

MONTEREY COLLEGE OF LAW
FINAL EXAMINATION
SPRING 2018

CRIMINAL PROCEDURE

Professors B. Brannon & S. LaBerge

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.

Question 1

Acting on an anonymous tip, Officer Smith closely followed the 2017 BMW sedan of a suspected drug dealer. The BMW made a left turn at a location which was clearly marked with a sign stating, "No left turns allowed." Officer Smith turned on his emergency lights and the BMW pulled over. The officer contacted the driver, Mike Boyd, and observed a passenger in the right front seat. Officer Smith asked Mike for his driver's license and car registration which Mike provided. Mike was the registered owner of the BMW. Officer Smith handed Mike a citation for the illegal left turn, but informed Mike that he would be detained a few moments longer. A half-hour later another officer arrived with a trained narcotics detection dog, and the dog immediately alerted on the BMW's trunk. Officer Smith ordered Mike to open the trunk and Mike did so. Immediately upon opening the trunk, Officer Smith saw a white powdery substance in a clear baggie which based on his training and experience he suspected was illegal narcotics, and saw an illegal loaded hand gun. Officer Smith seized the items and arrested both occupants of the vehicle. The powdery substance later tested positive as heroin weighing 8 ounces.

Later at the police station, Officer Smith separately interviewed the passenger and Mike. Officer Smith properly Mirandized the passenger, who said he understood his rights and agreed to waive them. The passenger said Mike picked him up to give him a ride to the passenger's house; he also confessed to placing the gun in Mike's trunk a few moments before the traffic stop. Then Officer Smith properly Mirandized Mike, who said he understood his rights. Officer Smith asked Mike if he would like to "work off" his heroin bust by informing on his supplier. Mike asked if that meant he would not be prosecuted. Officer Smith agreed. Mike confessed to possessing the heroin for sale and told Officer Smith the identity of his supplier.

The DA charged the passenger with illegal possession of a gun and charged Mike with illegal possession of heroin. Defense counsel moved to suppress (1) the gun and heroin; (2) the passenger's statements to Officer Smith; (3) Mike's statements to Officer Smith.

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?

Question 2

With lawful probable cause, Monterey police arrested Tom for bank robbery in front of his house. Hearing a disturbance, Tom's wife Sara came outside. Officer Jones asked Tom if he would consent to a search of his house. Tom refused consent to search and yelled at his wife to keep the cops out of the house. Officer Jones took Tom to jail and Mirandized Tom. Tom demanded an attorney and Officer Jones asked no further questions. The police returned to Tom and Sara's house and asked for Sara's consent to search the house. Sara asked what would happen if she did not consent. The police truthfully replied they would get a search warrant, for which they had probable cause. Sara then consented, and while searching the house police located a mask and a gun that matched descriptions given by witnesses to the robbery.

The DA charged Tom with bank robbery. Tom was arraigned the next day in Superior Court and a public defender was appointed to represent him. Later that day Tom bailed out of jail and returned home.

A week after Tom's release from custody on the bank robbery charges, Officer Phillips from the Salinas Police Department arrested Tom on a valid warrant for possession of child pornography. At the police station, Officer Phillips Mirandized Tom who said he understood his rights. Tom voluntarily waived his rights and admitted to photographing neighborhood children.

That day, Tom was placed in a fair, non-suggestive line-up with 5 other jail inmates. Tom's public defender was not notified. Witnesses to the bank robbery identified Tom as the robber. Each witness positively recognized Tom as the man who robbed the bank. Their descriptions of Tom at the time of the robbery matched Tom.

The DA charged Tom with possession and production of child pornography and Tom's public defender was appointed to represent him.

Tom's public defender moved to suppress the following items of evidence: 1. The mask and gun. 2. Tom's admission that he photographed neighborhood children. 3. That witnesses identified Tom as the robber at the line-up. 5. Any testimony of those witnesses at trial identifying Tom as the bank robber.

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?

QUESTION 1 ANSWER OUTLINE¹

Credit ranges from ½ to +++; ½ = half of a +
No credit = ∅

I. The gun and heroin

+ **++Issue 1:** Was there reasonable suspicion for the stop/detention? Is a pretext stop legal?

Rules:

1. +A detention occurs when a reasonable person under the totality of the circumstances **would not feel free to leave or to decline the officer's requests or terminate the encounter**. *United States v. Mendenhall* (1980).
2. +Detentions—proof required: **Reasonable suspicion that crime afoot**. *Terry v. Ohio* (1968).
 - a. Reasonable suspicion defined:
 - b. Less than probable cause. Reasonable suspicion is more than a mere "hunch." A fair possibility—possible cause. A reasonable possibility crime is afoot.
 - c. +Officer's subjective reasoning does not control: **Pretext stops permitted**. *Whren v. United States* (1996).
 - i. If officer has probable cause (or a reasonable suspicion to detain), a seizure is permitted under the 4th A even if the officer has a hunch D is committing a different crime not supported by PC or RS. Officers may likewise search if they have PC, even if they hope to discover a different crime not supported by PC.

+ **+Analysis and conclusion:** The initial detention of the occupants, because of the illegal left turn, was valid.

⊙ **++Issue 2:** Was the passenger detained?

Rule: A passenger in a car is seized, along with the driver, during a traffic stop. *Brendlin v. California* (2007).

Analysis and conclusion: The passenger was lawfully detained at the outset.

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.

- ii. But details included in tip that are corroborated need not be suspicious.
Alabama v. White (1990).

1/2
+++**Analysis and conclusion:** The anonymous tip was not corroborated, because Officer Smith discovered no evidence of narcotics before searching the trunk. Therefore, the anonymous tip did not amount to reasonable suspicion and did not justify the detention. Probable cause is required to search the trunk of a car, and no warrant is required because of the automobile exception. Although a dog sniff is not a search, once Smith had PC to search the trunk because the dog alerted, the search was already poisonous fruit of the illegal detention.

0
+**Issue 5:** Does the passenger need standing to challenge the search of Mike's trunk and the seizure of the gun?

+**Rule:**

1. Standing to challenge the seizure of one's person is governed by the *Mendenhall/Drayton/Hodari* substantive 4th A definition of a seizure.
 - a. Under *Brendlin v. California* (2007) passengers in car have standing to contest an illegal stop (or on these facts, a prolonged detention). If the stop is illegal, passengers may successfully exclude evidence obtained in a subsequent search of the car as fruit of the poisonous tree. If the stop is illegal, the passengers need not show a REP in the area searched under *Rakas*.

+**Analysis and conclusion:** The passenger need not demonstrate a reasonable expectation of privacy (standing) concerning the trunk, because the search of the trunk was derivative evidence of the passenger's illegal detention.

II. The passenger's statement to Officer Smith

+ 1/2
++**Issue 1: Was the Passenger's Mirandized confession fruit of the poisonous tree of the illegal, prolonged detention?**

++++**Rules:**

1. Fruit of the poisonous tree: 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 are obtained by means sufficiently distinguishable to be purged of the primary taint, the exclusionary does not apply.** *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.

→ +Confessions must be voluntary to pass muster under the 5th Amendment. The 5th Amendment is violated whenever an involuntary confession, coerced by police, is admitted at trial.

1/2 +Deception—lies about the law—criminal procedure or penalties—are likely a 5thA/Due Process violation.

1/2 +Inducements by police which can render a confession involuntary:

Confession involuntary where police told D that if she confessed to marijuana sales she would not be prosecuted. D confessed and her statements were used to convict her. *Lynumn v. Illinois* (1963).

"Tell us the truth and we will release you tonight."

"Tell us the truth and we will reduce your sentence," or "the prosecutor or judge will go lighter on you."

+ +**Analysis and conclusion:** Although Mike's implied waiver of Miranda was valid, Officer Smith promised leniency (the chance to avoid prosecution), which apparently was also a lie, not about case facts but criminal procedure, because it does not appear Officer Smith allowed Mike to work off the heroin bust, since the DA charged Mike with that crime. Mike's confession was involuntary in violation of the core 5th Amendment because he was promised leniency. Although no Miranda violation occurred, a core 5th A violation did.

Extra credit:

1/2 MIKE'S CONFESSION FBT OF ILLEGAL RETENTION.

QUESTION 2 ANSWER OUTLINE¹

Credit ranges from ½ to ++++; ½ = half of a +
No credit = ∅

I. The mask and the gun

+ **++Issue 1:** Did Tom's wife Sara have apparent authority to consent to the search of her and Tom's house? Does Tom's refusal affect Sara's consent?

++++Rules:

- + 1. 3rd Parties can consent to search if they have actual or apparent authority. *Illinois v. Rodriguez* (1990).
- + a. Apparent authority is a form of reasonable belief by officers, even if believed facts turn out to be false. A reasonable mistake does not render a search unreasonable under the 4th A.
- + 2. However, when two co-occupants are present and one refuses the search even though the other consents, the search is not constitutional. *Georgia v. Randolph* (2006).
- a. Elements: 1. Objector physically presence at scene; 2. Express refusal to consent.
3. But *Randolph* does not apply if after refusal police remove objector from scene by arresting him, even if objector was present at home when he objected to their entry, if police subsequently obtain consent to search from cohabitant with apparent or actual authority to consent. *Fernandez v. California* (2014).
- i. Police returned to residence one hour after objector arrested and obtained consent to search from abused cohabitant.
- ii. Court states that *Randolph* applies only when the objector is standing in the door saying "stay out" when officers propose to make a consent search.

+ **++Analysis and conclusion:** Although the facts don't explicitly state that Sara lived at the house, it is a reasonable inference she did. A wife who lives at a residence with her husband has apparent authority to consent to a search of her residence. Sara's status as Tom's wife, a given in the facts, provide apparent authority to consent.

1/2 **+Issue 2:** Was Sara's consent voluntary even though police told her if she did not consent they would obtain a search warrant?

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.

- d. Invocation is NOT offense specific: Police cannot question D about a different crime unless there is a break in custody of 14 days. *Arizona v. Roberson* (1988). The invocation applies to all crimes; therefore, there is no offense specificity limitation.
 - i. Bright-line rule rationale: Confession suppressed even though D knowingly and voluntarily waived, officer did not know of invocation of right to counsel 3 days earlier, and D's subsequent statement entirely voluntary.
 - 1. Request for counsel expresses suspect's "own view that he is not competent to deal with authorities without legal advice."
- e. Summary: If subsequent interrogation occurs in Miranda custody, D may not confess to police until Edwards 14 day prophylactic expires unless D initiates further communication with police, counsel present during interrogation, or perhaps subsequent police questioning is non-custodial.

+Analysis and conclusion: The Edwards prophylactic had not expired. Police cannot initiate communication and seek a Miranda waiver, even concerning a different crime. Tom's confession will be excluded.

III. The evidence from the line-up procedure

++Issue: Did the line-up violate Tom's 6th Amendment right to counsel? Will the evidence of the procedure be excluded?

+++Rules:

6th A trigger: Attachment of the 6th A (see *Massiah* Outline) + ID procedure using D's presence. *United States v. Wade* (1967); *Gilbert v. California* (1967).

1. **Attachment:** US Supreme Court uses term "formal charges" to mean "initiation of adversary judicial proceedings," which requires an indictment or an initial appearance before a magistrate. *Massiah* attaches:
 - a. Arraignment: *Brewer v. Williams* (1977).
2. **Rule:** The presence of counsel is required at such a line-up.
3. **Rationale:** A line-up is a critical pre-trial stage. The 6th A applies at critical stages to preserve the right to a fair trial.
4. **Exclusionary Rule: Remedy for a violation:** Evidence of the line-up procedure using D's presence conducted without counsel is **excluded** at trial per se.
 - a. A rigid, bright-line prophylactic rule.
 - b. Whether or not the line-up procedure was suggestive.

- c. **These factors are an inquiry into whether the court views the witness' identification as reliable under the totality of the circumstances.**

++
+++Analysis and conclusion: Because the facts state the line-up procedure was fair and each witness positively identified Tom as the robber, it is highly likely the witnesses' identification resulted from their observations of Tom at the crime scene, rather than because Tom was one of 6 subjects in a tainted (because counsel was absent) ID procedure. The facts provide no evidence the witnesses would have identified someone besides Tom if Tom's counsel had been present. The fact multiple witnesses identified Tom and none of the witnesses identified anyone else, indicates the IDs derived from the independent source of the witnesses' crime scene observations. The witnesses' testimony at trial should be admitted because the IDs appear reliable under the totality of the circumstances.

1)

217218



Brannon and LaBerge

Question 1

Were the gun and heroin properly seized under the rights afforded under the 4th Amendment?

In order for a search and seizure to be reasonable under the 4th Amendment, firstly, the government agent conducting the search and seizure must be in a lawful vantage point. This can be in the form of a lawful traffic stop. The police then normally need probable cause to search the person and containers associated with the person. This may be reduced to reasonable suspicion when certain factors posing threats of safety to police officers, like the risk that the suspect is armed and dangerous, or a threat of the destruction of evidence are introduced to the situation. However, due to the exigent factors inherent of an automobile, such as mobility, there is an exception to the search and seizure of an automobile. With a driver moving through traffic in his car, the automobile exception requires that the police make a valid stop of the car. Regardless of the intention of the stop, the police must be able to show that they pulled the car over for a valid traffic violation. If the stop is not valid, then the seizure of the car was unreasonable under the 4th amendment. Once the police have turned their lights on and the car succumbed to this show of authority, the car and its passengers are seized. Upon pulling the car over, the police must diligently pursue the traffic violation as a prolonged

seizure, without affecting an arrest or with a valid search warrant, is not reasonable under the 4th amendment.

Presently the facts show that Mike's BMW turned left where there were signs that said not to turn left. The police turned their lights on to have Mike pull over due to this traffic violation. This was a lawful stop, giving the police a lawful vantage point from which to assess the car's occupants. Now seized by this routine traffic stop, Mike and his passenger had the benefit of the 4th amendment that they could not be held beyond the amount of time reasonably required to issue a citation, make an arrest, or conduct a diligent assessment of the vehicle. Here, the police took over a half hour to get a trained narcotics dog to sniff the car. Though the police were originally honoring the 4th amendment rights of the occupants, this prolonged detention of Mike and the passenger to retrieve a drug detection dog was unreasonable. As such, the evidence must be excluded.

The prosecution could argue the the police were in a lawful vantage point and Mike and the passenger consented to wait the "short" period and consented to opening the trunk. Consent must be voluntary and the prosecution would have the burden of proof of showing that the suspect knew his right to refuse, was not coerced by things like being in custody, comments made by the police, or a language or education barrier. Here, the police ordered Mike to open the trunk. Moreover, at this point in time, it had been over a half-hour and this could be argued to appear like custody.

Even though a drug detection dog who sniffs a container(such as the trunk) which would normally need PC to open, alerted the police to narcotics, thus creating PC, the police were no longer conducting a reasonable seizure of Mike and his passenger. This is what the defense would argue. The police passed the threshold of reasonable and the gun and heroin found in the trunk are inadmissible. Therefore, the subsequent arrest of Mike and the passenger was not valid as it was based on fruits of an unreasonable search and seizure.

Did the police properly obtain, per the constitution, the passenger's statements?

Miranda requires that when there is a custodial interrogation of a suspect, Miranda rights must be read before any deliberate elicitation ensues. Miranda is the prophylactic safeguard designed to protect the interests of the 5th amendment. In order to waive the rights prescribed through Miranda, the police have the BOP of showing that the suspect knowingly, intelligently, and voluntarily waived his rights knowing the nature and consequences of abandoning such rights. Mere silence cannot be construed as a waiver. A waiver need not be express either. Here, the passenger stated that he understood his rights and waived them. This is a sufficient waiver. Under this the subsequent confession could appear admissible.

The fruits of the poisonous tree doctrine presents the issue that a primary illegality can taint the disclosure of ensuing evidence. If a second disclosure of information followed the primary illegality, to admit this second disclosure into evidence could be an exploitation of the primary illegality. In order to admit the second, third, etc disclosure (following any illegality), it must be shown that any taint caused by the primary illegality is dissipated. This is shown by factors such as the temporal proximity between the primary illegality and the second disclosure, whether there were any intervening events that dissipated the taint of the first illegality on the second disclosure, and what the purpose or flagrancy of the misconduct from the first illegality was. Together, the facts surrounding the 1st, 2nd, and any subsequent disclosures following a primary illegality are analyzed to see if the taint has dissipated and the subsequent disclosures are free to admit into evidence as their products of their own making. Here, we have a confession, following a primary illegality: the unreasonable search and seizure. This confession to owning the gun happened on the same day as the arrest.

The prosecution will argue that the confession was properly Mirandized and that the confession was too attenuated from the prolonged seizure and the police misconduct was negligent at the most, but not sufficient to warrant exclusion of derivative fruits.

Defense would argue that (1) Mike was in custody for an arrest affected by the fruits of an unreasonable search and seizure; and (2) the confession was fruits of the poisonous tree. Defense will argue that the cat was out of the bag as the police already found the gun. This confession was tainted by the unreasonable search and seizure.

The court will most likely rule that the initial arrest was unreasonable and the ensuing interrogation was not admissible.

Did the police properly obtain, per the constitution, Mike's statements?

First of all, Mike's arrest was unreasonable and this statement should not come in due to the invalid arrest.

Secondly, Miranda rule (see supra). Mike was properly Mirandized and said he understood them. This does not assume a waiver. The core fifth amendment prohibits compulsion by the state that uses coercion, extreme deception, untrue promises of benefit, psychological and physical deprivation, etc. This was seen in *Brown v. Mississippi*, and this is seen presently. If a statement, even taken pursuant to Miranda, is taken via misconduct of police officers such offering an untrue promise of benefit from confessing, the statement was induced involuntarily. Custodial interrogation already has an inherently coercive pressure which is protected by Miranda. However, the deeper issues of the 5th amendment come into play when the officer uses the power of contempt to elicit an incriminating response. This puts into effect the cruel trilemma that runs against the integrity of the modern judicial system. Here, while in custody, under an invalid arrest, Mike was asked if wanted to essentially make a deal in exchange for giving the officer the

identity of his supplier. As Mike's case went to trial and we are now working on a motion to suppress said statement, this promise by the officer was clearly untrue. As such, the officer tempted Mike with immunity to gain a confession and the identity of the supplier using an untrue promise of benefit. This makes the statement involuntary under the 5th amendment.

Alternatively, the statement could be excluded under the fruits of the poisonous tree doctrine (see supra).

The prosecution would argue that "work[ing] off" his heroin bust was not promising an untrue benefit and there was confusion at this point over exactly what that meant. Prosecution could also say he was properly mirandized and knew his rights, making the confession voluntary under Miranda standards.

The defense would argue that (1) Mike was there on an invalid arrest; (2) the confession was involuntary as Mike clarified with the officer that this meant he would not be prosecuted if he gave the identity of the supplier. If there was any confusion as to what was promised, Officer Smith agreed to Mike's clarification. Mike was subsequently prosecuted. As such, this was coerced and the confession was involuntary as Mike was prosecuted; and (3) the confession would be considered a fruit of the poisonous tree, stemming from the unreasonable search and seizure.

The court would have to agree on either of the three arguments that Mike's confession would not come in.

217218

Brannon and LaBerge

ID:

Exam... CrimLwProBMCL-Spg18

END OF EXAM

2)

85

217218

Brannon and LaBerge

Question 2

Was the search of Tom's house and subsequent discovery of the mask and gun in violation of Tom's constitutional rights?

When entering a home without a search warrant, the police must have a reasonable belief that the person consenting has authority to let them in; this person must minimally have apparent authority to consent to the search of the home or have actual authority. If the suspect declines the search and instructs this third party (such as a wife) to not let the police in. The police must honor this declined entrance until that suspect is off the premises and a reasonable time has passed. If the third party asks the police a question concerning the upcoming actions by police, such as they did in the present case, they must do so in a way that third party's consent remains voluntary, free from coercion, custodial effects, extreme deception, etc. (see previous case on voluntary under the 5th amendment). Here, Sara asked the police what their proposed action would be if she declined the police the search. The police did have probable cause for the arrest, answered that they had PC and that they would obtain a search warrant. This does not appear coercive or even mildly untrue. The prosecution would argue that the search of the house under Sara's consent was thus reasonable under the 4th amendment.

The defense could argue that Tom's initial denial would override Sara's consent to let the officers in. D would say that it was not enough time in between the two requests to enter the home and it was police badgering. However, this argument would likely lose and the

with
this

court would allow the evidence from the house in as Tom was off the premises and in jail by the time the police returned to ask Sara again.

Was Tom's admission to Officer Phillips after he was Mirandized in violation of his constitutional rights?

Miranda (see previous essay). The privilege of the 5th amendment right to counsel, once invoked following a Miranda warning, presumes that no future waiver of Miranda is voluntary (Edwards) as they have already elected at the pre-trial level that they needed the assistance of counsel. This right to counsel, once invoked under Miranda, must be scrupulously honored, giving the police no right to re-initiate interrogation. This right, under Shatzer, is not case-specific and extends up to the point the 14th day of a break in custody. Here, Tom affirmatively and unambiguously invoked his right to counsel while he was under arrest for the bank robbery. This right follows him up to the 14 day point. The day after he invoked, he was arraigned on this matter and appointed counsel, automatically triggering the 6th amendment right to counsel as well. Tom was released from jail and, 11 days after he invoked his right to counsel under Miranda, Officer Phillips arrested him for child porn. Though Officer P mirandized him again, his previous invocation still protects him. As such, even though Tom properly waived his rights with Officer P, the subsequent confession to Officer P was not voluntary under Edwards. This involuntary standard is not the same as the due process standard of core 5th amendment and does not automatically trigger exclusion of all subsequent testimony.

The prosecution will argue that Officer P was from a different police department and the case was unrelated. However, both defense counsel and the court will most likely agree that Tom's 5th amendment rights were violated and this is an irrebuttable presumption of the non-waiver of future right to counsel that extends up to 14 days/break in custody. This confession must be thrown out.

Was the positive ID made by the witnesses to the burglary against Tom's constitutional rights and does this effect future testimony?

The 6th amendment guarantees that a defendant will have counsel present at every critical stage of adverse judicial proceedings. This right attaches the moment such proceedings commence and need not be invoked such as the Miranda right to counsel. A police line-up, whether or not it was suggestive, is a critical stage of criminal proceedings. As such, defense counsel must be present. It is a per se exclusionary rule that if defense counsel is not present, the line-up cannot be used and the prosecution must declare an independent source of identification in order to allow any identification methods such as in-court ID to be introduced at trial. The independent source must show whether there were any discrepancies between ID before and as a result of the line up, whether the witness had a sufficient opportunity to view the suspect before the line-up, how much certainty they had in their ID, etc. Any suggestiveness by the police in the initial line-up without counsel present will make it that prosecution cannot bring in any ID procedure by the witness as the evils of misidentification have already been made and the witness is tainted. Here, even though the line-up was not suggestive, defense counsel was not present. Under the 6th amendment, this line-up cannot be used in court and prosecution will have the BOP of showing that an independent source of ID can be made for each witness in order to allow such testimony into court.

The defense could argue that if the witnesses were together when they ID'd Tom, it could have taken just one witness to point out Tom and the others took this witness's lead. The argument would lead to whether this was a police created suggestiveness. Though the line-up itself was not suggestive, if they had all 5 witnesses in the room, this could be incredibly suggestive. In the case that it was a police-created suggestiveness, no ID could be made at trial as the witnesses are tainted. If it was not a police-made suggestiveness, it would still not automatically exclude the in-court ID. The defense would have to show

how this line-up tainted the group of witnesses which would attack their credibility. The defense would argue that it was police-created. As a secondary, admitting the evidence as taint of the credibility works on behalf of the defense too.

217218

Brannon and LaBerge

END OF EXAM

① consent to search by Sara
MASK + gun
Ill. a Rodriguez

3/3

② consent to search by Sara Voluntary?
- totality of crime.
- threat to get the.

3/3

③ Terms Admission of Motejo. Fred
Re-interview of the mood of counsel
Edwards
Shutze.
NOT opinion specific
bring in law cell.

1/2

④ Line by EVID.
WADE / Gilbert
G.H. brand cut slice
Exclude lineup

1/2

⑤ Test of ID lists at TRIAL
Independent source
Exclusion - per se to prevent
PI breakdown

with effort to observe
discrepancy in the info
certainty
loss of form
Stressfulness of lineup

- 1/2
no mention
of Frakes
to suggest
reality source