

CRIMINAL LAW & PROCEDURE  
FINAL EXAMINATION  
SPRING 2020  
PROFESSOR S. WAGNER

QUESTION 1

Dan went to Department 5 of the Superior Court of Ventura County to attend the sentencing proceedings for defendant Jackson. Dan, normally a casual drinker, consumed four shots of whiskey in an effort to calm his nerves before entering the courtroom. Dan had grown quite intolerant and impatient because of what he considered poor communication by the assigned prosecutor. Jackson had been convicted of several counts of child molestation and one of the victims in the case now before the court was Dan's son, Eric.

The day before the scheduled sentencing, the assigned prosecutor told Dan that she expected the judge to impose the maximum sentence of 25 years. Prior to the imposition of Jackson's sentence, Jackson was allowed to address the court. Jackson looked directly at Dan and said, "Look Pop, your little boy asked for it. This whole thing is bullshit." This prompted courtroom deputies to stand sentry at Dan's side in order to prevent trouble or disruptions. The judge called a 15 minute recess and informed all parties that he would be back to impose Jackson's sentence. When court reconvened, the judge sentenced Jackson to 6 years, which was the lower term. Audible gasps could be heard throughout the courtroom. Dan reacted by leaping from his seat in the gallery and running towards Jackson. Dan forcefully threw two armed deputies to the ground and proceeded to strike Jackson several times in the head with a baton that he pulled away from one of the deputies. Jackson was unable to defend himself because he was in handcuffs.

Dan was physically restrained by deputies in the courtroom. While two deputies were escorting Dan out of the courtroom, one deputy said, "Man that judge is weak, that lowlife deserved to die right there in the courtroom." In response to this comment, Dan said, "why didn't you let me finish him off?" Despite valiant efforts by top surgeons, Jackson died from blunt force trauma to his head.

1. What substantive crimes would you expect to be charged against Dan and what defenses would Dan assert? Discuss.
2. Is Dan's statement to the deputy on the way out of the courtroom admissible? Your answer must include a legal description of the deputies actions relative to Dan on the way out of the courtroom. Discuss.

ISSUE OUTLINE/COMMENTS (DAN/COURTROOM/JACKSON)  
CONTROLLED DOCUMENT (SFW)

Interrogatory #1: Required points of discussion: Murder, Proper Degree of Murder, Voluntary Manslaughter, Battery (2 counts: the shove and taking the baton) and Larceny (D did dispossess the deputy of the baton) There is support and room to argue Dan committed 1st Degree Premeditated and Deliberate ITK. Did D have time for reflection, planning? Or, was this impulsive conduct more akin to Vol. Man? What was the triggering event that set D off? What did D do during the 15 minute recess? Was he mulling over his

moves in case the judge went soft on Jackson? What is the law re “words” as the cause or basis for “Legally Adequate Provocation (LAP)? What about D’s displeasure with the poor communication from the assigned prosecutor? Can that factor into the LAP quotient?

Note that a premium is placed on a learned discussion on “Premeditated and Deliberate” Intent to Kill and how true reflection and mulling over is measured (Action centers on the quality of reflection, not necessarily the quantity or time of reflection in many jurisdictions).

The 2d Degree Malice theories are Intent to commit SBI/GBI and Depraved Heart / Extreme Indifference for Human Life.

A very thorough Voluntary Manslaughter discussion is expected as there are many factors leading to a finding of legally adequate provocation (HOP). There is also evidence to support “cooling-off” and LAP / HOP subsiding

There is room to make the permissible interference that D may have been intoxicated (4 shots). Would this be a factor in aggravation or mitigation? Intoxication may serve to negate MR for crimes that require specific intent. Does it serve as mitigation in Implied Malice Murders? Or, is it really aggravation? Intoxication would be most potent as a defense to 1st Degree M.

Interrogatory #2: Is the “Miranda” R implicated? What type of police contact was this? Dan was escorted from the courtroom. Did this meet the definition of a detention, arrest? Was D directly interrogated? Here, the deputies likely engaged in the “functional equivalent of questioning” and the deputy’s quip about the judge was likely aimed at deliberately eliciting an incriminating response. What theory might prevent the use of D’s extrajudicial statement? It would likely be ruled as a Miranda violation if viewed as “functional equivalent of Q” and therefore it may only be used to impeach, should that occasion arise.

END

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Question #2

Brothers Dax, Abe and Buck own and operate a very successful marijuana cultivation operation called DAB Enterprises (“DAB”) in rural San Luis Obispo County. Their operation is completely lawful and in compliance with state and local ordinances. The brothers had been experiencing a spike in unwanted visitors; many of whom were scaling fences and stealing mature marijuana plants. Dax suspected that the culprits were a group of teens from a nearby trailer park and he vowed to catch them. With the assistance of both Abe and Buck, Dax installed high voltage electrical razor-wired doubled-fencing within the half-acre enclosure. The brothers were able to confirm the strength of the electrical voltage when they discovered a dead deer entangled in the fencing the morning after their installation. Two days after the installation, at dusk hour, the brothers discovered that Vance, age 17, was entangled on the inside portion of the fence. Dax ordered Abe and Buck to have no direct contact with Vance and Dax told Abe and Buck to “Let the little varmint think about his deeds overnight.” The next day, the brothers discovered that Vance was the apparent victim of what appeared to be a savage attack by a mountain lion. Unbeknownst to Dax and Abe, Buck called 911 and hysterically told the dispatcher that “Some trespasser got caught in our electrical fencing last night. I knew we should have helped him but Dax said to leave him there overnight. Please come help.” The call then dropped due to spotty reception. Medics and sheriff’s deputies arrived at the DAB property. Vance was pronounced dead at the scene and the official cause of death was documented as “Severe blood loss; animal attack.” Responding deputies arrested Dax and Buck and placed them in the rear seat of a patrol car. Abe ran away from the scene as soon as he learned that Buck had called 911. Abe has not been apprehended.

Assume that you have been tasked to assist the prosecution in the assessment of the above events and that you have been specifically asked to address the items/issues below.

1. What substantive criminal offenses/crimes have been committed by Dax, Abe and Buck either individually or under recognized group criminality theories? While discussing potential culpability for the death of Vance you must include an assessment of all potential causation-related concerns. How does Abe’s status as missing or absent factor-in? Discuss.
2. Assume that Buck’s 911 call was recorded and saved as potential evidence. How might Buck’s 911 call be utilized by the prosecution? Discuss.
3. Assume that while Dax and Buck were in the back of the patrol car that their incriminating conversations were being recorded by a hidden recording device. What legal issues arise regarding the potential use or admissibility of these conversations? Discuss.

## ISSUE OUTLINE / COMMENTS (CONTROLLED DOCUMENT)

This question prominently features the law of “causation” with special emphasis on “criminal proximate causation” relative to the death of Vance [Act/Omission ————>Harm]. The self-help measures undertaken by D, A and B fall way outside of lawful defense of property (high voltage electrical double-fencing with no “warning” signs). Discussions re culpability for the crime of Murder with efforts to mitigate malice are the correct pathway. The Criminal Procedure-based interrogatories could be addressed/dispatched rather succinctly (Rog #2: Admission by a Co-P / Member of a conspiracy or Accomplice —> inculpatory statement to dispatcher would likely be imputed to D and A; Rog #3: Very brief Miranda/5th Am. discussion/no Advisement given/Was there questioning?/Any coercive tactics employed by deputies triggering DP?/No REP in the back of a patrol car

### Interrogatory #1 (Substantive Crimes/Group Criminality/Murder/Manslaughter/Causation)

Facts give rise to evidence of group criminality. Conspiracy, Accomplice Liability is supported due to the acting in concert component. B’s “at large” status does not impact or unravel the conspiracy culpability (there is ample evidence that there was agreement by actions/conduct re building and installation of the fence. Was there a Homicide? Did Vance die at the hands of another? The focal point would be “nexus and causation.” Both Cause in Fact (aka, Actual Causation) and Criminal Proximate Causation are expected and required points of discussion worthy of banner treatment and a robust “foreseeability” discussion was expected (20-30 point value). Did D, A and B commit the crime of Murder? Express Malice is a stretch (no ITK here), but Implied Malice theories of Intent to commit GBI and Depraved Heart/Extreme Indifference for Human Life are in-play as viable theories. Next, efforts to mitigate malice would be undertaken to get to Invol. Man. (Can D, A and B effectively argue that the appropriate level of culpability is more akin to criminal negligence?)

Defenses: Defense of property is a loser (raise and dismiss). Attack (bad pun) causation by casting the animal attack as an unforeseeable independent intervening act that breaks the chain of causation?

[Act/Omission ————>Harm] Is the fault line broken on these facts? Is the animal attack a natural and foreseeable consequence? Is that entangled deer still hanging out there so as to attract a wild animal (maybe a hungry mountain lion?) Great “food for thought” here.

### Interrogatories 2 and 3

See intro comments, above. Rog #1 is busy and a heavy lift. It poll-tested at around 42 minutes (including outlining the question and then giving it a full/hearty “I-R-A-C”), so these last two Rogs could be handled with dispatch). Rog #2: Having already discussed group criminality, much of the work was already done. Buck’s statements to the dispatcher would be admissible as admissions by a co-conspirator or accomplice, as they related to the goal of the conspiracy or target objective - the statements would likely be imputed to D and A. Points were earned for Rog #3 by simply recognizing that there was PC for the arrests, that there is no obligation to issue Miranda Warnings unless the deputies desired to interrogate/question (they did not) D and B and that there was no REP in the back of the patrol car, so those admissions/inculpatory statements are coming in.

END

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Question #3

Police officers believed that Duke had assaulted Bart because Bart failed to pay Duke for cocaine Duke sold to Bart. The officers obtained a valid warrant for the arrest of Duke on an assault charge. They went to Duke's apartment and arrested Duke at the front door when he responded to their knock. The officers then walked through the apartment and, in a rear bedroom, saw drug paraphernalia which they left in place. A police officer advised Duke of his Miranda rights. Duke immediately stated: "I do not want to talk to you." Duke was booked and placed in a cell with Sam, an inmate who was known by the jailers to be an informant. Sam asked Duke why he had been arrested and engaged Duke in a conversation about drug sales during which Duke made statements incriminating himself concerning drug trafficking. Sam promptly related Duke's statements to jail personnel.

Police then obtained a warrant authorizing a search of Duke's apartment for cocaine and drug paraphernalia. The affidavit in support of the warrant recited that Duke had sold cocaine to Bart. The affidavit also recited that a police officer had seen drug paraphernalia in Duke's apartment. The affidavit did not disclose Duke's statements to Sam or the circumstances in which police observed the drug paraphernalia. Officers who executed the search warrant seized the drug paraphernalia and cocaine which they also found in the apartment.

Duke has been charged with possession of cocaine and drug paraphernalia under applicable state laws.

1. Duke has moved to exclude from evidence his statements to Sam. Duke claims his statements were involuntary, were elicited after he invoked his Miranda rights, and were obtained in the absence of counsel. He argues that admission of the evidence would violate his rights under the Fifth and Sixth Amendments to the United States Constitution. What arguments should the prosecutor make in opposition to the motion, and how should the court rule on the motion? Discuss.
2. Duke has also moved to exclude any testimony regarding the police officers' initial observations of drug paraphernalia in Duke's home and to exclude the items seized in the search made pursuant to the search warrant. What arguments based on the Fourth Amendment to the United States Constitution should Duke make in support of this motion, what arguments should the prosecutor make in opposition to the motion, and how should the court rule on the motion? Discuss.

## **FINAL EXAM QUESTION #3 (ISSUE OUTLINE/COMMENTS)**

### **Interrogatory 1(Duke's Stms to Sam)**

Fifth Amendment violation? Need custody (requirement met) and Interrogation by by LEA.

Here, there was no questioning conducted by a police officer. The safeguards developed by the "Miranda" decision are not furthered (see "Illinois vs. Perkins"). The coercive police-dominated atmosphere that "Miranda" was intended to combat is not present here. Duke spoke to Sam at his own peril. Duke's statement was not obtained in violation of "Miranda." Result: The statement would be deemed admissible and it would be used in the People's Case-In-Chief.

Sixth Amendment violation? The 6th Am safeguards are not implicated on these facts, as there has been no triggering event. Duke has not been arraigned (no critical stage). Duke cannot effectively assert a viable 6th Am. violation.

### **Interrogatory 2 (Seized Items, Initial Observations by LEA)**

Fourth Amendment threshold issues: State Actor, REP, No Warrant (Search Clause is implicated). Exceptions to Warrant requirement: Plain View (legitimate on these facts? POC), Protective Sweep (legitimate on these facts? POC) and Search Incident to LA.

### **Items Obtained per Search Warrant**

The PC recital is lacking in precision (it is conclusory in nature, yet likely not a misrepresentation by Police). The SW is likely not facially invalid, so Good Faith Exception may apply (using totality of circs).

1)

**QUESTION #1**

**CONSPIRACY** is an agreement between two or more persons to commit an unlawful act, or a lawful act by unlawful means. Requiring an Actus reus of 1) formation of an agreement 2) overt act, and a Mens Rea of 1) intent to enter into an agreement 2) intent to commit a specific target crime.

Here, there are no facts to support that an agreement was ever made.

Therefore, there is not enough evidence to show that Abe, Dax and Buck were co-conspirators.

**ACCOMPLICE** is a person who aids, in any way, in the commission or concealment of a crime (requires active participation).

Here, Dax received the assistance of both Abe and Buck to install a high voltage electrical razor-wired doubled-fencing. All three of the individuals knew that the fencing could result in death as a deer died in the fencing prior to Vince getting stuck in it. When the brothers noticed that Vance had gotten stuck in the fencing they listened to Dax when he ordered them to have no direct contact with Vance. By listening to Dax, Abe and Buck both omitted an act (of helping Vance) that they knew could result in a death. In that omission, Abe and Buck helped commit a crime.

Therefore, Abe and Buck could be considered accomplices to Dax. Accomplices can be found guilty for the crimes that the principle party (Dax) commits.

**SOLICITATION** when one entices, encourages, or requests another to do an unlawful act.

Here, Dax invites Buck and Abe to build a dangerous fence around their property. Once the fence traps Vance, Dax instructs Abe and Buck not to help Vance while he is in distress. These are both demonstrations of requests by Dax to the brothers of completing unlawful acts.

Therefore, Dax could be found guilty of solicitation.

**FALSE IMPRISONMENT** is the intentional physical or psychological confinement of another without privilege or consent.

Here, the brothers recognized that Vance was caught in the fence that they built and intentionally did nothing to help him get out through the night. They did not have consent or privilege to keep Vance stuck in the fence. All of the elements have been met.

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Therefore, the brothers could be found guilty of false imprisonment.

### DEFENSE FOR BUCK

WITHDRAW/ ABANDONMENT if the defendant terminates participation prior to the crime, and their actions had not contributed to the crime, or the defendant notified law enforcement in time to prevent the crime.

Here, Buck will argue that he attempted to abandon the crime as he made a 911 call to try and help Vance. This defense will not be successful, as Buck waited too long to act.

HOMICIDE is the killing of one human being by another human being (need an act or omission).

Here, Vance is killed due to the omission of another human.

CAUSATION need both actual and proximate cause.

ACTUAL but for the defendant's acts, the result would not have occurred. Thus, the defendant is the actual cause of the victim's death.

But for the brothers ignoring the fact that Vance was caught in the fence, Vance would not have died. Actual Causation has been met.

PROXIMATE It is foreseeable that the defendant's acts would have created the result. Thus, the defendant is the proximate cause of the victim's death.

It was foreseeable that the fence could result in death, as the deer demonstrated. The brothers proved to be a substantial factor in the death of Vance, as they did not help him get out of the fence (omission). Proximate causation has been met.

Actual and proximate causation have been met. The brothers were the cause of the death of Vance.

MURDER is the unlawful killing with malice aforethought. malice aforethought may be demonstrated by: intent to kill, intent to cause serious bodily harm, or a reckless and wanton disregard for human life.

FIRST DEGREE MURDER is a murder that is willful, deliberate and premeditated.

WILLFUL intentional

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**DELIBERATE** a conscious decision that an individual makes to perform a certain task.

**PREMEDITATED** speaks to planning and thoughts before hand.

Here, the brothers will argue that they simply wanted to teach Vance a lesson about breaking into their property, not kill him. This negates the element of intent.

Therefore all of the elements have not been met, the brothers should not be found guilty of first degree murder.

**SECOND DEGREE MURDER** is any murder that does not meet the requisite elements of a first degree murder. Depraved heart falls under this category, depraved heart murder can be demonstrated by a murder where the individual acts with malice aforethought, conduct that manifests extreme indifference to the value of human life.

Here, the brothers demonstrated an extreme indifference to the value of human life by not helping Vance out of the fence when they knew he was stuck and death was a possibility.

Therefore, the brothers could be found guilty of second degree depraved heart murder.

**MANSLAUGHTER** is an unlawful killing of a human being by another human being without malice aforethought.

**INVOLUNTARY MANSLAUGHTER** is an **UNINTENDED** unlawful killing without malice aforethought

Here the brothers demonstrated malice by the disregard for human life and wanton conduct as discussed above. The brothers should be charged with second degree depraved heart murder rather than involuntary manslaughter.

## **QUESTION #2**

STATEMENT VOLUNTARY? yes

WAS THE DEFENDANT IN CUSTODY WHEN THE STATEMENT WAS MADE? no

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Therefore, the statement that Buck made "Some trespasser got caught in our electrical fencing last night. I knew we should have helped him but Dax said to leave him there overnight. Please come help." during the 911 is admissible.

There is no reasonable expectation of privacy when a 911 phone call is being made. A reasonable person would expect that 911 calls get recorded.

The prosecution can use the statement made to demonstrate the mens rea of Buck, as he stated "I knew we should have helped him" Buck knew that the actions or omissions that they were committing were wrong.

### QUESTION #3

#### ADMISSIBILITY OF INCRIMINATING STATEMENTS IN BACK OF PATROL CAR

WAS THE DEFENDANT'S STATEMENT VOLUNTARY? yes

Here, the statements were made in the back of a police care, there are no facts to demonstrate that the individuals were being coerced in any manner.

WAS THE DEFENDANT IN CUSTODY (NOT FREE TO LEAVE) WHEN THE STATEMENT WAS MADE? yes

Here, the facts state that Dax and Buck were arrested and placed in the back of a police car, they were objectively not free to leave.

WAS THE STATEMENT MADE IN RESPONSE TO KNOWN POLICE INTERROGATION (ANY WORDS OR CONDUCT LIKELY TO ELICIT A RESPONSE?) no

DIRECT INTERROGATION face to face verbal communications that end in a question mark.

FUNCTIONAL EQUIVALENT OF QUESTIONING officers questions were no doubt aimed at getting an incriminating statement.

Here, there are no facts to state that ANY type of interrogation was taking place, as there are no facts to demonstrate that an officer was even present in the vehicle with them. One would presume that the officers were outside of the vehicle if the defendants are freely making incriminating statements.

Therefore, statements that were made in the back of the patrol car that were recorded, are admissible.

**END OF EXAM**

2)

**PEOPLE v. DAN**

**What crimes could the Dan be charged with?**

**Dan's culpability for the death of Jackson**

**Homicide**

Homicide is the killing of one human being by another human being. For the prosecution to prove beyond a reasonable doubt that Dan (D) is culpable for the death of Jackson, they must prove a nexus between Jackson's death and Dan's actions. Here, it appears Jackson died as result injuries to his head sustained from D's acts of striking him with a baton.

**Actual Causation- *Is Dan the cause in fact of Jackson's Death?***

The prosecution must prove that but for the defendant's acts, the result would not have occurred. Here, the prosecution will claim but for D striking Jackson in the head several times with a baton, Jackson would have not sustained blunt for trauma to his head, which resulted in his death. Therefore, Dan is the actual cause of Jackson's death.

**Proximate Causation: *Is it fair to hold Dan culpable for Jackson's death?***

If it is foreseeable that the defendants acts would have created the result, then the defendant is the proximate/legal cause of the act. Here, foreseeable is key and it is foreseeable that striking someone in the head with an object designed to harm (police baton) will cause harm. D hit Jackson in the head several times before he was pulled off by a deputy. It is foreseeable that striking someone in the head is more likely to result in death, especially when someone does not have the ability to use their hands to protect themselves from the blows.

The defense will argue that it was not foreseeable that Jackson (J) would die as a result of the blows because D only intended to harm (J) and did not intend to kill him. Even if D did not intend to kill J, that does not release him from being the proximate cause of J's death.

Therefore, the court will likely find that D is the proximate cause of J's death.

**Malice- *Did D have the requisite intent for murder at the time he struck J?***

Murder is the unlawful killing of another with malice aforethought. Malice is the requisite mental state for the crime of murder. For the defendant to be found guilty beyond a reasonable doubt, one of the four malice theories must be proven. The four malice theories are Intent to kill (express malice), Intent to cause GBI (implied malice), WWD for human life (implied malice), and Felony-Murder.

### **Intent to Kill**

Here, there J's death did not occur during the attempt, commission, flight, or enumerated felony, so FMR does not apply. The prosecution will attempt to show that D had the intent to kill J. It will have to be proven that D had the intent (mens reas) to kill J at the same time he was striking him (actus reas) concurrently. The use of the baton, a deadly weapon, will infer his intent to kill (deadly weapon rule).

D will argue he was intoxicated at the time. He is a casual drinker who consumed four shots of whiskey that day, likely resulting in the casual drinker being intoxicated. D will claim that his intoxication would have prevented him from forming the intent to kill J. Yes, he was angry with the prosecutor, frustrated with the judge and disgusted with the victim, but he was provoked by the defendant (more on voluntary manslaughter below) and he reacted. D may claim he hated J but did not want to kill him, he only wanted to make him hurt.

### **Intent to cause GBI**

When a defendant intends to cause GBI, malice is implied by their conduct or omission. Here, D struck J with the baton several times in the head before an officer pulled him off. Prosecution can argue that an intentional blow to the head demonstrated that D intended to cause GBI because that is where the most damage can be done. D will argue that he didn't intend to hit J in the head, he blindly swung at him, unaware that he was hitting him in the head. D can claim he was in the "heat of passion" and was not paying attention to where he was hitting him. Unless the prosecution can prove beyond a reasonable doubt that D intended to strike J in the head for the intent of causing GBI, this malice theory will be unproven.

### **Wanton, Willful Disregard (WWD)**

Under WWD, the prosecution is able to prove that the defendant recognized the harm and proceeded anyway, based on the totality of the circumstances. This will be harder for the prosecution to prove because it seems at no time the defendant recognized the harm. He even made a statement afterwards that he should have been able to finish the job. The prosecution will

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argue that D's acts were intentional, while D will argue he was provoked, seeking to mitigate involuntary manslaughter. This will likely not be a viable theory for both parties.

Thus, the prosecution may be able to prove malice in D's acts and may push for a first-degree murder charge.

### **First-Degree Murder**

Murder committed with specific intent to kill, of which is premeditated and deliberate. Premeditation does not rely on the quantity of time but quality of reflection. Premeditated and deliberate intent can be formed instantaneously.

Here, the prosecution will push for a first-degree murder charge if they can prove D specifically intended to kill. The prosecution can argue that D premeditated at the bar, building up the courage before entering the courtroom. When D heard J's unapologetic statement, this triggered D to get angrier. They can claim once he heard the sentence of 6 years instead of the 25 he was expecting, he reacted by taking a baton and deliberately attempted to kill J. The defendant's statement of "why didn't you let me finish him off" implies he had not plan of stopping until D was dead. However, unless the prosecution can prove that D intended to grab the baton for the purpose of killing J, they may not be successful.

### **Defense of D: Mitigation to Second-Degree Murder. *Can D argue successfully argue legally adequate provocation?***

Second Degree Murder is all murder committed with malice but without premeditation or deliberation. Here, D will attempt to mitigate the malice theory down to voluntary manslaughter in order to reduce his potential sentence.

### **Voluntary Manslaughter**

An intentional killing where malice is mitigated by legally adequate provocation or imperfect self-defense. Here, D will argue that he was provoked when D made the statement "you little boy asked for it". The point of contention will be if D had a valid cooling off period. After the statement was made, there was a 15 minute recess. Was that 15-minute break adequate time for D to cool off? The prosecution will argue yes, while D will claim no. Once court resumed, he realized this was it and he reacted by hitting J. Whether D truly had enough time to cool off will be up to the trier of fact.

### **Battery (Jackson)**

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The unlawful application of force of another without consent, resulting in bodily injury or offensive touching. Here, D committed battery when he applied force by striking J with a baton, resulting in blunt force trauma on J. The charge will be escalated to aggravated battery because D used a baton to strike J. Because this is a general intent crime, D cannot use the defense of justification.

**Two additional counts of Battery (2 Police officers)**

D will also be charged with battery of the two police officers. D forcefully threw the two armed to the ground (force), which resulted in him offensively touching them without their consent. If they saw D coming, he could be charged with assault on the officers as well.

**ASSAULT (Jackson)**

An attempt to commit a battery or the intentional creation of reasonable apprehension of imminent bodily harm. Here, D may be charged with aggravated assault (due to the use of the baton) because the weapon was used in a murder. D would also be unable to use intoxication in this case because aggravated assault is a GI crime.

**LARCENY (Theft of baton)**

The trespassory taking and carrying away of the personal property of another with the specific intent to deprive the other person of the property. Here, D took the baton from the officer, carried it over to where J. Unless the prosecution can prove that he intended to keep the baton (likely not), they cannot successfully charge D with larceny.

**#2 : Admissibility of Dan's Statements: *Is D's out of court statement admissible and able to be used by prosecution?***

When a statement is given by a suspect to law enforcement, there are three recognized methods to prevent introduction. The due process voluntary clause, Fifth Amendment Miranda warning, and the Sixth Amendment right to counsel. Since D had not been formally charged, the sixth amendment right to counsel would not be applicable. Here, the statement made by the defendant was "why didn't you let me finish him off", which would lead to a strong circumstantial case for the prosecution.

**Miranda Warning: Is this a setting in which officers were required to give a Miranda Warning?**

The Miranda Warning and valid waiver are prerequisites to the admissibility of any statement made by the accused during custodial interrogation. Here, in order for the Miranda to be required, both custody and interrogation would be required.

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### **Custody**

A person is considered to have been seized when in view of all circumstances surrounding the incident, a reasonable person in such situation would not have feel free to leave. Here, the defendant was physically restrained while in the courtroom. He was being escorted by the officers, indicating they were controlling his movements. In addition, the officers had just personally witnessed D commit an aggravated battery at the very least. Thus, it is likely D was in custody.

### **Interrogation- *Is the cops statement indicative of functional equivalent?***

Express questioning or the functional equivalent would qualify as interrogation. Here, the officer's statement could be shown as functional equivalent because it was likely to receive a response from D, which it did. Therefore, D was likely interrogated. Because there was both custody and interrogation, D's statement can be inadmissible.

### **DUE PROCESS- Statement's voluntary made?**

Any statement made involuntarily cannot be used against the defendant at trial. Here, D may claim his statements were involuntary due to the factors combined. He was intoxicated, mentally distressed, upset. If the officer knew those factors, which is likely as the officer witnessed the trial and could possibly smell the alcohol on his breath. Therefore, the statement can also be dismissed due to due process.

**END OF EXAM**



3)

## **DUKE'S STATEMENT TO SAM: ARGUMENTS FOR ADMISSION**

In order to use a confession or inculpatory statement in the case-in-chief against a defendant, the prosecution must prove by a preponderance of the evidence that it was not obtained in violation of any constitutional rights.

### **Fifth Amendment Violation**

The Fifth Amendment privilege against self-incrimination is modernly protected by the rule requiring government agents to administer a *Miranda* advisement prior to any custodial interrogation of a detainee or suspect. The reasoning behind the rule is that the inherently coercive effect of being questioned while under control of the police can encourage a detainee to surrender Fifth Amendment protections unwillingly, even in the absence of any police misconduct. The advisement must contain notification of rights to remain silent and to have assistance of counsel. Once issued, it may be ignored, invoked, or waived (often in writing). Invocation or waiver may subsequently be withdrawn.

### ***Miranda Advisement***

Officers advised Duke of his rights immediately following his arrest. We are given no facts to suggest that the administration of the *Miranda* advisement was invalid in any way.

### ***Invocation of Rights***

Following the advisement, Duke immediately invoked his right to remain silent. Once invoked, police must cease all questioning (after a break and a fresh advisement, they may question regarding a different crime), but a suspect may imply a subsequent waiver of the right by reinitiating the interrogation himself.

Duke did not invoke his Fifth Amendment right to counsel, which must be specifically invoked. It does not attach automatically unless the suspect asks for the assistance of an

attorney in questioning. In that case, he has a right to hire a private attorney or be appointed one if he is indigent.

### ***Custodial Setting***

The custodial setting will be found if (1) the suspect reasonably did not feel free to leave or terminate the interaction under the circumstance, and (2) the environment has sufficient markers of official custody to be inherently coercive, e.g. away from the public, deprived of food and water, forced to sit for a while, etc.

Duke was booked into the jail and placed in a cell. Any reasonable person in Duke's position would have known they were not free to leave. And the coercive atmosphere of a jail cell is widely acknowledged as the occupant is not free to decide he doesn't want to interact with any officials who approach him.

### ***Interrogation***

The interrogation must be purposeful, but does not need to be direct questions. Statements and acts designed to elicit an inculpatory response from the suspect may serve at the functional equivalent of questioning for the purposes of interrogation under the Fifth Amendment. The party conducting the interrogation must be a government agent for the protections to attach.

Sam asked Duke a direct question about why he had been arrested. Then he engaged him in a conversation about drug sales. Sam known to be an informant by the jailers. There is no evidence to suggest that they planned to have Sam question Duke, but it may be inferred from the fact that they placed him in Sam's cell that they hoped Duke might spill the beans to Sam, and that Sam would in turn tell law enforcement what he learned. If so, it may be found that Sam was acting at the behest of law enforcement agents.

However, it is not sufficient in a Fifth Amendment inquiring to find that the interrogator was acting at the behest of law enforcement. In order to qualify for the protections from inherent coercion that are provided by *Miranda*, the interrogator must actually be known to the suspect as a government agent. Otherwise, there is no coercive tendency. Duke had no idea that Sam was a regular informant. He thought, rather unwisely, that he was free to talk

in front of Sam and discuss his drug related exploits without the information getting back to the police.

### **Sixth Amendment Violation**

The Sixth Amendment protects a defendant's right to the assistance of counsel during adversarial proceedings, including the critical stage after charges are filed (arraignment) and before the actual trial commences. Once the right attaches, a defendant may not be questioned about the crimes charged unless counsel is present, or if the defendant knowingly and voluntarily waived his right to have counsel present.

Sam is seeking to enforce his Sixth Amendment right to counsel, however there is nothing in the facts to suggest that right had attached. Sam had been booked into jail but not necessarily arraigned at the time he spoke to Sam. (There is no Sixth Amendment Right to counsel at a preliminary hearing to determine probable cause to detain.)

Furthermore, Duke was arrested on assault charges. Even if he had been arraigned and his Sixth Amendment rights had attached for the assault, his conversation with Sam concerned drug trafficking offenses, not the assault. Sixth Amendment rights are offense specific. Offenses will be found to be different, even when based on the same nexus of facts, if they require additional elements to be proved. The elements of assault and drug possession vary significantly.

### **Application of Exclusionary Rule**

Duke is seeking to have his conversation with Sam suppressed under the Exclusionary Rule, a judge-made law intended to deter police misconduct related to constitutional violations by finding evidence resulting from such violations inadmissible in the prosecution's case-in-chief. However the prosecution may credibly argue that Sam was incapable of violating Duke's *Miranda* rights because he was not known to be a government actor and that Duke's Sixth Amendment Right to Counsel for the drug trafficking crimes had not yet attached because adversarial proceedings, at least for that charge, had not yet commenced at the time of the conversation.

**CONCLUSION:** The court should find the conversation between Duke and Sam admissible.

# MOTION TO SUPPRESS FRUITS OF EVIDENTIARY SEARCHES

## Fourth Amendment

The Fourth Amendment protects citizens from unreasonable search and seizure and requires that warrants be issued only on probable cause and by a neutral and detached magistrate.

Duke is seeking to have the evidence found in his house during two separate searches, one supported by a warrant, ruled inadmissible. In order to use the Fourth Amendment, Duke must first prove that a search took place.

## ***Government Actor***

Fourth Amendment protections only come into play when there is a government agent, or a private individual acting at the behest of such an agent.

Both searches of Duke's home were conducted by police officers. A government actor is present, so Duke may find himself cloaked in Fourth Amendment protections if he can establish a reasonable expectation of privacy.

## ***Expectation of Privacy***

Traditionally the expectation of privacy was mainly seated in the home, violated by physical police trespass. The *Katz* test expanded to include any actual expectation of privacy that society was willing to recognize as reasonable. Under *Jones*, the analysis used today is based on the Totality of the Circumstances.

Nowhere is the expectation of privacy stronger than in the home. Duke lives in an apartment, which he presumably rents, but that does not affect his protection since he is an occupant of the home. Almost any act within Duke's apartment by police will be considered a search, and will be found presumptively unreasonable without a warrant or a valid exception to the warrant requirement.

## Warrantless Search

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Modernly, courts are beginning to detach the strict warrant requirement and focus more on reasonability analysis, but most courts still have a strong warrant preference. There are a handful of recognized exceptions however when police may be permitted to search a home without a warrant and still have the search be found reasonable (and resulting evidence admitted).

### ***Incident to a Constitutional Arrest: Protective Sweep***

When executing a lawful (not constitutionally violative) arrest, police may search the person and area immediately surrounding the arrestee under the *Chimel* Doctrine. However police may also be permitted to conduct a protective sweep of an arrestee's home if there is reason to believe that armed and dangerous accomplices may be nearby.

Duke was arrested with a (facially) valid arrest warrant for assaulting Bart. Duke will point out that he was arrested at the front door, so the officers had no reason to go any further than the entryway, since that is as far as Duke's "wingspan" extended at the time of the arrest. After searching that area for weapons and destructible evidence, the police should have been through. However the police believed that the assault against Bart took place because of a drug sale. Drug-related violence often includes weapons, so a jury might find the police had ample reason to suspect that an armed accomplice might be elsewhere in the apartment.

### ***Plain View***

While lawfully positioned, an officer may observe and seize any contraband or evidence of a crime that he can detect using his senses (not just sight) but without any physical manipulation of the item.

If the officers were reasonable in conducting a protective sweep of Duke's apartment, then they were lawfully positioned in the rear bedroom where they saw the drug paraphernalia. Presuming it was out in the open and they didn't have to touch it to see what it was, the plain view exception applies. Duke may argue that they had no business going into a bedroom, but it is reasonable to believe that an accomplice might be hiding in a room.

### **Validity of the Warrant**

The second search of Duke's home was conducted pursuant to a warrant. A warrant must be based on an affidavit or oath reciting articulable and factual probable cause to believe that evidence of a crime will likely be found in the place searched, it must be particular in the location and scope, and it must be issued by a neutral and detached magistrate.

***Probable Cause: Behind the Face of the Affidavit***

The affiant officer based his probable cause recital on the belief that Duke sold cocaine to Bart and the observation of the drug paraphernalia. However no facts are given to support the officer's belief that Duke assaulted Bart because of a drug sale. While probable cause may be based on facts and observations compiled by a number of officers in cooperation, as well as logical inferences based on the officer's experience and expertise, it may not be based simply on conclusive statements without factual support. Why did the officer believe that Duke sold Bart drugs?

If Duke can prove that the officer's probable cause recital included a statement that was false, either intentionally or recklessly, and that the statement was material to the finding of probable cause, then the warrant is not valid. If the warrant is not valid, then none of the its fruits (the drug paraphernalia and cocaine that the officers seized in the second search) are admissible at trial.

**Application of Exclusionary Rule**

The Exclusionary Rule may be used to suppress evidence obtained in violation of Fourth, Fifth, or Sixth Amendments. It is a judge-made rule designed to deter future police misconduct. It applies only to the extent of its deterrent effect and only if such deterrence outweighs the societal cost.

***Good Faith Exception for Facially Valid Warrant***

When police rely on a facially valid but defective warrant, there is no deterrent effect since there is no misconduct to punish.

The magistrate issued a search warrant, despite the questionable probable cause recital. If the officers who executed the search warrant were not aware of the conclusory nature of the affiant officer's probable cause statement, then they may have reasonably believed that the

warrant was valid. If so, regardless of whether the warrant was actually valid, the second search of Duke's apartment may be found valid. However, if the same officer who failed to provide adequate probable cause executed the warrant, then he may have been acting in bad faith since he knew, or should have known, that the warrant was on shaky ground.

***Independent Source***

Even if the warrant is found procedurally invalid due to the poor probable cause statement, if there sufficient probable cause remains after removing the officer's unsupported belief about the drug sale, the evidence may still be admissible under the independent source exception. Presuming the search incident to arrest is a valid warrant exception in this case, the plain view observation of the drug paraphernalia remains valid probable cause. And the police may be able to introduce Duke's conversation with Sam to strengthen the probable cause statement. If so, the evidence found during the second search will likely remain admissible.

**CONCLUSION:** If the warrantless search was valid and the police can use Duke's statements to Sam, probable cause can be established to save the warrant and allow the court to rule the testimony regarding police observations and evidence seized during the second search admissible in the prosecution's case-in-chief against Duke.

**END OF EXAM**