MONTEREY COLLEGE OF LAW
FINAL EXAMINATION
SPRING 2016

CRIMINAL PROCEDURE

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Instructions:

1. Bluebook users – Please write your examination number (not your name) on the cover of each of your bluebooks. 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 sentences we cannot read.

2. Computer users – Please type your examination number (not your name) at the beginning and end of your essay. Return every page of this examination along with your answer.

3. Make sure you read the question carefully before answering. State clearly any assumptions you make. Organize your answer before you start writing.

4. This examination consists of three (3) questions of equal value. There is a three (3) hour total time limit to complete your answers. You should attempt to allocate approximately one (1) hour answering each question. You are being tested primarily on your ability to apply law to facts. The best answer is one that includes a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts.

5. There are multiple issues to address in each of the exam questions. Some issues are fairly straightforward and do not require detailed analysis. Other issues are more complicated; those issues merit more extended discussion.

6. This exam has five (4) pages, including this instruction page (page 1), exam questions (pages 2-4) and a last page indicating the end of the exam (page 4).

Criminal Law & Procedure Final Examination
Spring 2016
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Question 1

Officer Jones received a tip from an untested confidential informant that a notorious street gang was illegally selling heroin from a house located at 111 Elm Street in a neighborhood known for drug dealing.

Officer Jones surveilled the house on 3 occasions and observed numerous short visits to the house, most by young men wearing identifiable gang paraphernalia associated with the street gang. On each occasion, Officer Jones observed the same man answer the door.

During a fourth surveillance, Officer Jones observed the man who answered the door leave the house. Officer Jones contacted the man, identified himself as a police officer, showed his badge, and asked the man for his identification. The man immediately ran, throwing a small packet into the bushes. Officer Jones chased the man and arrested him. Officer Jones then located the packet which contained a white powdery substance, cash, and a gang "kite" which directed the killing of a rival gang member.

After transporting the man to jail, he was identified as Billy Smith and the booking officer located identification in Billy's possession that listed 111 Elm Street as his residence. Jones drafted a statement of probable cause and affidavit in support of a search warrant which particularly described the residence at 111 Elm Street. Under items to be seized Jones listed heroin. The statement of probable cause included all of the above facts. In addition, Officer Jones wrote: "The packet contained heroin, based on my training and experience." The warrant was reviewed by a deputy district attorney and approved by a judge.

The next day officers served the search warrant. They found no heroin, but in the single bedroom closet they found an illegal fully automatic firearm.

Jones never performed a presumptive test (designed for use by officers at the stationhouse) on the white powdery substance, which is a standard police procedure before a suspect is booked into jail for controlled substance possession. Subsequently, Jones had the white powdery substance tested by a lab. The substance was not heroin, but instead was "bunk."

The prosecutor charged Billy with possession of an illegal weapon and conspiracy to murder. Billy's lawyer filed a motion to suppress the kite and the illegal weapon found at Billy's house. The prosecutor responded that the evidence was admissible and that even if the search of Billy's residence was not supported by probable cause, Officer Jones acted in "good faith." For both items of evidence, what are the pertinent arguments on each side and how should the court rule?

Question 2

On the night of March 1, Amy drove after having too much to drink. On a rural road in south county, she struck a bicyclist and kept going.

Amy was about 20 minutes from home at the time of the collision but just before she reached her home, a CHP officer observed Amy weaving, pulled Amy over and after investigating, lawfully arrested Amy for driving under the influence. Amy was taken to jail, booked, and made bail. The next day she hired an attorney to represent her in the DUI case.

Two days later the cyclist died at a trauma center. Sheriff's Deputy Sue, assigned to investigate the vehicular homicide, decided to research all of the traffic stops in South County on the night of March 1st and discovered Amy's DUI report. Sue drove to Amy's address listed in the report and discovered Amy's car parked in the front driveway of the house between the street and Amy's garage. The car was parked in front of the attached garage which was situated to the immediate left of the house's front door. Sue walked a few feet up the drivew ay and inspected the right front of the car and discovered what appeared to be paint transfers from the bicycle. Using a knife, she scraped some of the transfers off the car, placed them in an envelope, and departed. Subsequently the sheriff's lab confirmed the paint transfers were from the decedent's bicycle.

Two weeks later Amy appeared with counsel in court and was arraigned on her DUI. After the arraignment was concluded, Amy's counsel departed. Deputy Sue, who in full uniform watched the proceedings, then approached Amy and told Amy that she would like to talk to her. Sue directed Amy to follow her into a room off the hallway used by attorneys to meet with clients and witnesses. Amy complied. Sue asked if Amy saw a bicyclist riding on the road the night of her DUI. Amy admitted seeing the bicyclist. When Sue asked if Amy struck the bicyclist, Amy told her she was done answering questions. Deputy Sue then arrested Amy for vehicular manslaughter.

Deputy Sue transported Amy to the sheriff's office and read Amy her Miranda rights. Amy said she understood her rights and wanted her attorney. Sue asked no further questions. Amy was taken to jail and the next day the prosecution charged Amy with vehicular manslaughter. Amy was arraigned on the vehicular manslaughter that afternoon and told the court she had hired an attorney, who was not present, to represent her. Amy posted bail the next day and was released from jail. A week later, Investigator Tom from the sheriff's office contacted Amy at her home. Investigator Tom read Amy her Miranda rights. Amy said she understood her rights. Investigator Tom asked whether Amy was afraid after she struck the bicyclist. Amy broke down, cried, and said "Yes."

In Amy's vehicular manslaughter case, what arguments should the defense and prosecution make concerning the admissibility of 1) the paint transfers and expert testimony they were from decedent's bicycle; 2) Amy's admission to Deputy Sue; and 3) Amy's admission to Investigator Tom? How should the court rule on each item of evidence?

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Question 3

Law enforcement in the county was placed on "Full Alert;" a child had been abducted.

At 10:00 a.m., foster parents reported to police that a six year old child suddenly went missing from their home minutes before. Police spoke to a neighbor of the foster parents who knew the biological parents of the six year old. The neighbor reported to police that shortly before 10:00a.m., she saw the biological parents, John and Sue, parked near the foster home in a dark blue Honda Civic with a license plate number she provided to police. John and Sue both had prior contacts with law enforcement, and police considered them unstable and an immediate risk to their child. A police check of DMV records revealed that the blue Honda Civic was registered to John.

At 11:00 a.m., Officers Brown and Reyes observed the blue Honda driving in the general vicinity and made a felony car stop; John was the only occupant of the car. The officers ordered John out of the car and arrested him. Officer Reyes searched John and located what felt like a cellphone in John's shirt pocket. Officer Reyes seized the phone and handed it to Officer Brown. Officer Brown opened the phone and was able to see texts to and from Sue which disclosed a conspiracy to abduct the child and made clear Sue currently had the child in her custody at an unknown location. The texts were made that morning ending just before John's arrest.

While Officer Brown informed police dispatch of these facts, Officer Reyes approached John who was handcuffed and seated in the caged rear of the patrol car. Officer Reyes asked John to tell him where the missing child was located. John responded by spitting at the officer. Officer Reyes then responded, "What do you think are your chances of ever seeing your child again if you don't cooperate?" After John failed to respond, in a loud voice Officer Reyes repeated the question several times. John finally responded stating that the child was with Sue at a location John provided. Police immediately responded and arrested Sue and recovered the child at the location John provided without incident.

The prosecutor charged John with felony child abduction. Although John's defense attorney correctly conceded that probable cause supported John's arrest, he filed a motion to suppress the following evidence: (1) The information law enforcement obtained from the cell phone; (2) John's statements to Officer Reyes; (3) Testimony from law enforcement concerning the child's location and recovery. For each item of evidence, what are the pertinent arguments the defense and prosecution should make and how should the court rule?

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1)

======== Start of Answer #1 (2165 words) ========

192804 - Let's start at the very beginning

Q1

Officer Jones (OJ) is a police officer and is therefore a Gov't agent

Issue 1: The "tip" by the confidential informant (CI)?

Under *Gates,* when an anonymous informant supplies a tip to the police, the police must corraborate the information provided. Under the *Aguillar-Spinelli* test, an informant's information, if the police are relying upon it for probable cause for the warrant, must be based on the informant's basis of knowledge and veracity/reliability. Here, the CI is untested, similar enough to an anymous tip that the information needed to be verified. Future actions predicted by the CI and corraborated by the police are strong indicators of veracity. Basis of knowledge may be shown when the information turns out to be correct.

Here, Officer Jones (OJ) went suveilled the house 3 times and saw numerous short visits - drug customers typically do not engage in prolonged social visits with their dealers, so this fact favors the veracity of CI. The CI stated that a "notorious" street gang was illegally selling heroin in a known drug dealing neighborhood - the address was provided. The officer, who would be a position to know the type of gang indicia used by a "notorious" street gang, was in a possition to recognize the the same gang that the CI had informed on - this indicates "future behavior."

The defense may argue that since this is a known drug dealing neighborhood, that surveillance may have shown numerous houses to engage in similar behavior - that therefore the informatino was not based on the CI's veracity. Furthermore, even if the Defense admits that Billy Smith (BS) is a gang member, they may point out that gang members often socialize and get together - the young men visiting may have been paying their respects rather than buying drugs. Also, the defense will point out that the white powder was NOT heroin, so the basis of knowledge by the CI was nonexistent.

The Aguilar-Spinelli test is not evenly weighed, but rather a common sense, totality of the Circumstances (TOC) may be considered.

Here, the CI stated that a gang was selling drugs from a house - the officer observed gang members coming and going from the house - and eventually a "kite" showing further evidence that the man who ansswered the door was likely in a gang (low level members).

This information alone would not be sufficeint for probable cause (PC) for a search warrant: PC is a common sense decision, based on a TOC, more than a "hunch" and less than a preponderence of the evidence, based on specific and articulable facts, to a fair probability, that evidence of crime will be found at the place to be searched.

2) Was the Encounter between OJ and BS Consensual (consensual encounter=CE)?

If a reasonable person feels free to leave or disengage from police questioning they are not detained. Search and seizure under the 4th Am. requir a warrant

unless an exception applies. Consensual encounter is such an exception.
Factors to consider in a TOC anaylysis:
In public? here, the officer and BS were in public - favors CE
How many officers? here, one officer - favors CE
Did the officer frame his communication as a request? - Here, OJ Identified himself and ASKED to see some Identification - the

defense may argue that by showing his badge, the officer made a show of force that a reasonable person would interpret as a demand to be still, not to leave or discontinue contact until given permission - however, the Prosecution will counter that the officer was likely NOT in uniform (as he was doing surveillance) and therefore used his badge to ID himself.
Emergency Lights or other show of force? OJ did not activate any lights, not place his hand on his gun (per our facts), or make any other show of force than to Identify himself and then ask to see some identification.
Subjective intent of the officer not at issue - objective test regarding how a reasonable officer would conduct themselves in a CE and what a reasonable person (presumes innocence) would feel in a TOC.

The initial encounter was consensual - the showing of the badge was not a sufficent show of force to make the CE a detention.

3) Exception to the warrant requirement - Hot Pursuit.

Full fledged, headlong flight from an officer in a known drug area if sufficeint reasonable suspicion (RS=specific and articulable facts to a fair possibility that criminal activity is afoot and tied to a particular person, less than PC, under TOC, more than a "hunch") for the officer to give chase - the chasee must be subjectively aware that he/she is being chased (otherwise, police could just spend all day chasing people who didn't know it and that would create

"unreasonable searches" in violation of the 4th Am.). the Chasee is not detained or in custody until he/she submits to the officer, or the detention or arrest is effected under *Hodari*.

The defense may argue that BS may have seen OJ skulking around, not knowing who he was, ad assumed that a rival wanted to "get him" and that this same man could have been using a fake badge as a ruse to kidnap or kill BS, thus his flight was for self preservation rather than to run from teh police. The prosecutino will counter that there was no reason to "dump" the package then.

The officer had the right to secure BS and detain him - however, the facts state that he was "arrested" - the charge is not clear, as littering would be an infraction. The defense will argue that there was no PC to arrest without the package; the prosecution will argue that there was sufficeint PC, based on the CI's tips of drug sales, OJ"s observation, and the "flight" that the package contained heroin.

Here, the officer was in a known drug area, initiated a CE, and BS immediately fled -

4) Is the Package Evidence of the Poisonous Tree?

As a person is not seized while in hot pursuit (still fleeing) - therefore the collection abandoned property is not a search under the 4th Am. OJ saw the package was thrown by BS, therefore there was evidence that it had been in BS's possession. If the initial encounter was unconstitutional, then under the exclusionary rule (evidence obtained in violation of the Constutition is not admissible in Court) the package (and thus the "kite") would not be admissable. An attenuation analysis (whether the taint of the violation dissipates or is removed from the evidence) does not apply here.

5) Search INcident to Lawful Arrest•

If the officer had PC of the illegal nature of the package at the time of arrest, it is not necessary to seize it before the arrest - may be immediately after - the defense will argue that OJ could not have PC there was anything illegal in the package.

PC for Warrant

The 4th Am requires a warrant to conduct a search unless an exception applies. Here, no exception applies to get OJ into the BS's home. A warrant must be signed by a nonbiased, nuetral magistrate, and must be supported by PC (see above) and particularity as to the area(s) to be searched, the items seized (in this case). The officer must swear an oath to back up the PC.

OJ provided the magistrate with ALL of the information above - the fact the CI was untested, the facts of the CE, the hot pursuit, and the collection of the package - the facts do not indicate that OJ left ANYTHING out. Therefore, for the warrant, the officers relied on the MAGISTRATE to identify there was sufficeint evidence for a search. Based on a TOC at the time the warrant was issued, (TOC described above), a court would likely find there was sufficeint evidence for a warrant.

Execution of Warrant:

According to the facts, the only item listed as an item to be seized was "heroin" - there are no facts to indicate that the officers illegaly served the warrant.

Was the weapon in plain view?

An exception to the warrant requirement is Plain View (PV) - if the officers had a right to be where they were during the search, any illegal item not listed in the warrant as an item to be seize, may be seized by officers if its illegality is a given

conclusion. As heroin could fit in a closet, the officers had a right to open the closet door, and had a right to be in the house per the warrant - to trained officers, an illegal fully automatic gun would be readily apparent to be illegal. As long as there was a valid warrant, the gun was in PV and the seizure was legal.

Heroin that isn't heroin - bad faith?

The good faith exception states that if an officer knowingly relies and and represents false information to the magistrate (lies) as the PC for the warrant, those "facts" must be removed from the PC supporting the warrant. If the false information is so inextricably entertwined with the "good information" that removing it creates PC that could not be reasonably relied upon, the warrant is defeated - if the remaining facts provide enough PC for a reasonable officer to rely upon, the warrant is not defeated (Divisibility) If the officer lies or is recklessly disregards the truth it is considered bad faith.

The defense will argue that as the "heroin" turned out NOT to be heroin, and as that was the only item to be seized in the home, and as there was a standard procedure that was known to OJ which he NEVER PERFORMED, and as the basis of the arrest and booking was for possession of a controlled substance, that the officer was so derilict in his duty as to be recklessly disregarding the truth - the defense will state that this was likely purposeful, and that the fact that the officer relied on his "training & experience" to determine the powder was "heroin," and it wasn't, the whole arrest is invalid as well.

Is the Warrant Divisible (see immediately above)•

The facts are:

1) untested CI gives info

2) officer confirms gang members & comings and goings from the house consistent with narcotic sales

3) BS always opens the door

4) Officer asking for ID and BS flees in headlong flight

5) BS abadons package

6) Officer believes package to contain heroin - Kite discovered

The information that would be in question is the CI's basis of knowledge and the - the defense will argue, as above, that the CI fails the *aguilar-spinelli test* as the TOC do not support his basis of knowledge as the powder was NOT heroin. The prosecution will argue that the CI could have believed the powder to be heroin, and point out that there were members of the gang CI said there were.

The other piece of informatino is the "non heroin" - the defense will argue that had OJ done his job according to standard procedure, he would have discovered the error and had to "unbook" or release BS. What would have been left then for PC other than a stream of visitors and a piece of paper with writing on it -

Inevitable discovery:

When the police would have inevitably discovered the evidence anyway (for example during an inventory search) - the prosecution may argue that the Kite and the gang activity would have been sufficeint to get into the house to investigate a conspiracy to commit murder, and therefore the gun would have been discovered anyway. The defense would counter that BS was not lawfully arrested when the package was discovered, and therefore would not be admissible and (illegal detention = illegal search).

Standing:

If the home belonged to BS, or it was his residence, he would have standing to challenge the search provided he had a reasonable expectation of privacy in the

bedroom (what if he had roommates and he didn't have access to the single bedroom). BS was seen at the residence on four occassions, he answered the door, and it was listed as his residence on his identification. BS has standing based on these circumstances.

Conclusion:

The court should rule that OJ's failure to follow standard procedure showed a reckless disregard to ascertain the truth, and that had the magistrate only had knowledge of BS's flight and a kite, there would not have been PC for a search of the house - this would result in the GUN being inadmissible.

The court should rule that there was PC for the arrest after the headlong flight, and therefore the kite is admissable (but the kite would not have been sufficeint to get into the house since there was nothing else to show if the kite was just a joke, bravado by gang members, or serious).

END 192804

======== End of Answer #1 ========

QUESTION 1 ANSWER OUTLINE[1]

Scoring ranges in magnitude from + to ++++

Credit will be denoted by the number of + symbols awarded. ½ = half of a +

No credit = Ø

Evidence item 1: The kite

+Issue 1—Did Officer Jones detain Billy? Admissibility of the kite depends on whether Officer Jones detained Billy.

+++Rules: Trigger for detention: A detention occurs when a reasonable person would not feel free to leave. *United States v. Mendenhall* (1980). But, a detention (or arrest) also requires either [*California v. Hodari* (1991)]:

1. A physical touching, even if unsuccessful, to effect the seizure OR
2. A show of authority + submission by the suspect.
3. If suspect runs before a detention is effected in one of these ways, it's not a detention. If D tosses evidence, it is admissible even if the officer lacks reasonable suspicion.

++++Analysis: It is likely that a reasonable person would not have felt free to leave when Officer Jones identified himself as an officer, showed his badge and asked for identification, since reasonable people follow directions from police, unless police act outside constitutional boundaries. However, even if the Mendenhall standard is met here, Hodari explains that standard is a necessary, but not sufficient, condition for a detention. The suspect must also submit to the show of authority, unless there is an actual physical touching. Billy did not submit to Officer Jones' efforts to detain him, and there was no physical touching. Therefore, there was no detention and no reasonable suspicion was necessary. Officer Jones seizure of the packet did not implicate the 4th A (see below).

+Issue 2—Was the packet lawfully seized?

Rules:

++Reasonable expectation of privacy: Katz test [*Katz v. United States* (1967)]: A search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable (REP) [to obtain information according to plurality after *Jones*]. No REP in info/objects exposed to public/third parties (therefore it is not a search; no REP = no search). Even if no [illegible]l choice in whether to disclose.

[1] This outline is not a model answer because it does not include model analysis (a complete and thorough analysis of all facts) and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions. Also, it is not possible due to time constraints to obtain all credit available. Better answers address major issues thoroughly where more points are available. Points may be deducted if an answer addresses minor issues without spotting central issues.

Examples:

- Trash left in a public area [*California v. Greenwood* (1988)].
- Abandoned property (e.g., "that suitcase isn't mine" or dope toss [*California v. Hodari D.* (1991)]).
- Objects knowingly exposed to public/third parties in curtilage [*California v. Ciraolo* (1986)].

+++Analysis: If Officer Jones was within the scope of a lawful activity at the time Billy discarded the packet, its seizure was justified because Billy had no REP in property he knowingly abandoned. If Billy did not abandon the packet as a result of an unlawful show of authority or other 4th A violation, it is not poisonous fruit and is admissible. There is no search and *Hodari* is directly on point. Under no circumstances would Billy's illegal arrest affect admissibility of the packet, since the officer's seizure of the packet was not fruit of the poisonous tree of Billy's arrest, even if illegal. The packet's seizure was not derived, or obtained by exploitation, of the subsequently illegal arrest.

Evidence item 2: The illegal automatic firearm

+Issue 1—Was there probable cause to arrest Billy? This issue is not relevant to the admissibility of the kite since the kite was not poisonous fruit of an illegal arrest. The legality of Billy's arrest is only tenuously related to probable cause in the warrant. Discussing this issue leaves less time to discuss issues central to the calls in the question.

Rules:

+An arrest requires probable cause. No warrant is required for an arrest on PC in a public place. Credit given once for definition of probable cause (see definition below).

+Flight: (1) Headlong, unprovoked flight when suspect noticed officer (2) in area of heavy narcotics trafficking, may constitute a **reasonable suspicion**. *Illinois v. Wardlow* (2000).

Exclusionary rule—credit given once (see below for definition).

+++Analysis: The primary corroboration that Billy was engaged in criminal activity came from the packet, which was not discovered until after his arrest. Therefore its contents could not constitute probable cause for his arrest. The informant's tip does not constitute probable cause because the informant was untested. Corroboration for narcotics sales was scant because the only evidence Officer Jones had was numerous short visits to the house observed on three occasions. Even if the visitors were gang members, probable cause requires evidence members of a gang are committing a crime. SCOTUS has never held that flight could constitute probable cause, only reasonable suspicion. Further, the facts here are different than in *Wardlow* because here Billy's flight was "provoked," in that Officer Jones objectively *tried* to effect a detention, unlike in *Wardlow*. However, the only evidence gained from Billy's arrest was confirmation, at the booking, that he lived at the address. If Billy's arrest was illegal, that confirmation from the booking search is poisonous fruit and must be excluded from the warrant. But Billy's presence at the residence answering the door numerous times (observed on three separate occasions) and his exiting of the house again before his arrest probably amounted to probable cause he

lived there anyway. If so, Billy's illegal arrest would not affect the validity of the warrant. Billy's arrest is irrelevant to whether the kite is admissible (see above).

+Issue 2—Did probable cause support the warrant? According to the facts, the search warrant authorized a search of the residence for heroin. Did the officer set forth sufficient facts for PC there was heroin in the house?

Rules:

++Booking Searches: Neither PC, RS or warrant required because a special needs/administrative search whose primary purpose is not apprehending criminals.

1. Includes booking searches of persons and their property. *Illinois v. Lafayette* (1983).
    a. The governmental interests supporting a booking search justify a greater scope than a search incident to arrest. Therefore a booking search may be more intrusive than a search incident to arrest, even to include strip searches "although that step would be rare."

++++Probable cause defined:

1. A fair probability or substantial chance that evidence of a crime or contraband will be found in a particular place; OR a reasonable ground for belief of guilt that is particularized as to a person and/or place.
2. Based on the totality of the circumstances by common sense evaluation. *Illinois v. Gates* (1983).
3. Less than a preponderance.
    a. Innocent explanations do not necessarily negate probable cause.
4. It is only when the plausible explanations substantially outweigh the probability of criminal activity that probable cause is lacking.
5. PC includes expertise of police officer.
6. Not just personal knowledge of arresting or searching officer, but collective knowledge of involved officers.
7. Objective standard based on facts known to arresting officers (including their collective knowledge):
    a. Officer's subjective reasoning does not control: Pretext stops permitted. *Whren v. United States* (1996).
8. Officers can make reasonable mistakes of fact. A search or seizure based on an officer's incorrect assessment of the facts does not violate the 4th A unless the officer's assessment is unreasonable. Probable cause does not mean guilty in fact.
9. Anonymous tips and confidential informants are not presumed reliable and must be corroborated.
10. Three factors used to assess reliability of information (especially hearsay from a CI) in a search warrant to determine whether probable cause exists under totality of the circumstances [*Illinois v. Gates* (1983)]:

a. Source's basis of knowledge: Does source have personal knowledge of facts recited? A wealth of detail may create an inference of personal knowledge.
b. Source's reliability: Who is the source? If cop or citizen, presumed reliable. Anonymous CIs are not presumed reliable. If source is a confidential informant (CI), does CI have a track record of reliability? Does CI's story subject CI to penal liability? If so, (especially if CI has a history of reliability) there is an inference of credibility. Otherwise, presumption is that untested CIs are not sufficiently credible to provide probable cause without corroboration.
c. Corroboration of information by other sources or investigation: This factor can remedy defects in the knowledge and reliability factors under the totality of the circumstances. Corroboration is required for anonymous tips and CIs. But corroboration of illegal activity is not absolutely required.

11. PC does not require corroboration if personal knowledge and reliability prongs satisfied. Even a weak prong combined with an especially strong prong may constitute PC. Even corroboration of innocent facts may cure defects under the other prongs if common sense would determine the information is true under the totality of the circumstances.
12. The statement of probable cause must contain facts that support any conclusions offered, not just conclusory statements.

++++Analysis: Jones established that Billy lived at the residence in part from evidence obtained during a booking search. In combination with the short visits by putative gang members, finding a resident in possession of heroin should sufficiently corroborate the tip of heroin sales by a gang from the residence. However, Billy did not in fact possess heroin. This was the key fact that corroborated the tip. Jones told the magistrate that the packet contained heroin, based on his training and experience. Officers can make reasonable mistakes of fact, but not unreasonable ones. Was Jones' mistake of fact unreasonable? Jones did not perform a presumptive test on the white powdery substance, which should have revealed it was bunk before Jones sought the warrant, although it is standard police procedure to do so. Given that a standard procedure was omitted, and given that Jones merely concluded the packet contained heroin, apparently only because the substance was white and powdery, there is a strong argument the warrant was not supported by PC. Jones offered only a conclusory statement the substance was heroin. Adding "based on my training and experience" is also conclusory without any facts or analysis supporting the conclusion. The prosecution would argue that under the totality of the circumstances, which included Jones' observations, the cash, and the gang evidence, and the fact that gangs are frequently involved in narcotics transactions, that Jones made a reasonable mistake of fact, and that there was probable cause the substance was heroin. Probable cause does not require the substance was in fact heroin and Jones merely offered what, in effect, was an opinion the substance was heroin based on his training and experience.

+Issue 3—Did Officer Jones nevertheless act in good faith so the exclusionary rule should not apply even if the warrant was not supported by PC?

Rules:

++Exclusionary rule/Fruit of the poisonous tree: Not a "but for" test but this is a causation test. Question is whether derivative evidence (fruits) **have been obtained by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint**. *Wong Sun v. United States* (1963).

++++Magnitude of police error necessary to trigger the exclusionary rule:

1. The exclusionary rule applies only when the substantial social costs of the rule (cost to the truth in evidence) are outweighed by the benefits of deterring 4th A violations.
    a. Where applicable, the exclusionary rule must pay its way by **substantially deterring official unlawfulness.**
2. Search Warrants: Where officers act in reasonable reliance on a search warrant, though unsupported by PC, issued by a neutral and detached magistrate, the exclusionary rule does not apply. *United States v. Leon* (1984).
    a. Requires objectively reasonable reliance by police.
        i. This standard is met when reasonable minds can disagree.
        ii. If unreasonable—no reasonable grounds—to conclude affidavit contains PC, exception does not apply.
            1. For example, no reasonable reliance by police where affidavit relies on conclusory assertions which don't include sufficient facts. Affiant's bare opinions are insufficient to trigger *Leon* exception.
    b. Reasoning:
        i. No deterrence effect upon officer if officer acts in objective "good faith" on judgment of a magistrate.
        ii. Magistrate, not officer, is in error.
            1. Because magistrate has no stake in outcome, no deterrence effect available on magistrate. Therefore exclusionary rule does not apply.
            2. Magistrate has no incentive to violate the law (not in competitive enterprise of ferreting out crime). Therefore exclusionary rule does not apply.
            3. But the exclusionary rule is presumed to have a deterrent effect on unreasonable judgments by police even if magistrate also in error.
    c. Limitations to Leon's exception (the evidence is inadmissible in these situations):
        i. False information: Officer knowingly or in reckless disregard of the truth provides false information in affidavit.
        ii. Material omission: Officer knowingly or in reckless disregard fails to include in affidavit information adverse to PC.

++++Analysis: The statement of probable cause omitted any reference to a standard presumptive test of the white powdery substance. Instead, the statement of PC related only that based on Jones' training and experience, the substance was heroin. Leon stated that an affiant's bare opinions are insufficient to trigger the good faith exception. Jones did not tell the magistrate how he concluded the substance was heroin, other than the packet contained a white powdery substance. (The facts state that the statement of PC included all of the above facts, which include that the packet contained a white powdery substance). The defense would further argue that Jones, in reckless disregard of the truth, provided false information—that the bunk was heroin. The defense would also argue that the magistrate may have presumed that Jones performed a presumptive test and that not performing this standard procedure was a reckless material omission. There is a strong argument that the good faith exception should not apply and that instead Officer Jones acted recklessly in not performing a presumptive test on the substance, which should have revealed that PC arguably did not support the warrant. The prosecution would argue that the magistrate relied on Jones' expertise, that Jones never claimed to have performed a presumptive test, that one is not required for PC, and that a DDA and a judge both thought the facts constituted PC. Even if Jones was negligent, he acted in good faith and the exclusionary rule should not apply.

+Issue 3—Could officers seize an illegal firearm even though it was not listed in the warrant under items to be seized?

++Rule: 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.
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: The closet was within the area to be searched, since drugs could be placed there. In searching the closet, officers found a fully automatic firearm. It appears this item was in plain view. It is not clear from the facts, however, whether the illegal nature of the firearm was immediately apparent. This element must exist before officers can seize or manipulate an item in plain view.

Ques. #1

THE Kite - good answer

/ (1) Detention ?
/ (2) reason. susp. ?
Factors
/ (3) Informant tip
Anon. ? corrob.
/ (4) Exclusionary Rule

THE ILLEGAL Weapon

/ (1) PC support arrest
definition
fair prob. totality

/ (2) objective std
Anon. tips not pres. reliable

/ (3) Factors:
- basis of knowl
- reliability
- Corrob.

/ (4) Good Faith

LABEL DISCUSSION #1
EV ITEM

82

2)

======== Start of Answer #2 (1175 words) ========

The fourth amendment ensures that people shall be secure in their persons, papers, effects and houses from unreasonable search and seizure and that warrants Shall be issued on probable cause and signed by a magistrate particulary describing the places to be searched and the items to be seized.

Government Agents: Yes

SEARCH

Whether or not a search occurred can be ascertained by using the Katz and Jones tests. Under Katz, a search occurs if a person has a REP that society would deem as being reasonable. Under Jones, there is a common law tresspassory invasion for the purpose of obtaining information.

Here, Sue approached Amy's residence for the specific purpose of examining her vehicle and taking paint scrapings. A person's house affords the highest level of REP, as a persons house is truly their castle. The fact pattern states that the car was parked in her front driveway between the street and Amy's garage. The question that arises is whether Amy had an REP regarding her car and its placement and whether Sue scraping constituted an illegal search. In defining REP in this case one must examine curtilage. Was the area in which the car was parked intimately attached to the residence and was it located within the curtilage. The defense will contend that Sue was not legally in a place she had a right to be and the car was within the boundary of the property and was situated very near to the front door. The defense will claim that Amy had an REP as her car was not parked on the street, but rather very close to the front door (initimate aea). As in Jardines, with the sniffing dog, Sue approaching within the curtilage to obtain scrapings violated Amys REP under Katz and was a common law tresspassory invasion for the purpose of obtaining information (Jones). The defense

will contend that Sue should have obtained a proper search warrant. The prosecution will claim that the vehicle was not within the curtiledge and that scrapng the paint would be tantamount to obtaining garbage from a trash can on the street. Prosecution will claim that AMy had no REP on her car where it was located and Sue had a legal right to be there.

EXCLUSIONARY RULE

Is a judicially created remedy meant to exclude evidence in order to curb police misconduct.

The defense will claim that since the scrapings were obtained during an illegal search, any derivitave evdience (paint transfer and expert testimony) should be exluded under the FOPT. FOPT is not a "but for" test bu rather should be viewed on a case by case basis with totality of the circumstances. Prosecution will claim that Sue did not require a warrant as the car was not within the curtliage and Sues actions were not tresspassory in nature.

The paint transfer will most likely be excluded as FOPT

6TH AMENDMENT

Gurantees right to counsel during criminal justice process.

MASSIAH

Once adversarial proceedings are initiated againts the accused by the government, 6th ammendment rights automatically attach. Adversarial proceedings include arraignment, grand jury, or pretty much any court proceedings. The 6th ammendment right to counsel is offense specific and the police are precluded from questioning the suspect on the offense for whcih they are charged unless a waiver if obtained.

Here, Amy had already been arraigned when Sue asked her to accompany her to a room to answer questions. The prosecution will maintain that the questions were not related to the DUI for which she had just been arraigned and therefore Sue was in her legal right to question Amy on a different offense of vehicular manslaughter, and therefore she was not in violation of Massiah. The defense will claim that the overlap between the two crimes was significant and inextricablly linked and that Sue was in effect, questioning Amy about her DUI, as the DUI is what caused the vehicular manslaughter. Sue did not give a Miranda admonition so there was no waiver of her 6th ammendment rights. AMy was not in custody at the time, so Miranda will not apply to this instance.

EXCLUSIONARY RULE

Is a judicially created remedy meant to exclude evidence in order to curb police misconduct.

The defense will claim that AMy's statement to Sue was a Massiah violation and therefore should be excluded a FOPT as it was obtained from that violation. However, even if excluded, the statement can still be used to impeach Amy were she to take the stand. The prosecution will argue that Sue was questioning Amy on a completely unrelated crime.

The court will most likely rule the statement to Sue as not being admissable.

5TH AMMENDMENT

Guarantees right against self incrimination and right to due process. (Due process violation not existant in this pattern)

MIRANDA

Miranda acts as a prophylactic against violations of the 5th ammendment. Miranda requires Custody and Interrogation in order to be triggered. Custody is defined as arrest or the functional equivalent of arrest and interrogation is questions designed to ellicit incriminating resposes. Miranda is not offense specific.

Here, Amy was arrested and transported to the sheriff's office. She clearly expressly and unambiguously invoked her right to counsel. However, Tom approached her only 7 days later at her home after she had been arraigned on the vehicular mansluaghter. When Tom asked her questions, this was a clear Edwards Violation of Miranda, as there had not been a 14 day break in custody. Amy's waiver was made knowingly and intelligently although she did not expressly waive, it is clear that she impliedly waived as she immediately started speaking after she said she understood her rights.

EXCLUSIONARY RULE

Is a judicially created remedy meant to exclude evidence in order to curb police misconduct.

Here, the defense will maintain that Amy's statement to Tom was an Edwards violation of her 5th amendment Miranda rights and should be excluded. However, it can still be used to impeach her credibility if she takes the stand.

Amy's statement will most likely be excluded

6TH AMENDMENT

Gurantees right to counsel during criminal justice process.

MASSIAH

Once adversarial proceedings are initiated againts the accused by the government, 6th ammendment rights automatically attach. Adversarial proceedings include arraignment, grand jury, or pretty much any court proceedings. The 6th ammendment right to counsel is offense specific and the police are precluded from questioning the suspect on the offense for whcih they are charged unless a waiver if obtained.

Amy had already been arraigned on vehicular manslaughter and therefore adversarial proceeds were intitiated. The defense will claim this was a Massiah violation and therefore should be excluded a FOPT as it was obtained from that violation. However, even if excluded, the statement can still be used to impeach Amy were she to take the stand. However, Tom read Amy her Miranda rights which could act as a waiver for her 6th ammendment rights. The defense will claim that a 6th ammendment waiver must be express and Amy's waiver was clearly not express in this instance.

Her statement to Tom will also be excluded.

======== End of Answer #2 ========

QUESTION 2 ANSWER OUTLINE[1]

Scoring ranges in magnitude from + to ++++

Credit will be denoted by the number of + symbols awarded. ½ = half of a +

No credit = Ø

Evidence item 1: The paint chips and expert testimony they matched decedent's bicycle

+Issue 1: Did Sue conduct a search of the curtilage of Amy's house without a warrant by **observing** the paint chips on Amy's car or was Sue in a place she had a right to be and conducted no search, but instead an observation in plain view?

Rules:

+A warrant and probable cause are required to search the curtilage of a house.

++++There are two tests to determine whether a search occurred, either of which is sufficient:

1) Katz test [*Katz v. United States* (1967)]: A search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable (REP) [to obtain information according to plurality after *Jones*].
2) 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"].

++There is a REP in curtilage of home which is restricted from public access. Curtilage defined using four factors to determine central question: **Is area in question intimately tied to the home itself?** [*United States v. Dunn* (1987]:

1. Distance between home and area claimed to be curtilage.
2. Whether questioned area within fence or enclosure surrounding home.
3. Whether uses within area correspond to intimate activities of home.
4. Steps taken by resident to protect area from public view.

+++There is no REP in objects knowingly exposed to public/third parties in curtilage [*California v. Ciraolo* (1986)]. However, if the government exceeds a homeowner's implicit license for visitors, a trespass occurs when the government is on the curtilage to obtain information. *Florida v. Jardines* (2013). In *Jardines*, the attempt to gather information occurred in the curtilage which is treated the same as the house. A trespass occurred because the homeowner's implicit license for visitors to approach and knock at the front door does not contemplate introducing a trained police dog to explore that area.

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

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[1] This outline is not a model answer because it does not include model analysis (a complete and thorough analysis of all facts) and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions. Also, it is not possible due to time constraints to obtain all credit available. Better answers address major issues thoroughly where more points are available. Points may be deducted if an answer addresses minor issues without spotting central issues.

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.
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).
    a. Must have lawful access.
        i. For example, police can't open drawer without lawful access & then claim "plain view" justifies seizure of contents.
        ii. For example, observation of contraband from lawful vantage point outside home is plain view observation, but entry into home to seize contraband still requires warrant or exception to warrant requirement. Officer not in a place s/he has a right to be for seizure. In contrast, observation of contraband while officer executing warrant in home provides PC, and because officer in a place s/he has a right to be while executing warrant, officer may seize contraband even if not listed in warrant. In latter example, officer in a place s/he has a right to be for both observation and seizure.

++++Analysis: **1) Curtilage**: The defense will argue that Amy's car was in the curtilage of the home and that the front driveway is an area intimately tied to the home. If the front porch is curtilage as in *Jardines,* then so is the front driveway. The prosecution will argue that the front driveway is not within the curtilage because it is not fenced, is open to public view from the street, and is not used for intimate activities that the homeowner wishes to conceal from public view from the public street. Amy did nothing to protect that area from public view. The defense will counter that the front driveway is restricted from public access. It is private property, not a sidewalk or street. The prosecution will argue that Amy exposed her car to public view so even if the car is in the curtilage, *Ciraolo* controls. **2) Sue's observations a search?** The defense will argue that a search occurred here as in Jardines because Sue exceeded any implied license for visitors on her front driveway. She trespassed under Jones to obtain information. Amy did not extend an implied license for visitors to observe (and then scrape) paint transfers off of her car parked in her front driveway. The prosecution will counter that Jardines did not hold that an officer could not make a plain view observation. Any visitor could do so. Plain view observations are different than introducing a trained police dog onto the curtilage, which visitors do not ordinarily do. There is an implied license for visitors to view cars on Amy's front driveway. There is an implied license for visitors to walk on the driveway on the way to the front door. Therefore, Sue was in a place she had a right to be when she saw the paint transfers in plain view. The seizure of them is a separate issue discussed below. Thus, according to the prosecution, Sue did not conduct a search by observing the paint chips. Sue did not conduct a search under Katz because Amy did not have an REP in the exterior of a car parked not in her garage but on a driveway exposed to public view. Sue did not conduct a search under Jones because she did not trespass in observing the paint chips. The defense would counter that Sue probably bent down or got down on hands and knees to inspect the right front of Amy's car. Even if Jones does not control the observation of the paint chips because, unlike placing a GPS device, observing the exterior of a car is not, without more, a trespass (but there was a trespass in the curtilage according to the defense), Amy had a REP against this sort of observation, because the car

was parked on her driveway facing the garage. The defense would argue that Sue's vantage point on these facts was not exposed to the public.

+Issue 2: Could Sue seize the paint chips without a warrant and with probable cause?

++Rules: Plain view (see above—credit given once).

Automobile Exception: Only PC required to search a car (no warrant required) unless search incident to arrest under *Gant* [see *Gant* rule below].

1) Bright line rule without any showing of exigency required: Applies even if police have time to obtain a warrant and even if there is no risk of destruction of evidence. *Chambers v. Maroney* (1970).

Probable cause is a fair probability or substantial chance that evidence of a crime or contraband will be found in a particular place; OR a reasonable ground for belief of guilt that is particularized as to a person and/or place.

1. Based on the totality of the circumstances by common sense evaluation. *Illinois v. Gates* (1983).
2. Less than a preponderance.
    a. Innocent explanations do not necessarily negate probable cause.
3. It is only when the plausible explanations substantially outweigh the probability of criminal activity that probable cause is lacking.

++++Analysis: The defense should argue that, even if the car was not in the curtilage, a trespass to obtain information occurred as in Jones. Seizing the paint chips was a trespass to obtain information, just as placing the GPS device was a search to obtain information. In both situations, 4th A protection was triggered. The prosecution would agree that a seizure occurred, but one permitted under the 4th A. This is because Jones merely held that a search occurred by placing a GPS transmitter to obtain information. The court did not reach the question of whether probable cause and the automobile exception to the 4th A rendered the activity in Jones lawful, because that question was not before the court. The only issue was whether a search occurred on the singular facts presented, and the parties did not argue, and the court did not reach, the next step: Whether that search was permitted by the automobile exception to the warrant requirement. The instant facts do not include long term GPS monitoring of Amy's car, which was the information the government sought in Jones. The prosecution would argue that because Sue was within the scope of a lawful activity and in a place she had a right to be, and had probable cause that the paint chips were evidence of a crime, the plain view doctrine allowed Sue to seize the paint chips. Thus, even if Sue conducted a search and seizure of Amy's car, no warrant was required under the automobile exception to the warrant requirement. The defense would counter that the facts do not disclose probable cause, but merely say that Sue discovered what appeared to be paint transfers from the bicycle. This may have been Sue's conclusion without sufficient supporting facts for probable cause. There are no supporting facts in the hypo. Further, the incriminating nature of the evidence must be immediately apparent. Here confirmation required analysis by the sheriff's lab. The prosecution would counter that the presumably matching color of the paint transfers alone amounted to a substantial chance, readily and immediately apparent to Sue, that the transfers were evidence of Amy's crime.

Evidence item 2: Amy's admission to Deputy Sue that she saw the bicyclist

+Issue 1—5th A: Was Amy in Miranda custody or did Sue only detain Amy or was the encounter consensual?

Rules:

++Custody + Interrogation triggers Miranda rules:

1. **Custody** defined: Formal arrest or functionally equivalent limitation on freedom of movement (to a reasonable person under 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. See *Detentions, Stop & Frisk and Arrest Outline*.
    c. Miranda custody is a term of art specifying circumstances presenting a serious danger of coercion; it is a necessary but not sufficient condition that a reasonable person would not feel free to terminate the interrogation and leave. *Howes v. Fields* (2012). Miranda custody also requires formal arrest or the functional equivalent.
    d. Totality of the circumstances test. *Howes v. Fields* (2012).
    e. Objective test: Undisclosed intent of police, including that D is the focus of the investigation, is irrelevant, and subjective views of suspect not determinative. *Stansbury v. California* (1994).
        i. But officer's state of mind relevant if manifested to suspect. *Beckwith v. United States* (1976)
        ii. Of course, objective circumstances of interrogation and custody relevant.
        iii. Rationale for objective test: The test is objective because it is designed to give clear guidance to the police.
    f. 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).
        i. 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.
        ii. 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.

++Detentions do not trigger Miranda:

1. Terry detentions, although the suspect is not free to leave, are not Miranda custody. *Berkemer v. McCarty* (1984).
2. Quantum of proof required: Reasonable suspicion that crime afoot. *Terry v. Ohio* (1968).
3. Requires reasonable suspicion of an ongoing crime rather an isolated episode of past criminal misconduct. *Navarette v. California* (2014).
4. Reasonable suspicion defined:
    a. Less than probable cause. How much less is difficult to define, but there still must be objective facts that support the seizure or exigency. Reasonable suspicion is more than a "hunch."
    b. A fair possibility—possible cause. A reasonable possibility crime is afoot.
        i. "A particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez* (1981).
        ii. See facts in *Terry v. Ohio* (1968), *United States v. Arvisu* (2002), *Alabama v. White* (1990), *Florida v. J.L.* (2000), and *Illinois v. Wardlow* (2000).

+Consensual encounter: Unlike a consent search, this is an objective standard.

1. No individualized suspicion necessary.
2. A **reasonable person under the circumstances would believe they were free to leave or terminate the conversation** [*Florida v. Royer* (1983)] and police who do the following do not create a detention (*Wilson v. Superior Court* (1983) 34 Cal.3d 777):
    a. Approaching an individual in a public place.
    b. Verbally identifying oneself as a police officer.
    c. Asking if the individual is willing to answer questions.
    d. Posing questions to that person if the person does not refuse to answer.
    e. Asking to see identification or other documents (airline ticket in *Mendenhall*) and then examining them.

++++Analysis: The defense will argue that from the beginning of her encounter with Sue, Amy was under arrest or the functional equivalent as Sue's subsequent overt arrest of Amy demonstrates. Sue was in full uniform and presumably armed. The prosecution would argue the encounter resembled that in Royer where the young African-American chose to accompany detectives to an office at the airport and the court deemed the encounter consensual. Sue said she would like to talk to Amy and Amy complied. A reasonable person would not think they were under arrest, and under the circumstances Amy herself knew she did not have to cooperate, which she subsequently demonstrated by refusing to answer questions. The facts here are no more custodial than in Mathiason, where a parolee complied with his parole officer's invitation for an interview at a police station. Sue only arrested Amy after obtaining additional evidence in the form of Amy's admission. But even if Sue intended all along to arrest Amy, an officer's subjective intent is not controlling. At most, Sue detained Amy which is not Miranda custody. Sue clearly had reasonable suspicion for a detention.

+Issue 2—6th A: Had Amy's Massiah right to counsel attached in her vehicular manslaughter case?

+++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: Attachment ("formal charges") + 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:
    a. Arraignment: *Brewer v. Williams* (1977).
    b. Indictment (by a grand jury): *Massiah v. United States* (1964).
    c. Initial appearance before a magistrate or judge marks the initiation of judicial proceedings which triggers the 6th A. *Rothgery v. Gillespie County* (2008).
3. 6th A is offense specific. It only attaches to the formal charges that trigger the right.
    a. Police may question a D about any crime other than one to which 6th A attaches, as long as the statements are not used in the defendant's trial for the crime to which the 6th A has attached.
    b. Attachment does not extend to closely related charges. *Texas v. Cobb* (2001).
        i. Although 6th A attached to burglary and counsel appointed, it did not attach to the murders that D committed after entering residence with the intent to commit a felony.
        ii. *Blockburger* (Double Jeopardy) test applies: Does each offense require proof of a fact the other does not? Here burglary has an element not contained in murder (entry into a dwelling) and capital murder has an element not included in burglary (murder [of more than one person during a single transaction]). Therefore, the uncharged offense of murder was a second offense distinct from the burglary and the 6th A did not attach to it.

+++Analysis: Amy's Massiah rights had not attached to Amy's vehicular manslaughter case, which on these facts is the case in which the prosecution seeks to introduce her admission to Sue. Amy was arraigned on her DUI. She had not yet been charged with vehicular manslaughter. Vehicular manslaughter includes elements of proof that DUI does not and is a separate offense under Cobb and Blockburger. The 6th A does not bar Amy's admission to Sue.

Evidence item 3: Amy's admission to Investigator Tom

+Issue 1—5th A: Does the Edwards prophylactic apply to exclude Amy's statement?

++++Rules:

1. **Re-interview after Invocation: Right to Counsel**
    a. 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).
        i. 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.
        ii. Bright-line rule without regard to whether subsequent confession is voluntary or subsequent confession taken after otherwise valid Miranda warning and waiver.
        iii. 14 day return to normal life provides break so that decision to answer questions is not the result of coercion.
    b. Once right to counsel invoked, *even if suspect has consulted with counsel*, police may not re-initiate contact and seek a Miranda waiver [until there is a break in custody of 14 days]. *Minnick v. Mississippi* (1990). Unless D initiates further communication, counsel must be present during interrogation.
        i. *Edwards* creates an irrebuttable presumption that a suspect wants an attorney present during questioning and that after invocation of the right to counsel subsequent police-initiated contacts are coercive.
    c. It is irrelevant whether questioning officers know about the previous invocation. Even if they do not, *Edwards* will bar D's statement even after subsequent Miranda warning and voluntary waiver.
    d. However, arguably it is likely that there must be a Miranda trigger for the subsequent interrogation. So if D released for one week and police question D **without placing D in Miranda custody**, the Edwards prophylactic may not apply. But *Shatzer* is not clear on this point.
    e. 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. Benefits of bright-line rule outweighs burdens on police [and apparently truth].

2. Request for counsel expresses suspect's "own view that he is not competent to deal with authorities without legal advice."

f. **Exclusionary Rule--Impeachment**: Statement taken in violation of Miranda admissible to impeach D who takes the stand at trial. *Harris v. New York* (1971).

++++Analysis: After Amy was arrested by Sue, Amy invoked her Miranda right to counsel. Tom reinitiated and sought a Miranda waiver a week later when Amy was not in custody. The defense would argue that the Edwards prophylactic applies, that Amy's waiver is therefore not valid, and that her admission to Tom is inadmissible under Edwards and a violation of the 5th A. The prosecution would argue that since Amy was not in custody during Tom's interview, there was no Miranda trigger for that interview, and therefore the Edwards prophylactic does not apply. Shatzer is not clear on the outcome.

+Issue 2--6th A: Had Amy's Massiah rights attached to her vehicular manslaughter case?

++Rule: Initial appearance before a magistrate or judge marks the initiation of judicial proceedings which triggers the 6th A. *Rothgery v. Gillespie County* (2008).

1. Attachment does not require presence, participation, or awareness of prosecutor.
2. Attachment does not require consultation or a formal relationship with counsel or that D actually be represented by counsel.

++Analysis: Amy's Massiah rights had attached to her vehicular manslaughter case because she was arraigned on that charge. It is irrelevant that her counsel did not appear.

+Issue 3--6th A: Did Tom deliberately elicit an incriminating statement from Amy under Massiah?

++Rules:

1. Deliberate elicitation:
    a. Defined: Objective standard—Where state intentionally creates a situation reasonably likely to induce incriminating statements and statements in fact elicited. *United States v. Henry* (1980).
        i. Deliberate elicitation is an objective standard. Subjective police intent to elicit or extract statements is not part of the test.
    b. Example: Christian burial speech. *Brewer v. Williams* (1977).
        i. Even though cop said: "I don't want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." Even if statements true as expression of subjective police intent, the Christian burial speech was deliberate elicitation.

+Analysis: By asking Amy if she was afraid after she struck the bicyclist, Tom clearly elicited an incriminating response from Amy and it was reasonably likely he would.

++Issue 4—6th A: Did Amy waive her Massiah rights under Montejo?

++Rule:

1. Waiver: Once 6th A right attaches, D may waive 6th A and submit to questioning. *Montejo v. Louisiana* (2009).
    a. 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.
    b. Waiver must be voluntary, knowing, and intelligent. *Montejo v. Louisiana* (2009).
2. Miranda warnings sufficiently advise a D of his 6th A *Massiah* rights. Police may question D after *Massiah* attaches with Miranda advisement and waiver. *Patterson v. Illinois* (1988).

+Analysis: Tom read Amy her Miranda rights and Amy said she understood them. Amy validly waiver her 6th A Massiah right to counsel under Montejo. The 6th A will not bar Amy's admission to Tom.

Extra Credit:

SEISED

80

3)

======== Start of Answer #3 (1484 words) ========

Question Three

Information from John's Cell

4th Amendment

State Action

In order to implicate the 4th am the search or seizure must have been made by a state agent. A state agent is someone who is paid or directed by the state. In this case Brown and Reyes were both paid and directed by the state because they were officers.

Search

John's Person:

In this case it is conceded that there was not an issue with John's arrest. When a person is lawfully arrested then an officer is permitted to search their person. Here, there was a valid arrest so there was not an issue with the fact that they found John's cell phone.

NOTE ONLY

John's Phone:

In Riley the court held that the Katz rule applied to cell phones. They held that a person has a privacy interest that society is prepared to recoginze as reasonable regarding cell phones, and that they cannot be searched without a warrant. (Although they can be seized until a warrant is issued to preserve the contents from destruction.) Therefore looking through John's phone was a search requiring a warrant or an exception.

Warrant and Exception

In this case there is not a warrant in the facts so the search is presumed to be illegitimate and it is on the burden of the state to show there was an exception.

Plain view:

The officers could argue that the texts were in plain view when they opened the phone. They could argue that just opening the phone was not in and of itself a search of the contents. They could argue that they opened it to be sure it was not an explosive device or a place where he was hiding drugs. They could argue that they lawfully opened it, and that the contents they saw were not searched for, but readily apparent on the screen. John could argue that they were just pushing their limits, and that they needed to get a warrant to open it at all. Here, the officers would have the better argument.

Destruction of Evidence:

The officers could argue destruction of evidence. They could argue that, although they seized the phone, someone could still remove its contents remotely. They could argue that Sue would become suspicous when John was gone for so long, and that she could remove the contents out of fear that he was caught. John could argue that this was rejected in Riley. Here, John would have the better argument.

Emergency:

The officers could argue that the child being abducted was an emergency which justified the search. They could argue that the child could be in danger since they did not know where he was and if he was safe. They could argue that, if the child was with Sue he was unsafe, since she was unstable. If he was alone he could be even worse off since he was only six. With this they could argue that they had some reason to

believe that the child was in potentially serious danger. John could argue that they did not have enough proof that the child was in danger to claim the emergency exception. Here, the officers would have the better argument.

Exclusionary Rule

The exclusionary rule provides that a defendant who has standing can move for the suppression of primary evidence that was gained in violation of their rights. If there is derivative evidence it is also excluded unless the taint of the illegal search was attenuated: inevitble discovery; independent source; or independant act of free will. In this case John will argue that the cell phone info was the primary evidence of an illegal search, and that it should be suppressed. The officers will argue that, since it was not a search, it should come in; and even if it was a search, they had several exceptions to the warrant requirement. Based on the above analysis the cell phone information will probably be admitted.

Statements to Reyes and the Derivitive Testimony from the Cops

Due Process

State Action

For a due process claim the interrogation must have been the result of state action. A state actor is one who is paid or directed by the state. Reyes was a state agent since he was a police officer.

Interrogation

For a due process violation the defednant's statement must be the result of an interrogation. An interrogation is express questioning or behaviour likely to elicit evidence. Here Reyes directly questioned John. Therefore there was an interrogation.

Coercion

Coercion is present when a persons will is overborne. Whether or not this occurs is based on a totality of the circumstances test, viewed subjectively through the eyes of the defendant.

Here, John would argue that Reyes' statement about him never seeing his child again if he didnt talk was coercive, and something that would be sufficient to overbare the will of most parents. John could also argue that he was scared of the cops and just wanted to get out of there and was tired of being asked repeatedly. In response the offcers could argue that John had been a danger to his child in the past, so much so that he was removed from their care, and that he was far from a softy just worried about seeing his child. They could also argue that John had a history dealing with cops, and that he was not scared of them. This would be supported by the fact he spit on them at the first. Therefore the court will likely find that the interrogation was not coercive.

Exclusionary Rule

The exclusionary rule provides that a defendant who has standing can move for the suppression of primary evidence that was gained in violation of their rights. If there is derivative evidence it is also excluded unless the taint of the illegal search was attenuated: inevitble discovery; independent source; or independant act of free will. In this case John will argue that his statement to Reyes was the primary evidence of an unconstitutinal interrogation. He will argue that the subsequent testimony from the cops was derivative evidence from that statement, and that as such, it should be suppressed as fruit of the poisonous tree. He will argue that there was no attenuation of the taint because the discovery was immidiate and there was no independant acts of free will that came between his statement and the discovery of the child.In response the officers will argue that, even if the statement is inadmissible, the derivative evidence will still be admissible because of inevetable discovery. They will argue that the very next thing that they would have done would be to search for Sue, and that they would have found him

with her in any event.

Therefore, the court will likely admit both the primary and derivative evidence.

Miranda

State Action

In order to implicate the 4th am the search or seizure must have been made by a state agent. A state agent is someone who is paid or directed by the state. In this case Brown and Reyes were both paid and directed by the state because they were officers.

Knowledge of State Action

The defendant must also be aware that the interrogator is a state agent. In this case John knew Reyes was a state agent because he was fully dressed and identified as a cop.

Custody

A defedant must be in custody for Miranda to apply. Custody is a formal arrest or an equivelent restraint of a persons freedom. Here, John was under arrest, in handcuffs, and in the back of a police car. Therefore, he was in custody.

Interrogation

For Miranda the defednant's statement must be the result of an interrogation. An interrogation is express questioning or behaviour likely to elicit evidence. Here Reyes directly questioned John. Therefore there was an interrogation.

Rights

When the aforementioned items are all present it is the officer's duty to advise the defendant of their rights. In this case, all the foregoing criteria were met but John was never advised of his rights.

Waiver or Invocation

Here there was no invocation since John did not know his rights to invoke. There was not a waiver because a valid waiver must be knowing and voluntary- knowing includes being advised.

Exception

One exception to Miranda is when there is an emergency situation. Here, the officers would try to argue that there was a very serious safety issue regarding the child that justified their foregoing the rights.

Exclusionary Rule

The exclusionary rule provides that a defendant who has standing can move for the suppression of primary evidence that was gained in violation of their rights. All derivative evidence is admissible.
In this case, even if John's statement is suppressed as the primary evidence of an unconstitutional interrogation, the court will still allow the testimony from the cops about the child as there is not a fruit of the poisonous rule for Miranda.

======== End of Answer #3 ========

END OF EXAM

QUESTION 3 ANSWER OUTLINE[1]

Scoring ranges in magnitude from + to ++++

Credit will be denoted by the number of + symbols awarded. ½ = half of a +

No credit = Ø

Evidence item 1: Evidence from the cellphone search

+Issue 1: Was the cellphone properly seized pursuant to a search incident to arrest?

++Rules: Search Incident to Arrest: No PC or warrant required to search person if PC to arrest.

1. Rationale: To protect officers making arrest and to protect against the destruction of evidence.
    a. Bright line rule rationale for arrestee's person and containers immediately associated with arrestee: Police have automatic right to search arrestee's person and 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).
2. Movable containers (such as luggage) require both a warrant and PC to search, absent an exception. *United States v. Chadwick* (1977). **However, containers can be seized with PC until a warrant obtained.**

++Analysis: The facts state that John's counsel correctly conceded there was probable cause to support John's arrest. Therefore, as an exception to the general warrant requirement, police could seize John's cell phone incident to John's arrest. The cell phone was immediately associated with John because it was on his person. The 4th A permitted Officer Reyes to conduct a full search of John incident to an arrest based on probable cause, rather than a more limited Terry pat down for weapons pursuant to a detention based on reasonable suspicion.

+Issue 2: Could Officer Brown search the cell phone incident to arrest without a search warrant?

+++Rules: Search of person incident to arrest includes search of objects and containers on arrestee's person if objects "immediately associated" with arrestee. *United States v. Robinson* (1973).

1. Wallet or purse OK.
    a. Currently, rule probably applies to most containers in possession of arrestee, like briefcases and book bags if searched contemporaneously with arrest.

[1] This outline is not a model answer because may not include model analysis (a complete and thorough analysis of all facts) and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions. Also, it is not possible due to time constraints to obtain all credit available. Better answers address major issues thoroughly where more points are available. Points may be deducted if an answer addresses minor issues without spotting central issues.

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2. Exception: NOT search of a cell phone. Bright line Robinson rule not extended to cell phones because privacy interest in mobile computers too great. Searches of other objects immediately associated with arrestee generally constitute only a narrow intrusion on privacy. The justifications for those SILAs—officer safety and destruction of evidence—are not sufficiently served by warrantless searches of cell phones. As for destruction of cell phone data, it is not clear that a warrantless search would make much of a difference. *Riley v. California* (2014).
    a. Cell phone may be seized incident to arrest.
    b. Standard exigent circumstances may apply to except warrant requirement.

+Analysis: The SILA exception to the warrant requirement does not extend to a search of a cell phone. (A warrant or exigency is required to search a cell phone seized incident to arrest).

+Issue 3: Was there an exigency excepting the warrant requirement to search the cell phone?

++Rule:

1. **Emergency Aid Exception/Imminent Risk to Public or Police Safety**: Excuses warrant requirement on (less than PC) showing that facts known to police constituted a reasonable suspicion of imminent danger to persons or police or that medical assistance needed. *Brigham City Utah v. Stewart* (2006); *Michigan v. Fisher* (2009).
    a. Objective std: Officers' subjective motivations irrelevant.
    b. Gravity of offense is not material where there is serious injury or threat of serious injury. *Michigan v. Fisher* (2009).
    c. Includes an imminent threat of violence. *Ryburn v. Huff* (2012).
    d. PC that underlying or associated crime committed NOT required.

+++Analysis: The facts state that John and Sue conspired to abduct their child, abducted the child, and that law enforcement knew both John and Sue who were unstable and presented an immediate risk to their child. Also according to the facts, probable cause supported John's arrest for child abduction. The officers therefore had at least a reasonable suspicion that Sue, who currently had possession of the child as a co-conspirator to the child's abduction, was an imminent danger to the child. The emergency aid exception therefore excepted the warrant requirement to search the cellphone.

Evidence item 2: John's statement to Officer Reyes providing the location of the child with his co-conspirator Sue

+Issue 1: Was John's statement taken in violation of Miranda?

Rules:

+++Custody + Interrogation triggers Miranda rules:

1. **Custody** defined: Formal arrest or functionally equivalent limitation on freedom of movement (to a reasonable person under the circumstances). *California v. Beheler* (1983); *Minnesota v. Murphy* (1984). Objective test.

confession and derivative evidence are excluded. However, inevitable discovery and independent source exceptions do apply to evidence derived from an involuntary confession. Impeachment: Involuntary confessions obtained in violation of 5th A Due Process are not admissible at trial for any purpose, including impeachment of defendant's testimony. *Mincey v. Arizona* (1978).

+++Fruit of the poisonous tree: The exclusionary rule applies to fruits of illegally obtained evidence (both primary and derivative evidence).

1. The copies made by prosecution of documents illegally obtained were poisonous fruit. *Silverthorne Lumber v. United States* (1920).
2. Fruit of the poisonous tree: Not a "but for" test but this is a causation test. Question is whether derivative evidence (fruits) **have been obtained by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.** *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. Confession not poisonous fruit.
    b. Government has the burden to prove sufficient attenuation of the causal chain to purge taint of illegality. *Brown v. Illinois* (1975).

+A defendant need not have a REP in derivative evidence to successfully exclude it. A defendant need have standing only concerning an unlawful search which leads to tangible evidence and testimony called primary evidence (evidence obtained directly as a result of the illegal conduct) not derivative evidence. The term "derivative evidence" is used only to describe evidence that is subject to fruit of the poisonous tree causation analysis when police acquire such evidence because of illegal police action earlier in the causal chain. If derivative evidence is fruit of the poisonous tree, it is inadmissible.

+++Analysis: After obtaining John's confession, Police immediately responded and recovered the child at the location John provided. There is no credible attenuation of the taint argument on these facts. There are no facts supportive of an independent source or inevitable discovery. The cellphone did not disclose the whereabouts of the child. If John's confession was involuntary, police testimony about the child's location and recovery was immediately and exclusively derived from John's confession, is poisonous fruit, and is therefore excluded, including for impeachment. SCOTUS has never held there is a public safety exception to a core 5th A violation.

Extra Credit: