

MONTEREY COLLEGE OF LAW
FINAL EXAMINATION 2020

CRIMINAL PROCEDURE

Professor Brannon

Instructions

1. This examination consists of three sections of equal value. There is a four (4) hour time limit to complete the exam.
2. First there are two essay questions. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing.
3. The essay questions test your ability to apply the law to the facts. Use IRAC. After stating the issue, provide a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts, and a conclusion.
4. There are multiple issues to address in the essay questions. Some issues are straightforward and do not require detailed analysis. Other issues may be more complicated; those issues merit more extended discussion.
5. The final section consists of multiple choice questions. Circle the letter corresponding to the correct answer. Please write your ID number (not your name) and your professor's name on page 1.
6. Bluebook Users/Essays -- Please write your ID number (not your name) on the cover of each of your bluebooks. Write your professor's name. Number your bluebooks. Return every page of this examination along with your bluebooks. Write on only one side of each bluebook page. Your answer must be double-spaced. Make sure your answer is legible. You will get no credit for words or sentences that we cannot read.
7. Computer Users/Essays -- Please type your ID number (not your name) at the beginning and end of your essay. Also type the name of your professor at the beginning. Return every page of this examination along with your answer.
8. This exam has twenty-three (23) pages including this instruction sheet.

CRIMINAL PROCEDURE SEASIDE QUESTION 1

Over the last month, dozens of cats in the neighborhood suddenly and mysteriously disappeared without a trace and their owners were in an uproar. Wendy saw Don, her reclusive next door neighbor who recently moved in but talked to no one, doing a lot of unusual digging in his backyard. Over the last month it looked like he had dug dozens of holes and filled them with dirt. Then one morning Vickie's pet black cat named Malice went missing, and when Vickie went looking through the neighborhood to find Malice (she had last seen Malice an hour ago), she thought she saw a black cat dart away from a crack in the drapes covering Don's front window, but she only got a glimpse out of the corner of her eye, and she couldn't be sure. Vickie immediately called the police and Officers Callahan and Berretta responded and obtained all of the above information. Officer Berretta hurriedly left to write a search warrant and Officer Callahan went to Don's front door and knocked. Don answered. Callahan asked whether Don knew anything about the missing cats in the neighborhood. Don replied that he knew his rights and refused to talk to police. Callahan asked if he could enter Don's home and look for a missing cat. Don replied, "I said I don't talk to police." Callahan said, "A life is at stake. I am searching your home." Don stepped aside and allowed Callahan to enter.

In the closet in the bedroom, Callahan found an illegal assault weapon. In a small drawer, Callahan located an envelope which he opened. Inside was a diagram labeled "Pet Cemetery" with plots laid out which later turned out to match the holes dug in Don's backyard. Callahan lifted a trap door in the floor, and discovered a black cat later identified as Malice in a cage under the house. Malice was drugged and asleep, but unharmed. Immediately after Callahan completed this search, Berretta arrived with a warrant signed by a magistrate authorizing the "search of Don's home and yard for Malice and evidence of any other cats, and for indicia of ownership and control of the premises." Police then discovered the bodies of dozens of cats buried in Don's backyard.

Don was charged with cat stealing and domestic animal abuse, both felonies in this jurisdiction, and illegal possession of an assault rifle.

Don's attorney moved to suppress any evidence concerning 1) Malice's location inside Don's home; 2) the assault rifle; 3) the Pet Cemetery diagram; 4) the bodies of cats in Don's backyard.

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

CRIMINAL PROCEDURE SEASIDE QUESTION 2

Officer Copsey lawfully arrested Dora for possession of a large quantity of cocaine. Copsey transported Dora to the police station, Mirandized her, and Dora lawfully waived her rights. Dora denied the cocaine was hers. Copsey expressed disbelief, and after the questioning continued for 15 minutes, Copsey told Dora to just admit the cocaine was hers. Dora replied, "I've had enough, just stop!" Copsey told her that was fine because he had more than enough proof beyond a reasonable doubt. Dora then broke down and admitted the cocaine was hers.

The next day Dora was arraigned on a charge of possession for sale of cocaine, Public Defender Butler was appointed, and the court released Dora on her own recognizance.

A week later Dora was arrested for possession of stolen property. Officer Copsey responded to the station to interview Dora. He Mirandized Dora and she invoked the right to counsel. Officer Copsey then placed Dora in a holding cell with a paid informant who wore a recording device. The two struck up a conversation and the informant asked what Dora was in for. Dora replied, "I burglarized a home and they caught me with the property. I'm also a cocaine dealer but I got busted last week and they took my stash."

The next day, Dora was arraigned on two counts, burglary and receiving stolen property, and the court again appointed Butler as counsel, who Dora consulted with about all of her cases. That day the court released Dora on her own recognizance. A week later Dora was arrested for shoplifting. Officer Phillips properly Mirandized Dora and she said she understood her rights. Officer Phillips told Dora she was caught on video stealing clothing. Dora said, "Sure, I've done lots worse."

At Dora's trial on all of the above charges, Don's attorney moved to suppress all of Dora's statements. What issue(s) should defense counsel raise? What law/rule(s) apply to each issue? For each issue, what argument(s) should the prosecution and defense counsel make applying the facts to the law (analysis)? How should the court rule on the motion to suppress concerning each statement?

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HIGH SCORE IN THE CLASS ON THIS QUESTION!

1)

Question 1

I.4th Amendment

The Fourth Amendment protects individuals' rights from unreasonable searches and seizures. These protections attach when the individual has a subjective expectation of privacy and the individual's subjective expectation of privacy is supported by societal acceptance and the expectation is objectively reasonable. In this case, Don has a subjective expectation of privacy against unlawful intrusions, searches, and seizures within his domesticity. Thus, Don has standing to object to the search. This expectation is objectively reasonable and the purpose of the Fourth Amendment is particularly to protect individuals' rights within their own home from state intrusion. Therefore, Don is entitled to the Fourth Amendment protections against unlawful searches and seizures.

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ISSUE

A. Warrant Requirement

Under the Warrant Clause of the Fourth Amendment, searches are presumed to be unreasonable without a warrant granted by an impartial magistrate based on the an officer's sworn affidavit that includes evidence and an oath against lying or misrepresenting facts to obtain the warrant. The warrant must include the particular items to be searched for and seized and be supported by probable cause. In this fact pattern, a valid search warrant was issued by an impartial magistrate after the search took place.

i. Valid Warrant

A valid warrant must be supported by probable cause, a sworn affidavit by a police officer without lies, misrepresentation, or deceit, and signed and issued by an impartial magistrate authorized to issue a search warrant to search a particular location for

particular items, enumerated in the warrant, that are supported by probable cause that are indicia of a crime.

i. Probable Cause

Probable cause is a strong suspicion that evidence will be found in a particular place or that the suspect committed a crime, based on the totality of the circumstances, based on evidence beyond a hunch, but less than a preponderance. Probable cause requires only a probability or substantial change of criminal activity, not an actual showing of such activity. Corroborated statements can amount to probable cause. In this fact pattern, Vickie's statements to officers that she "thought she saw a black cat dart away" from a crack in the drapes covering Don's window and her lack of sureness in seeing her cat inside of Don's home were not corroborated by the police. Furthermore, Vickie had not previously provided substantiated information to the officers in the past that would increase her reliability as a witness to support probable cause. Wendy, who had observed Don's "reclusive" behavior in the past and had observed him digging a dozen holes (which matched the number of cats that had gone missing in the neighborhood over the last month) could provide information to the police to support their evidence for probable cause for issuance of a warrant. The fact pattern does not indicate that Wendy made these statements to the police, however, the fact pattern also does not indicate that Officer Berretta lied or used deceit in his affidavit and the warrant was ultimately issued by a magistrate. For the purposes of analysis, it is presumed that the magistrate was impartial and authorized to issue the warrant, that there was no deceit in the affidavit, and that there was sufficient probable cause and that the warrant issued was valid. If the warrant issued was invalid then the prosecution's evidence: Malice's location inside Don's home, the assault rifle, the Pet Cemetery diagram, and the bodies of cats in Don's backyard would all be suppressed based on an invalid search and seizure.

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OSDANO
ALL
INFORMATION

B. Search

Before Officer Berretta obtained the valid search warrant, Officer Callahan asked Don if he would consent to a search of his home. Don replied "I said I don't talk to police." Despite Don's abrasiveness, Officer Callahan insisted "I am searching your home." At that time, Don stepped aside and allowed Callahan to enter. Officer Callahan then proceeded to search the premises where he found an illegal assault rifle in the closet in the bedroom, an envelope inside of a small drawer that had a diagram labeled "Pet Cemetery" with plots laid out that later were found to match the holes dug in Don's backyard, and the black cat, later identified as Malice, drugged and asleep under a trap door. Officer Callahan conducted a search of Don's home without a warrant and this evidence will only be admissible if Don consented to the search, there was an exigency, the taint of the illegal search was attenuated, or there was an exception to the exclusionary rule. Otherwise, the defense's motion to suppress all of the evidence will be granted.

a. Consent

The standard for a consent to search the property or person of an individual is supported by the totality of the circumstances determined by the court. In this case, Don indicated to Officer Callahan that he did not want to talk to the police. When Officer Callahan asked to search the home, Don again stated that he does not talk to the police. Although Don moved aside when Officer Callahan insisted, based on the totality of the circumstances, it may be reasonable to infer that Don did not consent to the search and that his will was overborne by Officer Callahan's show of authority. The prosecutor has the burden of proof to demonstrate that Don consented and that his consent is valid, which will be unlikely based on the totality of the circumstances.

C. Burden of Proof

The burden of proof in a criminal trial is on the prosecutor to prove beyond reasonable doubt that the defendant committed a crime that violated the law.

D. Exclusionary Rule

The Exclusionary Rule is a judicially created remedy that is not part of the Fourth Amendment but was crafted to deter officers and agents of the state from violating the constitutional rights of defendants by excluding evidence that was illegally obtained through an invalid search and seizure. The Exclusionary Rule does not automatically apply, but it does apply where the benefit of excluding the evidence and deterring an officer's willful or reckless behavior which violated the constitutional rights of the defendant outweighs the public interest in holding perpetrators of crimes responsible. In this case, Officer Callahan conducted a search without a valid search warrant and without an exigent circumstance which would permit a warrantless search. The evidence seized from Don's house will likely be excluded, despite the subsequent search executed after the valid search warrant was issued, unless the Prosecution can prove that the taint of the illegal search was attenuated by time, presence of intervening events, or that the misconduct was a minor infraction in good faith, then the evidence is likely not attenuated.

a. Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine applies to evidence that is obtained from an unlawful search. Under the exclusionary rule, all fruit of the poisonous tree evidence will be excluded from admission by the prosecution for a violation of the defendant's Fourth Amendment constitutional rights. The bodies of the cats found in the backyard pursuant to the warranted search would be considered fruit of the poisonous tree because they were found after the constitutional violation took place. In this fact pattern, the evidence seized from the home will be excluded as fruits of the unlawful, warrantless search unless the prosecution can prove attenuation of the taint.

b. Attenuation of the Taint

CASPERMAN DOES NOT EVEN AMOUNT TO "BUT FOR"

Attenuation of the taint attempts to discern when the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost. The burden of proof is on the prosecutor to prove that the taint of Officer Callahan's illegal search has been attenuated by intervening circumstances and temporal proximity. In this case, the search warrant was executed immediately after the initial illegal search in the same home. The closer in time that a lawful search is conducted to an unlawful search, the less likely that attenuation will be found. There were no intervening events between the time of the two searches. Officer Callahan may allege that he believed that an emergency aid exigency existed to rescue the cat and that he acted in good faith and that the violations resulting were minor. This argument will likely fail, because the breach resulted in a serious constitutional violation that allowed the officer to seize a plentiful evidence. Officer Callahan should have known that this exigency applies to persons, not to cats. Furthermore, Don did not change his mind and consent to the search. Based on these facts, the prosecution will unlikely be able to prove that the taint of the illegal search was attenuated and all evidence seized will be excluded unless the prosecution can find an exception to the exclusionary rule.

c. Independent Source

Under the independent source doctrine evidence may be admitted at trial when it was initially obtained illegally but later obtained lawfully and independently. Evidence that is discovered legally, pursuant to a valid warrant, can be admitted at trial even when the police initially entered the premises unlawfully. The prosecution's best case for admitting the evidence is that the independent source doctrine allows the evidence to be admitted, because the police would have found it soon thereafter when executing the valid warrant.

d. Emergency Exigency

One exception to the warrant requirement that authorizes warrantless searches is in the emergency aid exception exigency. An exigency is a circumstance that arises that allows an officer to conduct a warrantless search and seizure in the event of a hot pursuit, potential destruction of evidence, an emergency aid exception, or matters of public safety. An emergency aid exception exists when an objectively reasonable officer has reason to believe that there is a present need to assist occupants or others who are injured to treat for serious injury or protect them from imminent harm or danger. This standard does not depend on the subjective intent of the officer or the seriousness of the crime. Officer Callahan entered the home stating that "a life is at risk," which may have been suggesting that this exigency applied. Therefore, Officer Callahan's subjective intent to protect Malice from imminent harm is irrelevant to permitting a warrantless search under these circumstances under the emergency aid exception exigency. Although the seriousness of the injury is irrelevant to the application of the exigency, the exigency explicitly applies to persons in danger, not animals. A reasonable, objective officer would not likely find, based on Vickie's statements or any other evidence, that a person was located inside the home who was in imminent danger. A cat is unlikely to meet the standards to apply this exigency. Therefore, a prosecutor will not likely be successful in asserting a defense to Officer Callahan's warrantless search under this exigency and because no other exigencies exist (such as hot pursuit or public safety) and all evidence will likely be excluded.

E. Defense's Motion to Suppress Evidence

The defense's motion to suppress the evidence gained from the illegal search may be granted if the court finds that the warrantless search was unconstitutional and violated Don's rights against an illegal search and seizure. If the court determines that the search was conducted illegally without an exception to the exclusionary rule and without attenuation of the taint of the illegal search then all of the evidence will be inadmissible,

including Malice's location inside Don's home, the assault rifle, the Pet Cemetery Diagram, and the bodies of the cats in Don's backyard. The location of Malice under the house may be found to have expanded the warrant, but the court will likely defeat any challenge to admitting this evidence since Officer Callahan found Malice through a trap door and it was immediately contiguous with the house. Although the bodies were not found until after the search executed under the warrant, they would be considered fruit of the poisonous tree and would be excluded from evidence.

F. Prosecution's Admission of Evidence

The prosecution may argue that the evidence seized is admissible, although seized during an illegal search, based on the independent source exception to the exclusionary rule. Malice's location, the Pet Cemetery diagram, and the bodies of the cats were all found pursuant to the warrant which authorized "search of Don's home and yard for Malice and evidence of any other cats, and for indicia of ownership and control of the premises. Although the Pet Cemetery diagram was inside of a closed envelope, that envelope could have included a bill or lease which would have been indicia of ownership. Although the illegal assault rifle was not included in the search warrant, officers may seize any evidence of a crime beyond the mere fruits or instrumentalities of the offense without violating the Fourth Amendment. If the court finds that the Independent Source exception to the Fourth Amendment applies, although there has not been attenuation of the taint, then all of the evidence may be admitted.

G. Conclusion

The defense will have a strong argument to suppress the following evidence seized from Don's house: Malice's location inside Don's home, the assault rifle, and the Pet

Cemetery diagram based on Officer Callahan's illegal search of the premises which was conducted without Don's consent and absent an exigency. The defense will likely argue that the bodies of cats in Don's backyard, found after execution of the valid search warrant, are inadmissible as fruit of the poisonous tree as a result of the illegal search. The burden of proof will be on the prosecution to prove that the taint of the illegal search was excepted by the independent source doctrine, that the evidence would have been found and seized during the search under the warrant. If the prosecution is able to prove that the taint was attenuated, then all of the evidence may be admissible.

QUESTION 1 ANSWER OUTLINE¹

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

No credit = ∅

There are multiple legal issues governing the admissibility of more than one item of evidence in this question, so the best organization calls for first identifying issues that govern the entry into the house (which requires PC + a warrant or an exception). Next are issues concerning the scope of the search, which distinguish between the assault rifle, the diagram, and the discovery of Malice. Next is the effect of the search warrant, and then any other exception to the exclusionary rule.

++Issue 1: Did the police have probable cause to search Don's residence?

1. +++Rules: PC is a fair probability or substantial chance that evidence of a crime (or contraband) will be found in a particular place. PC is based on the **totality of the circumstances** by common sense evaluation. PC is less than a preponderance. If source is an identified citizen, the information is presumed reliable if based on personal knowledge and police need not corroborate.
2. +++Analysis/relevant facts: 1. Over the last month dozens of cats in the neighborhood suddenly and mysteriously disappeared. 2. Don recently moved in and was doing a lot of unusual digging in his backyard; over the last month he dug dozens of holes and filled them with dirt. 3. Vickie's black cat went missing that morning. 4. Vickie got a glimpse of a black cat darting away from a crack in the drapes of Don's front window, but she couldn't be sure.
3. +Conclusion: It is a close call whether there is PC that Don abducted Malice, but the time frames and dozens of holes (which correspond with the number of missing cats) support a substantial chance that Don is the perpetrator. On the other hand, Vickie could not identify what she thought was a black cat as Malice.

++Issue 2: Did Don consent to Callahan's search?

1. +++Rules: Consent Searches: No articulable suspicion or warrant required. Consent must be subjectively voluntary under totality of circumstances (but not knowing or intelligent). *Schneckloth v. Bustamonte* (1973). **Acquiescence insufficient: Suspect must affirmatively agree to search.** *United States v. Mendenhall* (1980).
2. ++Analysis/relevant facts: 1. Callahan asked if he could enter Don's home to look for a missing cat, and Don replied, "I said I don't talk to police." Callahan said he was entering anyway, and Don stepped aside.

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

3. +Conclusion: Although the prosecution might wish to argue that Don stepping aside constitutes consent, acquiescence is insufficient and it is clear that Don did not subjectively and affirmatively agree to the search.

++Issue 3: Was Callahan's entry into the home lawful under an exception to the warrant requirement, assuming Don did not consent?

1. Rules:

- a. +Even if Callahan had probable cause to search, a warrant or an exception is required to enter a home.
- b. +++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).
- Objective std: Officers' subjective motivations irrelevant.
 - But the exigency is not any need to investigate a crime or effect an arrest, it is to render aid or quell violence.
 - PC that underlying or associated crime committed NOT required.
 - Includes an imminent threat of violence. *Ryburn v. Huff* (2012).
- b. ++Reasonable suspicion defined:
- Less than probable cause. How much less is difficult to define, but requires objective facts that support the seizure (or exigency—see *Michigan v. Fisher*). Reasonable suspicion is more than a mere "hunch." Requires specific and articulable facts (*Terry v. Ohio* (1968)) under the **totality of the circumstances**. *United States v. Arvisu* (2002).
 - A fair possibility—possible cause. A reasonable possibility crime is afoot.
- c. +Scope of a search must be justified by PC (or by the exception to PC): Police can search locations where there is cause to believe the evidence may be, but they cannot look in places where there is no cause to believe an item of evidence may be.

2. ++++Analysis/conclusion: Based on the facts listed under the PC discussion above, there is a very good argument that reasonable suspicion, a lower standard than PC, supports the emergency aid exception, assuming it applies. There is probably a reasonable suspicion of imminent danger to Malice on these facts (see PC discussion above). If so, Callahan could search anywhere in the home where Malice might be found. Certainly if the facts involved a missing child in a neighborhood where other children had gone missing, reasonable suspicion would support entry into Don's home. But the emergency aid exception applies to persons; SCOTUS has never held it applies to protect the welfare of animals or pets.

+Issue 4: Assuming Callahan could enter Don's home to render emergency aid to Malice, was the assault weapon discovered in plain view?

1. Rules:

- a. +Plain View: Authorizes warrantless seizures if observation provides probable cause. *Coolidge v. New Hampshire* (1971). Neither PC nor a warrant is required for the observation if the doctrine applies. Observation of an item in plain view is not a search because ordinarily the 4th A does not protect or implicate observations.
 - b. +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).
 - c. +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).
2. ++Analysis/conclusion: It appears the illegal assault weapon was lawfully discovered in plain view. Because a closet in a bedroom could have contained Malice and because Callahan looked there before finding Malice, Callahan's discovery of the assault weapon was within the scope of the search for Malice. The assault weapon is admissible as long as it was in plain view, which means its illegal character was immediately recognizable in a place where Callahan could search for Malice.

+Issue 5: Was the scope of the search for Malice exceeded when Callahan opened the drawer and envelope and found the Pet Cemetery diagram?

1. +Analysis/conclusion: The item will be excluded (so far) because its discovery is not within the scope of the emergency aid exception, since Malice could not fit in an envelope.

++Issue 6: If the emergency aid exigency does not apply, does the independent source exception to the exclusionary rule (here the search warrant) render all of the evidence admissible? The envelope would also be admissible since the warrant authorized a search for indicia of ownership.

1. ++Rule: **Independent source exception to the exclusionary rule:** *When discovery also by legal means unrelated to original illegal conduct, evidence is not derivative and is therefore admissible. Murray v. United States* (1988). Applies to 4th, 5th (Due Process) and 6th A violations (but not Miranda). **But a subsequent search or seizure cannot be the result of (caused by) the previous illegal conduct.**

- a. +Reasoning: The exclusionary rule must not put police in a worse position than they would have been without the illegality.
 - i. Where evidence has an independent source, application of exclusionary rule would put police in a worse position because they could never again lawfully seize the evidence. The evidence would be permanently immunized from seizure.
 - ii. The evidence would have been admitted by the legal source, so the deterrence value is mitigated.
- b. +However, in *Murray* agents observed the target contraband upon illegal entry, then sought a warrant for that contraband knowing it existed on the premises. In this scenario, the government bears the "onerous burden of convincing a trial court that no

information gained from the illegal entry affected the officer's decision to seek a warrant." In other words, the government must demonstrate the evidence is not derivative of the primary illegality. This additional requirement sufficiently discourages illegal confirmatory searches (to see if a warrant is worth the trouble). **The government must prove the subsequent search is not the result of the previous illegal conduct and is supported by independent PC.**

- i. Mandates inquiry into subjective intent of officer.
- ii. Officer must have *plausible explanation for why the original search was conducted*—cannot be a “confirmatory search.” Illegal search cannot have been conducted in bad faith.
- iii. Facts obtained from illegal entry cannot be basis for issuing warrant nor **motivate police** to obtain warrant.
- iv. PC must exist based on other facts.

2. +++Analysis/conclusion: The facts state that Callahan and Berretta responded and obtained all of the facts that existed prior to entry (other than Don's assertion of his constitutional rights at the door, which cannot be part of PC). Officer Beretta then left to write a search warrant. Beretta arrived with a warrant authorizing the search of Don's home and yard for Malice and evidence of any other cats, and for indicia of ownership and control of the premises. The facts in the search warrant were therefore independent of Callahan's entry, assuming the entry was illegal. The warrant was not the result of, or caused by, Callahan's entry. There is no confirmatory search issue as in *Murray*, so that showing is not required. The warrant therefore was an independent source. And since all of the evidence discovered was within the scope of the search authorized by the warrant, all of the evidence is admissible. This includes the Pet Cemetery diagram, since the warrant authorized a search for indicia of ownership of the premises.

++Issue 7: If there was not probable cause in the search warrant, does the good faith exception to the exclusionary rule apply to admit the evidence?

1. ++Rule: Where officers act in reasonable reliance on a search warrant issued by a neutral and detached magistrate, though unsupported by PC, 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 about whether there was PC in the warrant, and the magistrate approves the warrant.
2. +Analysis/conclusion: As discussed above, whether there was PC is a close question, but the facts make clear that Beretta obtained all of the facts. Therefore, since reasonable minds could disagree, the police are entitled to rely on the judgment of the neutral and detached magistrate who issued the warrant. All of the evidence is therefore admissible.

EXTRA ADIT: DERIVATIVE EVIDENCE

HIGH SCORE IN
CLASS FOR QUESTION
#2! YOU KNOW THE
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BETTER WITH A COMPLETE
MORE
FULL STATEMENTS

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P+

Prof. Brannon

Test ID: 234473

Statement #1: Cocaine Ownership Admission

The issue with the first statement is whether Dora's admission following her request to terminate questioning would be admissible.

Dora was lawfully arrested before being Mirandized and lawfully waiving her rights. There is nothing in the facts that appears questionable on the part of the officer prior to the point when Dora said, "I've had enough, just stop!" The issue lies in whether the officer's statement following this was lawful. BE MORE SPECIFIC

The defense will argue that Dora had clearly and unambiguously requested that the questioning be terminated and that the officer's statement following this request was further custodial interrogation. Under the 5th Amendment, police cannot immediately continue interrogation once this right has been invoked. There was no break during which the police honored Dora's right to silence, nor did the officer remirandize Dora and ask for a waiver, both of which are requirements to reinitiate interrogation.

In response to the defense's argument, first the state will argue that the officer's statement did not constitute further interrogation. For an officer's statement or question to be considered interrogation, it must be something that is likely to illicit an incriminating response. Here, the officer stated that he was fine with terminating the questioning because he already had all of the evidence he needed to proceed. Objectively, this does not seem to be the type of statement that would illicit a confession, so the court should find that this wasn't part of an interrogation.

The second argument that the state would seek to make is that Dora's invocation of her right to silence was not unambiguous. She didn't say that she was invoking her right to remain silent, and there was even some ambiguity in what Dora wanted to stop. She could have been referring to the officer directly telling her to admit that the cocaine was hers just as easily as she could have been referring to the interrogation in general.

The court should rule against the defense's motion and admit the evidence.

Statement #2: "I'm also a cocaine dealer."

The issue with the second statement is whether Dora's statement about being a cocaine dealer to the informant would be admissible following her invoking her right to counsel.

The defense will argue that the paid informant was a government agent who continued to interrogate Dora following the point when she invoked her right to counsel. In addition to invoking her right to counsel under the 5th Amendment for this crime, Dora had been arraigned on the cocaine charge and had been assigned counsel, which causes the 6th Amendment right to counsel to be triggered. The 6th Amendment right to counsel is offense specific, but the cocaine dealing comment references the charge that her 6th Amendment right had already attached.

→ DEFENSE FOR 6TH A

The state will argue that this was not an interrogation. Police are allowed to use paid jailhouse informants in similar manners to this, and in these cases, the informant does not illicit information from the suspect. Statements obtained in this manner are generally admissible if they are voluntary and not the product of inducement by the government agent. If the informant was acting passively, this statement would be admissible.

The facts do not state who initiated the conversation, but the informant was the person who brought up the subject of the offense. Because of this, it is likely that the court will find that the informant's behavior went beyond a passive role.

The statement to the informant about the cocaine dealing should be suppressed.

Statement #3: "I burglarized a home..."

Because this statement arose under the same circumstances as the last, many of the same factors are involved. However, the 6th Amendment is offense specific, and had not yet attached to the stolen property offense, so the issue here is whether Dora's statement would be suppressed under her Miranda right to counsel.

The defense would argue that this constituted a continuation of interrogation following the invocation of the Miranda right to counsel. When a suspect invokes their right to counsel under the 5th Amendment, there must be a break in custody before the police can reinitiate questioning. One way that a sufficient break in custody can be established is if the suspect is placed in the general population of a jail or prison and there are two weeks before interrogation is reinitiated. Here, Dora was only in a holding cell, and there was not a significant gap in time.

The prosecution would argue that the informant's acts did not constitute an interrogation. However, as discussed in the previous section, the court would likely find that this is an interrogation. The informant was the person who brought up matters relating to the offense, and this question did induce Dora to make an incriminating statement.

This statement should be suppressed.

Statement #4: "I've done lots worse."

The issue here is whether Dora's previous invocation of counsel under Miranda for a previous offense barred Officer Philips from interrogating Dora about the shoplifting, thus rendering any statements made during that interrogation inadmissible.

There is nothing in the facts that indicate that Dora had a 6th Amendment right to counsel on this particular offense, so it is not an issue here. The main issue is whether Dora was in a position to waive her Miranda rights in light of the fact that she had invoked them on a previous offense. A waiver does not have to be express; it can be implied by cooperation following the suspect being Mirandized.

WHEN?
MIRANDA?
INTERVIEW?

RESET?

The defense will argue that there was not enough time to reset Miranda and allow the police to interrogate Dora about any crime. The facts indicate that there was only an approximate eight day gap between Dora's invocation and the questioning with Phillips. Had there been a two week gap, this statement would likely be admissible. In cases such as this it doesn't matter if the police knew about the previous invocation of Miranda, so this would not be a valid way to avoid having this evidence suppressed.

Due to the the 5th Amendment violation, this statement should be suppressed.

Conclusion

Only the first statement, the one referencing ownership of the cocaine, should be admitted. All others should be suppressed.

QUESTION 2 ANSWER OUTLINE¹

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

No credit = ∅

I. Dora admitted the cocaine was hers.

++**Issue 1:** Did Dora unambiguously invoke her Miranda right to silence when she said, "I've had enough, just stop!"? Did Copsey continue to interrogate her?

1. +Rule: Custody + Interrogation triggers Miranda
2. ++Rule: An invocation must be clear and unambiguous. *Berghuis v. Thompkins* (2010).
 - a. If any doubt, the questioning may continue.
 - b. Either an invocation of right to silence or counsel must be objectively unambiguous.
 - c. Objective standard: A reasonable police officer under the circumstances must understand the suspect wishes to stop talking. If a reasonable police officer would understand only that suspect might be invoking, it is not an invocation. *Davis v. United States* (1994).
3. +Rule: Interrogation defined: Express questioning or its functional equivalent by police reasonably likely to elicit an incriminating response. *Rhode Island v. Innis* (1980).
4. ++++Analysis/relevant facts/conclusion: Dora replied, "I've had enough, just stop!" Copsey told her that was fine because he had more than enough proof beyond a reasonable doubt. Dora then broke down and admitted the cocaine was hers. Did Dora's statement convey that she wished to stop the interrogation, or did she convey that Copsey should stop accusing her of possessing the cocaine? Was Copsey's subsequent statement interrogation?

II. "I burglarized a home and they caught me with the property."

+**Issue 1:** Was the statement taken in violation of Miranda? No.

1. ++Rule: Miranda interrogation requires questioning by police and suspect must be aware he is conversing with a government agent.
 - a. Interrogation is not a suspect's conversation with an undercover officer posing as an inmate. Suspect must be aware he is speaking to an officer. *Illinois v. Perkins* (1990).
 - i. The coercive atmosphere of police interrogation is missing.
2. ++Analysis/relevant facts/conclusion: Dora's confession to burglary is not a Miranda violation because it was not the result of police interrogation, even though she invoked her Miranda right

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

to counsel in the Copsey interview after her arrest for possession of stolen property. Miranda does not protect statements made to informants, regardless of a prior Miranda invocation.

+ **+Issue 2:** Was the statement taken in violation of Dora's 6th A right to counsel/Massiah? No, because the 6th A is offense specific.

- + 1. Rule: (see III.1.a below).
2. ++Analysis/relevant facts/conclusion: Dora was arraigned on a charge of possession for sale of cocaine, but this statement relates to burglary. Because Massiah is offense specific, the statement is therefore admissible in Dora's trial for burglary.

III. "I'm also a cocaine dealer but I got busted last week and they took my stash."

+ **+Issue:** Was the statement taken in violation of Dora's 6th A right to counsel/Massiah?

- + 1. Rules: Massiah trigger: 1. Attachment ("formal charges") AND 2. Deliberate elicitation of incriminating information by law enforcement.
- + a. ++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.
- + i. 6th A is offense specific. It only attaches to the formal charges that trigger the right.
- + ii. Police may question a D about any crime other than one to which 6th A attaches, and as long as the statements are not used in the defendant's trial for the crime to which the 6th A has attached.
- b. +Deliberate elicitation: Objective standard—Where state intentionally creates a situation reasonably likely to induce incriminating statements and statements in fact elicited. *United States v. Henry* (1980).
- ⊖ i. +Once the 6th A attaches, it may be violated without D's awareness that he is conversing with a government agent. *Illinois v. Perkins* (1990).
1. Rationale: This difference between the Miranda and 6th A/Massiah rule is because the 6th A protects the attorney-client relationship rather than Miranda's design to protect against police coercion.
2. Also, once 6th A attaches, police questioning requires a waiver, and D cannot waive when D does not know he is talking to a government agent.
- + ii. +Telling a government agent to "be alert" and not to "initiate conversation" or "question" the defendant WAS deliberate elicitation where informant in fact acted as more than a passive listener. *United States v. Henry* (1980).
- + 2. +++Analysis/relevant facts/conclusion: The statement is likely a Massiah violation if admitted in Dora's trial for possession of cocaine for sale, if there was deliberate elicitation by informant.
- + + 1/2 The informant asked Dora what she was "in for," and Dora confessed to committing those crimes.

IV. "Sure, I've done lots worse."

+ **++Issue 1: Miranda:** Did Phillips' questioning violate the Edwards prophylactic since Dora invoked her right to counsel during Copsy interview after stolen property arrest?

- 1/2
1. Rule: Re-interview after Invocation: Right to Counsel: Police may not re-initiate contact and seek a Miranda waiver after invocation of right to counsel until there is a break in custody of 14 days. *Edwards v. Arizona* (1981); *Maryland v. Shatzer* (2010).
 - a. +Reasoning: Miranda said interrogation must cease until an attorney is present. If D invokes right to counsel, he needs legal assistance before the law will allow police to ask if he has changed his mind.
 - b. +Bright-line rule without regard to whether subsequent confession is voluntary or subsequent confession taken after Miranda warning and voluntary waiver.
 - c. +14 day return to normal life provides break so that decision to answer questions is not the result of coercion.
 - d. +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.
 - e. +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.
 - f. +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.
 - g. +Miranda is not offense specific, so Edwards bars any subsequent questioning about any crime.
 2. +++Analysis/relevant facts/conclusion: Because Dora invoked her right to counsel in the Copsy interview after her arrest for possession of stolen property, and because only about a week had passed before her subsequent arrest for shoplifting, her Miranda waiver during the Phillips interview is ineffective because the Edwards prophylactic applies. Her confession to shoplifting is inadmissible in a trial for shoplifting.

+ **+Issue 2:** Did Dora impliedly waive Miranda? (The issue is not pertinent, since the statement will be suppressed due to violation of the Edwards prophylactic, but some credit is available if discussed).

- 1/2
1. ++Rule: Waiver test is whether D subjectively waived based on the totality of circumstances. It is a subjective, rather than objective, test. However, "[w]here the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis v. Thompkins* (2010).
 - a. Waiver need not be express ("Yes, I will talk to you.").

b. Implied waiver valid where suspect talks after acknowledging understanding rights.
North Carolina v. Butler (1979).

- 1/2
2. +Analysis/relevant facts/conclusion: Although Phillips did not obtain an express waiver of Miranda (Dora did not expressly agree to talk), she impliedly waived Miranda when she spoke and said, "Sure, I've done lots worse."