prove attenuation of the causal chain to purge taint of illegality. *Brown v. Illinois* (1975).

2. ++++Attenuation factors [*Brown v. Illinois* (1975); *Utah v. Strieff* (2016)]:

- a. Intervening circumstances: Miranda warnings, change of location, deliberative acts by defendant, acts by third parties may attenuate the chain of causation and purge the taint.
- b. Temporal proximity: The closer in time the illegality is to the discovery of evidence, the less chance for attenuation.
- c. Purpose and flagrancy of misconduct: The more serious and purposeful the violation, the more reason to deter the police and the more likelihood of suppression.
 - i. Impact of illegality on defendant: The greater the impact, the more likely the evidence will be tainted.
 - ii. Purpose of this factor is to deter bad faith police conduct—where belief in the legality of the police action is unreasonable.

+++Analysis: Callahan clearly entered Debbie's home without a warrant, did not have probable cause because the tipster was uncorroborated (there was no other evidence Debbie committed the burglary), and the facts disclose no exception to the warrant requirement. Debbie did not consent to the entry. Therefore, Callahan conducted a search under Jones. There was no attenuation between Callahan's illegal entry and Debbie's statement, because there were no intervening events other than Callahan's questions and Debbie's answers. Assuming the exchange was not itself illegal, temporal proximity (the questioning immediately followed the 4th A violation) and the flagrancy of the illegal entry favor suppression.

++Issue 2: Was Debbie in Miranda custody? Callahan did interrogate Debbie within the meaning of Miranda.

A. +Custody + Interrogation triggers Miranda:

- 1. ++Custody defined: Formal arrest or functionally equivalent limitation on freedom of movement (to a reasonable person under the circumstances) under the totality of the circumstances. *California v. Beheler* (1983); *Minnesota v. Murphy* (1984). Objective test.
 - a. Would a reasonable person under the circumstances believe he or she was under arrest or subject to some functionally equivalent limitation on their freedom of movement?

- b. Essentially the same definition for arrest as 4th A definition.
- c. An arrest requires either the application of physical force to restrain movement even if ultimately unsuccessful, or where that is absent, submission to the assertion of authority. *California v. Hodari* (1991).

+++**Analysis:** The questioning occurred in Debbie's home, and although arguably she was detained, she was not under arrest. Only after Debbie's statement did Callahan tell her she was under arrest. A police officer who illegally enters a home without consent does not ipso facto arrest the occupants. An illegal search does not automatically trigger an illegal arrest. An illegal search may occur during a mere detention, and that fact does not automatically convert the detention into an arrest. Debbie was not handcuffed or told she was under arrest. There was no application of force and Callahan made no statement concerning Debbie's freedom of movement. Likely, there are no specific facts that would cause a reasonable person under the circumstances to believe Debbie was under arrest before she made the statement. Even if Debbie would not have felt free to leave, Callahan violated Debbie's right of privacy in her home, not her right of freedom of movement to the level associated with an arrest.

II. Debbie's jail confession

++**Issue 1:** Was Debbie's jail confession taken in violation of Massiah?

++++**Rules:** *Massiah v. United States* (1964): The 6th A prohibits the government from deliberately eliciting incriminating information from a defendant after the initiation of adversary judicial proceedings in that case only, in the absence of counsel. The 6th A provides a right to counsel at all critical stages of the proceedings once the 6th A right attaches to a case. Police questioning is a critical stage.

1. **Trigger:** 1. Attachment ("formal charges") AND 2. Deliberate elicitation of incriminating information by law enforcement.
2. **Attachment:** US Supreme Court uses term "formal charges" to mean "initiation of adversary judicial proceedings," which probably requires an indictment or an initial appearance before a magistrate. *Massiah* attaches:
 1. Arraignment: *Brewer v. Williams* (1977).
 2. Attachment does not require consultation or a formal relationship with counsel or that D actually be represented by counsel at initial appearance.
3. **Deliberate elicitation:** Objective standard—Where state intentionally creates a situation reasonably likely to induce incriminating statements and statements in fact elicited. *United States v. Henry* (1980).
4. **Waiver:** Once 6th A right attaches, D may waive 6th A and submit to questioning. *Montejo v. Louisiana* (2009).
 1. Police are free to contact D and seek a waiver. D need not initiate. No right analogous to 5th A *Edwards* rule. *Michigan v. Jackson* (1986) overruled.
 2. Waiver must be voluntary, knowing, and intelligent. *Montejo v. Louisiana* (2009).

+**Analysis:** Debbie's jail confession violated Massiah because the 6th A had attached and there was no *Montejo* waiver. Her statement will be excluded.

0 ++**Issue 2:** Was D's statement fruit of the poisonous tree of Debbie's illegal arrest? Her arrest was clearly derivative of the Jones 4th A violation (Callahan's illegal search).

Rules: See attenuation rules above with Brown factors (credit awarded once).

0 ++**Analysis:** The prosecution would argue that Debbie's voluntary statement to Callahan was an intervening event and time had passed since her illegal arrest. But the prosecution would have a stronger case if Debbie had been advised of Miranda, and with those rights specifically in mind, chose to talk knowing her statement could be used against her. There was a passage of time, but Debbie was still in custody. A break in custody would also help the prosecution, but no break occurred. And again, the 4th A violation was relatively flagrant. Finally, the statement is clearly out because of the Massiah violation, so the defense doesn't need this more difficult argument to exclude the statement.

+ **Issue 3:** Was Debbie in Miranda custody during Callahan's interrogation?

+++**Rules:**

- 0
1. If suspect told she is free to leave or not under arrest, no arrest for stationhouse interrogation where suspect voluntarily agreed to accompany police, who drove D to station. *California v. Beheler* (1983).
 - d. Voluntarily going to police station at officer's invitation is not an arrest; therefore, no automatic rule of custody for stationhouse interrogation. *Oregon v. Mathiason* (1977).
 - e. Even though defendant in *Mathiason* was a parolee and objectively may not have felt free to leave, in fact his freedom to depart was not restricted in any way.
 - f. Test is NOT whether questioning takes place in a "coercive environment," or because the suspect is the target of the investigation. However, these factors may be relevant in determining whether a reasonable person would have believed they were under arrest.
 - 0 2. Service of a term of imprisonment, without more, is not Miranda custody: Prison inmate taken to conference room unrestrained and told free to leave anytime and return to cell is not custody, although he was interrogated 5 to 7 hours about child molest. *Howes v. Fields* (2012).

1/2 ++**Analysis:** To trigger Miranda custody for interrogation of inmate (though here Debbie was in pretrial custody), the issue is whether the inmate was subjected to more than the usual restraint on a prisoner's liberty. Would a reasonable person feel free to terminate the interrogation and go back to her cell? Callahan told Debbie she was free to do so. The scenario is controlled by *Howes v. Fields*.

III. The property seized pursuant to the warrant

++ **Issue:** Is the property seized pursuant to the warrant fruit of the poisonous tree of Callahan's illegal search and Callahan's Massiah violation? Yes, unless the independent source of the video saves the

video portion in the statement of PC. The portion of the warrant relating illegally obtained evidence would be excised from the warrant, and the remainder analyzed for PC and lawfulness.

++++Rules:

- 7
1. **Independent source exception to the exclusionary rule:** When discovery *also by legal means unrelated to original illegal conduct*, evidence admissible. *Murray v. United States (1988)*. Applies to 4th, 5th (Due Process) and 6th A violations (but not Miranda). **But a subsequent search or seizure cannot be the result of (caused by) the previous illegal conduct.**
 - a. Where search warrant is untainted by previous illegal entry (search warrant contained probable cause wholly unconnected with the illegal entry, and entry made to secure premises until warrant obtained, and evidence discovered for the first time during execution of the untainted warrant), the evidence is derived from an independent source. *Segura v. United States (1984)*. A search based on an independent source is untainted by the primary illegality. The evidence is therefore not derivative of the primary illegality.
 - b. Reasoning: The exclusionary rule must not put police in a worse position than they would have been without the illegality.
 - i. Where evidence has an independent source, application of exclusionary rule would put police in a worse position because they could never again lawfully seize the evidence. The evidence would be permanently immunized from seizure.
 - ii. The evidence would have been admitted by the legal source, so the deterrence value is mitigated.
 - c. However, in *Murray* agents observed the target contraband upon illegal entry, then sought a warrant for that contraband knowing it existed on the premises. In this scenario, the government bears the “onerous burden of convincing a trial court that no information gained from the illegal entry affected the officer’s decision to seek a warrant.” In other words, the government must demonstrate the evidence is not derivative of the primary illegality. This additional requirement sufficiently discourages illegal confirmatory searches (to see if a warrant is worth the trouble). **The government must prove the subsequent search is not the result of the previous illegal conduct and is supported by independent PC.**
 - i. Mandates inquiry into subjective intent of officer.
 - ii. Officer must have *plausible explanation for why the original search was conducted*—cannot be a “confirmatory search.” Illegal search cannot have been conducted in bad faith.
 - iii. Facts obtained from illegal entry cannot be basis for issuing warrant nor **motivate police** to obtain warrant.
 - iv. PC must exist based on other facts.

2. **Inevitable discovery exception to the exclusionary rule:** Government must show that the challenged evidence would have inevitably been discovered through means independent of the illegality. *Nix v. Williams* (1984).

- a. The inevitable discovery doctrine is actually a hypothetical independent source rationale.
 - i. The evidence was not actually obtained from an independent source, but would have been if independent investigation had been allowed to proceed.
- b. It is justified for the same reasons that the independent source exception is justified: The exclusionary rule must not put police in a worse position than they would have been without the illegality.
- c. Government has BOP to a preponderance. This means the government must prove it is more likely than not the information ultimately would have been discovered.
- d. *Nix v. Williams* (1984): Search party would inevitably have found body (derivative evidence) notwithstanding Christian burial speech. In *Nix* the illegality was a 6th A violation—but the doctrine also applies to evidence derived from 4th A violations and 5th A (Due Process) violations.

++++**Analysis:** It appears the video evidence was an independent source, since routine, unrelated investigation by another officer disclosed the evidence. It also appears police would have discovered Debbie's identity as the burglar without Callahan's illegal conduct, because the anonymous tipster ID'd Debbie. Callahan had already obtained Debbie's photograph via the anonymous tipster's call, a source independent of the subsequent constitutional violations. Although the tipster's call does not constitute probable cause, Callahan did not need PC to consult a law enforcement database, and the facts state Callahan lawfully obtained Debbie's photograph by doing so. Callahan violated no 4th A interest in his discovery of Debbie's identity. By comparing her image to the video, police would have inevitably recognized her as the burglar, if investigation independent of the constitutional violations had been allowed to proceed. Therefore, D's identity as the burglar would have been inevitably discovered exclusive of her illegal confessions. Her identity on the video would provide PC to search her house. Since that information was contained in the warrant, that portion of the warrant is valid and therefore the property was lawfully seized.

X-TRA CREDIT

+ core 5th A violation - LIES ABOUT FACTS

2)



Professors Brannon and LaBerge

87

HIGHEST GRADE
Q2!

1) The Contents of the Backpack

4th AMENDMENT

SEARCH OF THE UNKNOWN CAR

An unlawful search occurs when a government official searches an area that a reasonable person would have an expectation of privacy in without a valid warrant or an exception to the warrant requirement.

Government Action

The 4th Amendment is triggered by government agents, not private citizens, conducting a search or seizure which interferes with that

persons reasonable expectation of privacy. A government agent includes police officers and detectives as well as private citizens who have been tasked by the government to conduct government business (i.e. informants).

Here, the facts show that an elderly disabled homeowner called police who then responded to the vehicle being left in her driveway. Police are government agents.

The court will likely conclude that there was government action.

Search

A search occurs when there is a physical intrusion onto a persons constitutionally protected private property in order to gain information (Jones) and when a persons subjective expectation is violated and society deems their expectation of privacy to be reasonable (Katz).

Here, the police looked inside the vehicle from the outside where they saw a backpack which the prosecution will assert was in plain view. The defense will argue that by opening the vehicle and looking inside the backpack, the police officer physically intruded into an area in which the owner would have a subjective expectation of privacy. Further, defense will assert that society would support one having an expectation of privacy within their vehicle and within any closed containers that are in that vehicle.

The court will likely find that a search occurred.

Search Warrant

A search warrant is required in order to gain access to a home in which a person has a reasonable expectation of privacy (see above). A search warrant must be supported by probable cause, signed by a judge or magistrate, and particularly state the items/persons to be searched for or seized.

Here, there is no evidence that a search warrant was present.

The court will likely determine that there was not a valid search warrant.

Exceptions to the Warrant Requirement

A search may be conducted without a warrant if a valid exception to the warrant requirement is present. Exceptions to the warrant requirement include exigent circumstances (hot pursuit, emergency aid, and destruction of evidence), plain view doctrine, automobile exception, etc.

Automobile Exception

The automobile exception allows officers to search the interior of a vehicle (Acevedo case) and the trunk (Carroll case) without a warrant provided they have probable cause.

Here, the defense will argue that there was no probable cause to search the vehicle (see probable cause discussion below).

The court will likely find that the automobile exception did not apply.

Emergency Aid Exception

The emergency aid exception allows officers to enter a home and conduct a search without a warrant if they have reasonable suspicion that a person has been

Here, the prosecution will assert that because the vehicle was parked in an elderly and disabled homeowners driveway and was abandoned, the officers had reasonable suspicion that someone may have been injured or about to be injured. They will argue that they had an objective belief that in order to avert any harm to the owner of the vehicle or the homeowner, they would need to look inside the vehicle to gain information. The facts show that the home was in a rural area, therefore if the car was abandoned, the person who drove the car there and subsequently abandoned it may be previously injured or in harms way as they attempted to leave the vehicle.

The court will likely find that the emergency aid exception did not apply.

NEED TO
DEFENSE
AVAIL 122

The court will likely conclude that there was not a valid exception to the warrant requirement.

Probable Cause

Probable cause is a fair probability or substantial chance that police will discover evidence of a crime or contraband in a particular place -OR- a reasonable ground for suspecting that a person is guilty of committing a crime or that evidence will be located in a particular place. Probable cause is evaluated by reviewing the basis of knowledge, veracity/reliability of the information or informant, and if the information has been corroborated. If the first two prongs are present, no corroboration is needed.

Here, the defense will argue that the mere parking of a vehicle is not a crime, therefore police would not have had any belief that they would find evidence of a crime or contraband within the car. The prosecution may assert that leaving the car in another homeowners driveway is suspicious, however this would not give rise to the probable cause necessary to search a vehicle under the automobile exception (see above).

The court will likely find there was not sufficient probable cause.

The court will likely find that there was a Core 4th Amendment violation to Doug Doolittle's reasonable expectation of privacy when officers searched his car/backpack.

EXCLUSIONARY RULE

The exclusionary rule is a judicial remedy to Constitutional violations. If the court finds that there was a violation to a right protected by the constitution, the court can exclude evidence gained from the violation. Primary evidence is automatically excluded and derivative evidence is excluded as "fruit of the poisonous tree" unless an exception to the exclusionary rule applies.

Exceptions to the exclusionary rule include attenuation, independent source, and inevitable discovery. The 4th amendment has an additional exception of good faith.

Here, the defense will argue that the discovery of the sawed-off shot gun and the mask were primary evidence gained from an illegal search. They will assert that had the illegal search not been conducted, those items would not have been discovered. The prosecution may argue that the exclusionary rule would not apply as the emergency aid exception applied however the court would have likely ruled it did not apply.

The court will likely conclude the contents of the backpack will be inadmissible per the exclusionary rule.

The court will likely find that the contents of the backpack were inadmissible as primary evidence of the exclusionary rule.

2) *The Methamphetamine*

4th AMENDMENT

ABANDONMENT PRIOR TO ARREST/DETENTION

An unlawful search occurs when a government official searches an area that a reasonable person would have an expectation of privacy in without a valid warrant or an exception to the warrant requirement.

Government Action

The 4th Amendment is triggered by government agents, not private citizens, conducting a search or seizure which interferes with that persons reasonable expectation of privacy. A government agent includes police officers and detectives as well as private citizens who have been tasked by the government to conduct government business (i.e. informants).

Here, the facts show that an elderly disabled homeowner called police who then responded to the vehicle being left in her driveway. Police are government agents.

The court will likely conclude that there was government action.

Search

A search occurs when there is a physical intrusion onto a persons constitutionally protected private property in order to gain information (Jones) and when a persons subjective expectation is violated and society deems their expectation of privacy to be reasonable (Katz).

Here, items that are abandoned prior to a suspect being detained or arrested and that are now subject to third-party intervention do not have a reasonable expectation of privacy. The prosecution will assert that Doolittle "tossed an item into some bushes" while ignoring officer requests for him to stop. They will correctly point out that in order for an individual to be arrested or detained, there must be a physical touching or show of force or a submission to the officers show of authority (Hodari). There is no evidence that there was a touching or submission, therefore prosecution will argue he had not yet been arrested or detained at the time the items was abandoned.

The court will likely find that a search did not occur as there was no reasonable expectation of privacy.

The court will likely conclude that there was not a 4th Amendment Violation.

EXCLUSIONARY RULE - FRUIT OF THE POISONOUS TREE

The exclusionary rule is a judicial remedy to Constitutional violations. If the court finds that there was a violation to a right protected by the constitution, the court can exclude evidence gained from the violation. Primary evidence is automatically excluded and derivative evidence is excluded as "fruit of the poisonous tree" unless an exception to the exclusionary rule applies.

Exceptions to the exclusionary rule include attenuation, independent source, and inevitable discovery. The 4th amendment has an additional exception of good faith.

Here, the defense will argue that although a search may not have occurred in the finding of the methamphetamine that it will be inadmissible regardless as it is fruit of the poisonous tree which was derived from the prior illegal search of the vehicle and the backpack within the vehicle. As the court would likely find the backpack contents were inadmissible, any evidentiary fruits obtains after the primary illegality would also be inadmissible unless a valid exception applies.

Attenuation

Attenuation is an exception to the exclusionary rule that allows derivative evidence to be admissible provided it can be distanced from the primary illegality. In order to determine if attenuation applies, the court looks to the Brown Factors (Illinois v. Brown) which are 1)

HOW IS
DISCOVERY
OF METH
CASUALLY
RELATED
TO EV. IN
BACKPACK?
D SAW ASVICK
& RAN OF
OWN
VIOLATION;
THW THW
INMAYNED
HIM TO STOP
AS?

Temporal proximity; 2) Remoteness and intervening factors; and 3) Particularly the flagrancy and purpose of the police misconduct.

Here, the prosecution will argue that although the court found the prior search of the vehicle to be illegal, the discovery of a valid arrest warrant is an intervening circumstances which attenuates the current evidence from the primary illegality per *Utah v. Streiff*. The prosecution will argue that the unlawful detention in *Streiff* was attenuated from the discovery of drugs on his person because a valid arrest warrant was discovered. Under the present facts, the officers discovered a valid arrest warrant for Doolittle which would give them cause to arrest and search incident to lawful arrest would could be attenuated per *Streiff*. They will argue that although the meth was not found on Doolittle's person, the discovery of the warrant is still an intervening circumstance which would deem the meth admissible as it gave them cause to make contact with the suspect.

The court will likely conclude the methamphetamine was attenuated and admissible per the attenuation doctrine.

The court will likely conclude the contents of the backpack will be admissible per the attenuation doctrine of the exclusionary rule.

The court will likely find that the methamphetamine is admissible.

3) The Concealed Handgun

4th AMENDMENT

ARREST OF DOUG DOOLITTLE

In order to arrest an individual, the police must have probable cause to arrest. Arrests which are conducted in public do not require a search warrant, however officers still must have probable cause to arrest (Watson v. United States).

Here, the prosecution will argue that there was probable cause to arrest Doolittle on the crimes evidenced in the fact patter. They will also assert that there was a valid arrest warrant for Doug Doolittle. The discovery of the valid arrest warrant allowed officers to make an arrest with or without probable cause of the present crimes. The defense will argue that there was not adequate probable cause and the arrest was unlawful. The defense may try to assert that the arrest warrant was for a failing to pay a court fine which was a non-serious offense and likely carried no jail time, therefore Doolittle should not have been arrested, however this argument would not have legal merit.

Probable Cause

Probable cause is a fair probability or substantial chance that police will discover evidence of a crime or contraband in a particular place -OR- a reasonable ground for suspecting that a person is guilty of committing a crime or that evidence will be located in a particular place. Probable cause is evaluated by reviewing the basis of knowledge, veracity/reliability of the information or informant, and if the information has been corroborated. If the first two prongs are present, no corroboration is needed.

Here, the facts show that a vehicle was abandoned, a sawed-off shotgun and mask were found within that car along with a photo ID which identified the suspect, the vehicle was registered to the suspect, there was an outstanding arrest warrant, and methamphetamine was abandoned by suspect. The prosecution will argue that a reasonable officer would believe these facts gave rise to probable cause.

The court will likely find there was sufficient probable cause.

The court will likely determine that the arrest of Doolittle was lawful.

SEARCH INCIDENT TO LAWFUL ARREST

Police are allowed to search a suspect and containers within his immediate control incident to lawful arrest.

Here, the court likely determined that the search was valid (see above) which then allows the officer to search the suspects person and any containers within his immediate control. The prosecution will assert that the arrest and search incident to lawful arrest were valid.

The court will likely conclude that the search incident to lawful arrest were legal.

The court will likely conclude that the concealed handgun is admissible as there were no constitutional violations.

4) Doolittle's Confession He Was Drunk

5th AMENDMENT - MIRANDA

INVOCATION OF RIGHT TO COUNSEL

The invocation of right to counsel under Miranda is not offense specific, therefore it applies to the suspect as a whole. The invocation must be express, clear and unambiguous in order to be valid. After an invocation, the police must stop all questioning of the suspect and provide an attorney. In order to re-question a suspect after the invocation of right to counsel under Miranda, the police are allowed to reinterview the suspect after they have

been released from pre-trial custody plus a 14-day "waiting period" has lapsed. If the suspect initiates contact, the statements are admissible. Any statements made by a defendant in violation of this rule would be deemed inadmissible per Miranda.

Here, Doolittle invoked his right to counsel under Miranda by saying he wanted a lawyer. There is no specific information that would give rise to an argument that the invocation was not express clear and unambiguous. Doolittle was then released from pre-trial custody when he made bail and was involved in the car accident one week later. The defense will argue that Doolittle gave his statement "in a response to questioning" which shows that the defendant did not initiate contact with the officers. Defense will correctly assert that invocation is not offense specific and the fact that the officer was from another police agency does not circumvent the rule that the suspect cannot be questioned after invocation of right to counsel. The prosecution may attempt to argue that because Doolittle was not in custody at the time this questioning occurred that the re-interview rule after invocation did not apply. This argument has not yet been adjudicated and will likely not be successful here.

The court will likely conclude that there was a Miranda violation when police questioned Doolittle after his invocation of right to counsel, therefore the statement is inadmissible.

The court will likely conclude the statement Doolittle was drunk is inadmissible.

5) Doolittle's Confession He Was The Driver of the Car

5th AMENDMENT - MIRANDA

INVOCATION OF RIGHT TO COUNSEL

The invocation of right to counsel under Miranda is not offense specific, therefore it applies to the suspect as a whole. The invocation must be express, clear and unambiguous in order to be valid. After an invocation, the police must stop all questioning of the suspect and provide an attorney. In order to re-question a suspect after the invocation of right to counsel under Miranda, the police are allowed to reinterview the suspect after they have been released from pre-trial custody plus a 14-day "waiting period" has lapsed. If the suspect initiates contact, the statements are admissible. Any statements made by a defendant in violation of this rule would be deemed inadmissible per Miranda.

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suspect cannot be questioned after invocation of right to counsel. The prosecution may attempt to argue that because Doolittle was not in custody at the time this questioning occurred that the re-interview rule after invocation did not apply. This argument has not yet been adjudicated and will likely not be successful here.

The court will likely conclude that there was a Miranda violation when police questioned Doolittle after his invocation of right to counsel, therefore the statement is inadmissible.

The court will likely conclude the statement is inadmissible per Miranda.

5th AMENDMENT

A Core 5th Amendment violation occurs when a statement is made involuntarily and as a result of coercive police misconduct. Involuntariness is based on the totality of the circumstances.

Here, the defense will argue that because the officer told Doolittle that he didn't believe him and said "I take liars to Jail," there was police coercion. The defense may assert that there was a threat that he would take Doolittle to jail and threats are deemed to make a statement involuntary. The prosecution will argue that officers would have likely take Doolittle to jail regardless of whether he lied or not, therefore it was not an actual threat. The defense will counter and say that police did not have probable cause to arrest Doolittle (fair probability crime was committed by suspect), therefore they could not have taken him to jail. By

threatening to take him to jail, the defense will say the statement was rendered involuntary.

The court will likely conclude that the statement was made involuntarily as a result of police coercion and that no Core 5th Amendment violation occurred.

EXCLUSIONARY RULE

The exclusionary rule is a judicial remedy to Constitutional violations. If the court finds that there was a violation to a right protected by the constitution, the court can exclude evidence gained from the violation. Primary evidence is automatically excluded and derivative evidence is excluded as "fruit of the poisonous tree" unless an exception to the exclusionary rule applies.

Exceptions to the exclusionary rule include attenuation, independent source, and inevitable discovery. The 4th amendment has an additional exception of good faith.

Here, the defense will argue that because the statement was involuntary and a violation of the 5th Amendment, the statement made to offer regarding driving the vehicle should be inadmissible per the exclusionary rule.

The court will likely find the statement inadmissible per the exclusionary rule.

The court will likely find the confession that Doolittle was the driver of the car is inadmissible.

222258

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END OF EXAM

QUESTION 2 ANSWER OUTLINE¹

Credit ranges from ½ to +++; ½ = half of a +

No credit = Ø

I. The contents of the backpack

+ Issue 1: Did police have probable cause to search the car?

Rules:

+ +1. Automobile Exception: **Only PC required to search a car** (no warrant required). Bright line rule without any showing of exigency required. Includes any container in the car or trunk if there is PC to search the car. *California v. Acevedo* (1991).

+ +2. PC is a fair probability or substantial chance that evidence of a crime (or contraband) will be found in a particular place; OR a fair probability a particular person is guilty of a crime. PC is based on the totality of the circumstances by common sense evaluation.

+ + + + Analysis: What articulable facts did the police have that any crime was committed or was ongoing? If D trespassed, what evidence of that crime could be found in a backpack in the car? Isn't there an implicit license for visitors to park in a homeowner's driveway? Likely there is no PC here, because the driver could have been lost, could have had the wrong house, or could have needed to go to the bathroom, for example. Or could have been there on a solicitation call and then decided to take a walk. Or could have taken his dog for a walk. This encounter was in the middle of the day, which lessens suspicion.

II. The methamphetamine

+ ½ Issue 1: Did seizure of the meth implicate the 4th A? Was D seized beforehand?

Rules:

+ + 1. ++Detention: In addition to the *Mendenhall/Drayton* show of authority, the suspect must also **submit to the show of authority or, if not, there must be a physical touching**. *California v. Hodari* (1991).

¹ The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. This outline is not a model answer because it may not include model analysis (a complete and thorough application of the law to the facts by both prosecution and defense) and may not offer a conclusion. However, the rule statements are exhaustive and beyond model. Little or no credit will be awarded for rule statements not tethered to their relevant issue. Due to time constraints it may not be possible to obtain all credit available. Better answers address major issues thoroughly where more points are available. Points will be deducted if an answer addresses minor issues without spotting central issues, or for failure to use IRAC.

TOSS - MUCH MORE DIFFICULT
ARGUMENT FOR AC

containers immediately associated with arrestee without actual existence of threat or destruction. Fact of lawful arrest makes search reasonable without further showing. *United States v. Robinson* (1973).

1/2 **1/2 Analysis:** Police found the handgun on D's person pursuant to a SILA (assuming the arrest is lawful) therefore the gun is admissible (but see next issue).

+ **++ Issue 3:** Was the PC for D's arrest fruit of the poisonous tree of the arguably illegal backpack search?

++++ **Rule:** Application of exclusionary rule to derivative evidence—Attenuation factors:

- +++
1. Discovery of arrest warrant attenuates taint during illegal but good faith/negligent detention where evidence discovered pursuant to search incident to arrest on warrant. Discovery of derivative evidence attenuated because of intervening discovery of warrant, so evidence admissible. *Utah v. Strieff* (2016).
 - a. Temporal proximity in *Strieff* favored suppression since drugs discovered only minutes after stop.
 - b. Intervening circumstance of valid warrant, unconnected to stop, favored state. Warrant mandated D's arrest and search incident thereto lawful. The outstanding arrest warrant is a critical intervening circumstance wholly independent of the illegal stop.
 - c. Purpose and flagrancy of misconduct factor favored the state. In *Strieff* officer at most negligent and made a good faith mistake to detain. No evidence that unlawful stop part of any systematic or recurrent police misconduct. This was a bona fide investigation of a drug house.

+ **++++ Analysis:** D was arrested (not detained) and there was probable cause to arrest D because of the warrant. But the police discovered the warrant because of their search of D's backpack. Assuming this search was illegal, was D's arrest fruit of the poisonous tree/derivative evidence of the illegal search? Other than discovery of the DUI warrant, the only intervening event was D's flight. Under *Strieff*, resolution of this issue depends on whether the lack of PC to search the backpack was made in good faith. Were police only negligent in searching D's car without PC?

IV. Doolittle's confession he was drunk

+ **+ Issue:** Could the CHP officer seek a Miranda waiver?

++++ **Rule:** Re-interview after Invocation: Right to Counsel

- ++++
1. Police may not re-initiate contact and seek a Miranda waiver after invocation of right to counsel until there is a break in custody of 14 days. *Edwards v. Arizona* (1981); *Maryland v. Shatzer* (2010).
 - a. Reasoning: Miranda said interrogation must cease until an attorney is present. If D invokes right to counsel, he needs legal assistance before the law will allow police to ask if he has changed his mind.
 - b. Bright-line rule without regard to whether subsequent confession is voluntary or subsequent confession taken after Miranda warning and voluntary waiver.

QUESTION 2 ANSWER OUTLINE¹

Credit ranges from ½ to +++; ½ = half of a +

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I. The contents of the backpack

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Rules:

+1. Automobile Exception: **Only PC required to search a car** (no warrant required). Bright line rule without any showing of exigency required. Includes any container in the car or trunk if there is PC to search the car. *California v. Acevedo* (1991).

++2. PC is a fair probability or substantial chance that evidence of a crime (or contraband) will be found in a particular place; OR a fair probability a particular person is guilty of a crime. PC is based on the totality of the circumstances by common sense evaluation.

++Analysis: What articulable facts did the police have that any crime was committed or was ongoing? If D trespassed, what evidence of that crime could be found in a backpack in the car? Isn't there an implicit license for visitors to park in a homeowner's driveway? Likely there is no PC here, because the driver could have been lost, could have had the wrong house, or could have needed to go to the bathroom, for example. Or could have been there on a solicitation call and then decided to take a walk. Or could have taken his dog for a walk. This encounter was in the middle of the day, which lessens suspicion.

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- a. If there is no physical touching and suspect does not submit and runs, it's not a detention. If D thereafter tosses evidence, it is admissible even if the officer lacks reasonable suspicion.

2. ++Plain view: Authorizes warrantless seizures if observation provides probable cause. *Coolidge v. New Hampshire* (1971).

- 1. Neither PC nor a warrant is required for the observation if the doctrine applies. Observation of an item in plain view is not a search because ordinarily the 4th A does not protect or implicate observations.
- 2. A seizure of an item in plain view does not require a warrant if the incriminating nature of the evidence is immediately apparent (the observation provides probable cause to seize the evidence).
- 3. However, for doctrine to apply **an officer must be within the scope of a lawful activity in a place s/he has a right to be** for both observation and seizure (officer must have a lawful right of access to the object in order to seize it).

++Analysis: Even if police did not have a reasonable suspicion to detain D, under *Hodari* police effected no seizure when D abandoned the meth; therefore, the meth is admissible because it was found in plain view.

½Issue 2: Did police have a reasonable suspicion to detain D?

+Rule: Reasonable suspicion defined:

- a. Less than probable cause. How much less is difficult to define, but requires objective facts that support the seizure (or exigency—see *Michigan v. Fisher*). Reasonable suspicion is more than a mere "hunch."
- b. A fair possibility—possible cause. A reasonable possibility crime is afoot.

½Analysis: Since no detention was ever effected under *Hodari*, there was no 4th A seizure of D and therefore it makes no difference whether police had a reasonable suspicion.

III. The concealed handgun

½Issue 1: Did Police have PC to arrest D?

Rule: PC (credit given only once).

½Analysis: The warrant for D gave police PC to arrest him. (The facts do not present any ID issue. Facts say police saw D).

+Issue 2: Could police search D to locate the handgun incident to a lawful arrest?

++Rule: Search Incident to Arrest: No PC or warrant required to search person and most often containers in possession of arrestee if PC to arrest. Bright line rule for arrestee's person and containers immediately associated with arrestee: Police have automatic right to search arrestee's person and

TOSS - MUCH MORE DIFFICULT
ARGUMENT FOR DC

containers immediately associated with arrestee without actual existence of threat or destruction. Fact of lawful arrest makes search reasonable without further showing. *United States v. Robinson* (1973).

1/2 **1/2 Analysis:** Police found the handgun on D's person pursuant to a SILA (assuming the arrest is lawful) therefore the gun is admissible (but see next issue).

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 - b. Intervening circumstance of valid warrant, unconnected to stop, favored state. Warrant mandated D's arrest and search incident thereto lawful. The outstanding arrest warrant is a critical intervening circumstance wholly independent of the illegal stop.
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IV. Doolittle's confession he was drunk

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 - a. Reasoning: Miranda said interrogation must cease until an attorney is present. If D invokes right to counsel, he needs legal assistance before the law will allow police to ask if he has changed his mind.
 - b. Bright-line rule without regard to whether subsequent confession is voluntary or subsequent confession taken after Miranda warning and voluntary waiver.

- c. 14 day return to normal life provides break so that decision to answer questions is not the result of coercion.
- d. **Miranda is not offense specific:** Once Miranda is invoked, interrogation about a different crime is prohibited. Invocation of right to counsel or silence applies to all charges and cases even if police do not know about former invocation.

++Analysis: D's confession is inadmissible in the prosecution's case-in-chief under *Edwards* because the interrogation occurred within 14 days of D's invocation of his Miranda right to counsel to police during the first contact in the hypo. D's confession is admissible to impeach D.

V. Doolittle's confession he was the driver

+Issue: Did the CHP officer violate D's core 5th A rights?

+++Rule: Core 5th A violation

1. Trigger:

- a) confession must be involuntary—the defendant's will overborne—and the product of:
- b) coercive police misconduct.

A defendant's statements are **inadmissible if coercive police conduct was a motivating factor in the defendant's decision to confess.**

2. Coercion surrounding confession: Threats of harm, physical or psychological deprivations that reduce free will.

3. Inducements by police which can render a confession involuntary: 1) "Tell us the truth and we will release you tonight;" 2) "Tell us the truth and we will reduce your sentence," or "the prosecutor or judge will go lighter on you."

++Analysis: By threatening to take D to jail because he lied, the CHP officer is offering an implied inducement not to do so if D tells the truth. D's confession is likely a core 5th A violation and is inadmissible for any purpose, including to impeach D.