MONTEREY COLLEGE OF LAW -HYBRID

FINAL EXAMINATION

SPRING 2023

CRIMINAL PROCEDURE -SECTION 1

Professors C. Knight & N. Knight

Instructions

1. This examination consists of three (3) essays of equal value.

2. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing. The essay questions test your ability to apply the law to the facts. 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. There are multiple issues to address in the essay questions. Some issues may be fairly straightforward and do not require detailed analysis. Other issues may be more complicated; those issues merit more extended discussion.

3. There is a three (3) hour time limit to complete the exam.

Hybrid
Criminal Law & Procedure – Sec. 1
Spring 2023
Profs. C. Knight & N. Knight

Exam Question 1

Officer Hart 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 Hart 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.

During a fourth surveillance, Officer Hart observed a young man leaving the house he had seen on one prior occasion. Seeking to confirm his suspicion of heroin sales, Officer Hart contacted the man on the sidewalk near the house. Hart identified himself as a police officer, showed his badge, and asked the young man for his identification. The young man kept walking, saying he knew his rights. Officer Hart grabbed the man by his arm and demanded that he stop. The man, Bobby Jones, broke away and ran a short distance, throwing a small packet into the bushes as he ran. Officer Hart drew his firearm and ordered Bobby Jones to stop. Jones complied and Officer Hart handcuffed him. Hart located the packet which contained a white powdery substance, cash, and a gang "kite" [letter with instructions from gang leader] which directed the killing of a rival gang member. Hart asked Jones if the packet was his. Jones admitted the packet was his. Hart arrested Jones. The packet was tested at a lab and turned out to be heroin.

The prosecutor charged Jones with conspiracy to murder. Jones's lawyer filed a motion to suppress the arrest saying it was without a warrant. The lawyer filed a motion to suppress the kite and the heroin. The prosecutor responded that all of the evidence was admissible and the arrest was legal. For the kite and the heroin, what are the pertinent arguments on each side and how should the court rule? For the arrest, what are the pertinent arguments on each side and how should the court rule?

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Question 2

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 minutes before from their home. 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 10:00 a.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, Officer Reyes repeated the question several times. John finally disclosed the location of the child who was with Sue and the police recovered the child from Sue.

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; and (2) John's statements to Officer Reyes. What are the pertinent arguments the defense and prosecution should make and how should the court rule?

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Final Exam Question 3

On the night of March 1, Amy drove after having too much to drink. On a rural road, 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 the 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 driveway 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. During the conversation, 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.

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; and 2) Amy's admission to Deputy Sue. How should the court rule on the defense and prosecution arguments?

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CRIMINAL LAW & PROCEDURE – SPRING 2023- PROFS. N&C KNIGHT

FINAL EXAM QUESTION 1 ANSWER OUTLINE

Evidence item 1: The kite

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

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 Hart 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. Bobby did not submit to Officer Hart's efforts to detain him, and there was no physical touching. Therefore, there was no detention and no reasonable suspicion was necessary. Officer Hart 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 real choice in whether to disclose.

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 Hart was within the scope of a lawful activity at the time Bobby discarded the packet, its seizure was justified because Bobby had no REP in property he knowingly abandoned. If Bobby 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 Bobby's illegal arrest affect admissibility of the packet, since the officer's seizure of the packet was not fruit of the poisonous tree of Bobby'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 Bobby? 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 Bobby'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 Bobby 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 Hart 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 Bobby's flight was "provoked," in that Officer Hart objectively *tried* to effect a detention, unlike in *Wardlow.* However, the only evidence gained from Bobby's arrest was confirmation, at the booking, that he lived at the address. If Bobby's arrest was illegal, that confirmation from the booking search is poisonous fruit and must be excluded from the warrant. But Bobby'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, Bobby's illegal arrest would not affect the validity of the warrant. Bobby'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: Hart established that Jones 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, Bobby did not in fact possess heroin. This was the key fact that corroborated the tip. Hart 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 Hart's mistake of fact unreasonable? Hart did not perform a presumptive test on the white powdery substance, which should have revealed it was bunk before Hart sought the warrant, although it is standard police procedure to do so. Given that a standard procedure was omitted, and given that Hart 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. Hart 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 Hart's observations, the cash, and the gang evidence, and the fact that gangs are frequently involved in narcotics transactions, that Hart 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 Hart merely offered what, in effect, was an opinion the substance was heroin based on his training and experience.

Issue 3—Did Officer Hart 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 Hart' training and experience, the substance was heroin. Leon stated that an affiant's bare opinions are insufficient to trigger the good faith exception. Hart 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 Hart, 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 Hart 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 Hart 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 Hart's expertise, that Hart 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 Hart 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.

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FINAL EXAM QUESTION 2 ANSWER OUTLINE

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.
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.
2. **Interrogation** defined: Express questioning or its functional equivalent by police reasonably likely to elicit an incriminating response. *Rhode Island v. Innis* (1980).

Analysis: Police handcuffed John and placed him in the caged rear of the patrol car. The facts state police arrested him after a felony car stop. Officer Reyes asked John to tell him where the child was. This was a question reasonably likely to elicit an incriminating response from John. His knowledge of the child's location would help prove he engaged in child abduction. Officer Reyes therefore violated the Miranda prophylactic absent an exception.

Issue 2: Does the Miranda public safety exception apply to except the requirement for Miranda warnings and waiver on these facts?

Rule:

1. **Public safety exception to Miranda**: Police may ask questions reasonably prompted by a concern for public safety without a Miranda advisement. *New York v. Quarles* (1984).
    a. Police chase rape suspect—armed according to V—into supermarket where police momentarily lost sight of him. D then handcuffed and arrested and police discover empty shoulder holster. Officer asks "Where is the gun?" and D responds, "The gun is over there." Held D's statement and gun admissible at trial [gun was derivative evidence therefore became admissible under *Patane* (2004) without public safety exception].
        i. Reasoning: Cost-benefit calculus of Miranda different where there is a danger to the public and warnings may deter a suspect from providing information that is necessary to protect the public.

ii. Applies to public safety questions where there is an immediate necessity. Objective test, not "kaleidoscopic" subjective thoughts of police in such situations.

iii. Questions limited to public safety exigency, not general investigation of crime.

b. In California, includes Rescue Doctrine: Applies when an objective analysis of the facts known to police establishes the possibility that a missing victim may yet be saved. If so, police may violate Miranda in questioning a suspect as long as statement not involuntary under 5thA/DP. *People v. Richard Allen Davis* (2009).

Analysis: As set forth above, Officer Reyes had a reasonable concern for the child's safety. The Miranda public safety exception therefore applies, and excuses Miranda's requirement for a warning and waiver. Officer Reyes could therefore interrogate John even though he was in custody without advising John of his rights and without a waiver of those rights. John's answer providing the child's location is not excluded by Miranda.

Issue 3: Although John's confession passed muster under Miranda, was it involuntary under the core 5th A right?

Rules:

Using involuntary confessions as evidence is fundamentally unfair, even if the confession is true. The 5th A forbids involuntary confessions to deter coercive police conduct.

1. Trigger:

a) confession must be <u>involuntary</u>—the defendant's will overborne—and the product of:

b) coercive police misconduct.

Totality of circumstances test for voluntariness (but requires police coercion). Factors:

a) Characteristics of D, especially if unsophisticated. May include age, mental illness, level of education, and familiarity with criminal justice system.

b) Actions of police, especially if egregious.

c) Coercion surrounding confession:

1) Significant promises of benefit to D if D "tells the truth."

2) Threats of harm.

3) Physical or psychological deprivations that reduce free will.

Analysis: After John spat on Officer Reyes, the officer in a loud voice repeatedly asked John, "What do you think are your chances of ever seeing your child again if you don't cooperate?" Officer Reyes asked this question at least 3 times. The defense would argue this was a coercive threat. A threat to take the suspect's child away caused an involuntary confession in *Lynumn v. Illinois* (1963). Although not strong, the prosecution could argue that Officer Reyes posed a rhetorical question rather than an explicit threat. If under the totality of the circumstances the court found police coercion and that John's will was overborne, John's answer providing the location of the child is involuntary and inadmissible.

Evidence item 3: Testimony from law enforcement concerning the child's location and recovery.

Issue 1: Because Officer Reyes did not violate Miranda (and derivative evidence of a Miranda violation is always admissible as long as police don't intentionally violate Miranda in bad faith), defense counsel would argue that testimony concerning the child's location and recovery was derivative evidence and poisonous fruit of a core 5th A violation and therefore inadmissible.

Rules: 5th Amendment/Due Process Exclusionary Rule:

Fruit of the poisonous tree applies to derivative evidence of an involuntary confession: Derivative evidence is excluded if it is fruit of the poisonous tree of the involuntary confession. If so, both the 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.

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FINAL EXAM QUESTION 3 ANSWER OUTLINE

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).

4. 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.
5. 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).
6. 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.

13. Based on the totality of the circumstances by common sense evaluation. *Illinois v. Gates* (1983).
14. Less than a preponderance.
    a. Innocent explanations do not necessarily negate probable cause.
15. 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:

3. **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:

4. Terry detentions, although the suspect is not free to leave, are not Miranda custody. *Berkemer v. McCarty* (1984).
5. Quantum of proof required: Reasonable suspicion that crime afoot. *Terry v. Ohio* (1968).
6. Requires reasonable suspicion of an ongoing crime rather an isolated episode of past criminal misconduct. *Navarette v. California* (2014).
7. 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 <u>possibility</u> 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. <u>Asking</u> 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:

4. **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. <u>Deliberate elicitation</u>:
    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).
3. It is not clear whether waiver can be implied, from fact that D talks or shows police the location of evidence, as in Miranda context. *Brewer v. Williams* (1977). Note that in *Brewer* before D arguably impliedly waived (by showing police the location of the body), police violated D's *Massiah* rights when police deliberately elicited an incriminating response using the Christian burial speech. Therefore, the "waiver" was poisonous fruit of the *Massiah* violation.
    a. Although in *Brewer* the D received no less than three Miranda warnings on the day of his confession, including immediately before embarking on the trip to Des Moines, the court found no implied waiver when the D chose to show detectives the location of the body. The court stated the detective did not preface the Christian burial speech by telling D he had a right to a lawyer, and "made no effort at all to ascertain whether D wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that D waived his right to the assistance of counsel."

Analysis: Tom read Amy her Miranda rights and Amy said she understood them. But Tom did not obtain an express waiver of Amy's 6th A right to counsel. Instead, Tom proceeded to question Amy about the crime and Amy answered. Although this would be a proper implied waiver in a Miranda context, it is not

clear that implied waivers are permissible for a Montejo waiver of Massiah. If an express waiver is required to waive Massiah, Amy's statement is inadmissible. If an implied waiver is permitted to waive Massiah, Amy validly waiver her 6th A right to counsel under Montejo.

1)

The People v. Jones

Q1 For the kite and heroin, what are the pertinent arguments on each side and how should the court rule?

Confidential Informant:

The issue is whether the tip from the unknown informant constitutes probable cause to surveil the home on Elm Street.

An anonymous tip or tip from an unknown informant does not meet the requirement of probable cause on its own and must be verified by further investigation of details prior to the request of a valid warrant or search and seizure with warrant exception. Determining the validity of the tip in order to obtain probable cause for a warrant occurs by a totality of the circumstances test of checking the details given from a public vantage point in which a warrant is not required.

Here, Officer Hart went to the home and surveilled it from a public vantage point wherein he witnessed multiple individuals dressed in gang paraphernalia making short visits.

Therefore, the tip was verified due to the totality of the circumstances of the address given matching the particular description of the facts as the officer could see activity suggesting drug sales and gang related individuals

Fourth Amendment Search and Seizure:

The issue is whether the seizure of the evidence dropped by Jones, while fleeing from Officer Hart is a Fourth Amendment seizure.

The Fourth Amendment to the US Constitution protects individuals against unreasonable searches and seizures of their person , place and papers. In order to determine if a Fourth Amendment search occurred we must analyze the following factors; Government action, reasonable expectation of privacy, probable cause, warrant, exception to the warrant rule. A person is seized if they do not reasonably feel they are able to leave.

Government Action--Here, Officer Hart conducted the search and seizure and is a police agent so government action was involved.

Reasonable Expectation to Privacy--As determined by *Katz*, a person has standing if they have an objective and subjective reasonable expectation of privacy (REP). Per *Greenwood*, a person cannot claim a REP to evidence accessible to the public. The evidence was dropped while fleeing from Officer Hart so was objectively in plain view on the sidewalk where Jones cannot claim standing or a reasonable expectation of privacy as it was visible and accessible to anyone in the area.

Probable Cause--Probable cause is determined as more than a hunch and above the standard of reasonable suspicion but below the standard of preponderance of the evidence. If an officer has reason to believe that a suspect is committing or about to commit a crime, they may seek a warrant or proceed with a seizure using a valid exception to the warrant requirement. Officer Hart had probable cause to suspect the Jones was in possession of drugs because he witnessed Jones leaving a suspected drug house in a high crime area and Jones ran away when Officer Hart approached him which is suspicious behavior. in a public place.

Warrant--Officer Hart did not have a warrant to search or seize Jones or his property.

Exception to the Warrant Requirement--An exception to the warrant requirement occurs when evidence is in plain view, as was the package left by Jones when he threw it in the bushes while running. ✓

Because a government agent seized evidence in plain view known to be from a suspect whom he had probable cause to believe was in possession of contraband, he executed a valid seizure that was exempt from the protections of the Fourth Amendment.

Exclusionary Rule:

The issue is whether the seizure of the evidence dropped by Jones, while fleeing from Officer Hart is admissible.

yes!

Evidence obtained in violation of fourth amendment rights may be excluded er the exclusionary rule. This is a judicial based remedy to deter police misconduct. The exclusion will be measured on a test of the value to society by suppression of the evidence vs the deterrent to the police. If it is found that the social value is higher than the deterrent value, the evidence will still be admitted even if a violation occurred.

Here, the evidence was obtained lawfully per the plain view exception because Officer Hart had probable cause to pursue Jones and collect evidence attached to Jones in plain view.

The prosecutor will argue that the evidence was produced during an illegal seizure because Jones did not feel free to leave while being chased by police. This argument will

fail because Jones is not seized until he is properly apprehended by authorities (as discussed below).

Therefore, the evidence of the kite and the heroin should not be excluded.

Q2 For the arrest, what are the pertinent arguments on each side and how should the court rule?

Valid Arrest without a Warrant:

The issue is whether Jones was seized while fleeing police because he did not feel like he could reasonable leave.

A suspect may be arrested without a warrant in public so long as there is probable cause. In a similar case of *Hodari*, the US Supreme Court determined that a seizure has not occurred without a direct show of authority and submission by the suspect. The seizure is made once the suspect is physically apprehended and in the control of the authority even if prior to that they are in pursuit and don't feel reasonably able to leave.

Here, Jones ran after being contacted by the officer who already had probable cause to believe he was in possession of contraband (discussed supra) so Officer Jones was justified in pursuing him. Jones did not stop running until Officer Jones pulled out his firearm and ordered him to stop. At this point, by way of the show of authority by the officer of pulling the gun and the submission to the authority by way of stopping, Jones was seized.

The prosecutor will argue that Jones was seized prior to that because of the coercive nature of the chase but per the USSC ruling, the seizure has not occurred without the submission.

Therefore Jones was seized once he submitted to authority.

Coercion:

The issue is whether the officer used coercive force to detain Jones.

Coercion occurs when an officer uses excessive fore or intimidation to control a subject. This is a subjective standard depending on the totality of the circumstances of the suspect and whether they are vulnerable to influence. Factors considered are, age, nationality, education, number of officers in relation to suspect and conditions of the seizure.

The defense will argue that the officer coerced Jones with needless force in order to submit to their authority.

Here there was only one officer chasing Jones who is described as a "young man" so maybe a juvenile. He is a gang member in a high crime area however his other social metrics are not stated in the facts. The officer pulled a gun in order to force his submission which was a coercive tactic. This tactic was warranted given the totality of the circumstances because the officer had probable cause to believe Jones was committing a crime and used reasonable and necessary force to apprehend him.

Therefore the prosecutors argument of coercion will fail in trial.

In Conclusion:

The evidence of the heroin and the kite should not be excluded because it was obtained in plain view and dropped by a suspect who was not in custody. Jones was lawfully arrested because he was in public and submitted to the authorities. The court should rule to admit both the evidence and the arrest in the case of *People v. Jones.*

Good organization and analysis.
What about 5th Amd. right against
self-incrimination?

85

2)

PEOPLE V. JOHN

The overall issue is whether the information from John's cellphone and John's statements to Officer Reyes should be suppressed as evidence.

INFORMATION FROM JOHN'S CELLPHONE

Legality of the search of John and seizure of the cellphone itself

Defense may argue that the search of John and seizure of John's cellphone were illegal because a pat down only allows a search for weapons, and the cellphone is not a weapon.

The issue is whether the search and seizure of John's cellphone were illegal. Incident to arrest, police officers may do a pat down to search for weapons, but any evidence found during the pat down is allowed to be seized.

Because the search was done incident to arrest, the cell phone found on John is allowed to be seized, as the prosecution should argue.

Therefore, the search of John and seizure of the cellphone itself was legal.

Legality of searching information on John's cellphone

Defense should argue that searching the information on John's cellphone incident to arrest constituted a violation of his 4th Amendment right against unreasonable searches and seizures.

This right protects against unreasonable searches by government officials, protecting against warrantless searches where there is a reasonable expectation of privacy. Evidence obtained in violation of this right will be suppressed. Although, incident to arrest, the exterior of a cellphone may be searched for weapons, the information on the cellphone is considered a search, and not allowed to be searched without a warrant since there is a reasonable expectation of privacy with that information.

Here, since the evidence is the information on the cellphone itself, and the search was made by a government official (police officer) the search of this information is a violation of the right against unreasonable searches.

The prosecution may argue that the information on John's cellphone was out in the open since Officer Brown was able to see the texts upon opening the phone without any password or security required to open the phone. Evidence in open view is allowable and not considered a search under the 5th Amendment.

However, the information on John's cellphone was not viewable without opening the phone. Therefore even without a password or security required to open the phone, John had a reasonable expectation of privacy with regard to the information on his cellphone.

Therefore, the search of this information is a violation of the right against unreasonable searches.

Conclusion

Since the search of this information is a violation of the right against unreasonable searches, the court should agree to suppress the information from John's cellphone as evidence.

JOHN'S STATEMENTS TO OFFICER REYES

Violation of 5th Amendment right against self-incrimination

Defense should argue that John's statement was made in violation of his right against self-incrimination. The right against self-incrimination includes requiring being informed about the right not to incriminate oneself when in custody by a government official. Evidence obtained in violation of the right against self-incrimination is inadmissible as evidence.

Here, John was in custody by a government official: he was clearly in custody since he was handcuffed and seated in the caged rear of the patrol car, and Officer Reyes is a police officer, who is a government official. John was questioned about the location of the missing child without first being informed of his right against self-incrimination (he was not read his Miranda rights).

what are the fact to support this?

Perhaps the prosecution would argue that John's statements were made spontaneously, which would be an exception to needing to be informed of his right against self-incrimination. However, the question was posed several times, which indicates that time has passed and that John had time to think about his answer before responding. So, it is not plausible that his statements were made spontaneously.

Therefore, John's statement to Officer Reyes were made in violation of his right against self-incrimination, and, hence, should be inadmissible as evidence.

Statement not voluntary

Defense should also argue that John's statements were not voluntary. Statements are not voluntary if made because of police coercion, which can be established through the totality of circumstances. Statements that are not voluntary can be suppressed as evidence as being in violation of the right against self-incrimination.

Here, John was handcuffed and seated in a caged rear car of the patrol car. This setting indicates a coercive setting since he cannot leave. Importantly, Officer Reyes implied a threat of John not being able to see his child again if he does not cooperate, which is a coercive tactic. Additionally, Officer Reyes repeated the implied threat several times. The totality of these circumstances give evidence to John's statement being made under coercion, which would make his statement not voluntary and a violation of his right against self-incrimination. Therefore, his statement should be inadmissible as evidence.

Conclusion

Both because John was not informed of his right against self-incrimination and because his statement to Officer Reyes was not voluntary, the court should agree to suppress John's statement as evidence.

Great issue spotting, organization - please see my comments.

90.

3)

The People v. Amy

Fourth Amendment Search and Seizure:

The issue is whether the collection of paint samples from a car within the curtilage of the home is a 4th A violation for Amy.

Good statement of rules

The Fourth Amendment to the US Constitution protects individuals against unreasonable searches and seizures of their person, place and papers. In order to determine if a Fourth Amendment search occurred we must analyze the following factors; Government action, reasonable expectation of privacy, probable cause, warrant, exception to the warrant rule. A person is seized if they do not reasonably feel they are able to leave.

Government Action--Here, Deputy Sue conducted the search and seizure of paint and is an agent so government action was involved.

Reasonable Expectation to Privacy--As determined by *Katz*, a person has standing if they have an objective and subjective reasonable expectation of privacy (REP). The curtilage or area directly attached to the home is afforded the same REP as the home which is considered a castle and has ultimate privacy standards so is objectively protected by the 4th A.

Probable Cause--Probable cause is determined as more than a hunch and above the standard of reasonable suspicion but below the standard of preponderance of the evidence. If an officer has reason to believe that a suspect is committing or about to commit a crime, they may seek a warrant or proceed with a search and/or seizure using a

valid exception to the warrant requirement. Deputy Sue knew that there had been a hit and run and that Amy was arrested for. DUI near the area of th hit and run so was following up on her suspicion that Amy was involved in the vehicular homicide. Therefore probable cause existed.

Warrant--The officers did not have a warrant to search or seize Amy's car or paint shavings from the car.

Exception to the Warrant Requirement--An exception to the warrant requirement occurs when evidence is exigent or the delay of retrieval of that evidence would result in a dangerous situation or loss of evidence. Here, the officer had probable cause to obtain a warrant and not exception existed.

Amy's car was in the curtilage of her home where she had standing, therefore Deputy Sue should have taken the time to follow procedure and obtain a warrant. ✓

Exclusionary Rule:

The issue is whether the seizure of the paint samples and expert witness are admissible.

Evidence obtained in violation of fourth amendment rights may be excluded er the exclusionary rule. This is a judicial based remedy to deter police misconduct. The exclusion will be measured on a test of the value to society by suppression of the evidence vs the deterrent to the police. If it is found that the social value is higher than the ✓ deterrent value, the evidence will still be admitted even if a violation occurred. If evidence is deemed to be excludable, all evidence discovered as a result thereof is also excluded as "fruit of the poisonous tree."

Here Amy's 4th A rights were violated when Deputy Sue went onto the curtilage of her home and obtained paint samples from her car and those shavings were analyzed by an expert that determined they were from the bicycle . Therefore the samples must be excluded as well as the witness testimony that analyzed the samples.

6th A Violation:

The issue is whether the questioning by Deputy Sue was a violation of Amy's 6th A rights after she retained counsel for her DUI.

A defendant's 6th A right to counsel attaches after charging documents have been filed. The right is offense specific and pertains only to the charged offense. Once invoked, the defendant cannot be questioned without an attorney present for any pertinent portion of their case in regards to the charged offense.

Here, Amy retained and was arraigned for her DUI case along with her counsel. After the hearing, Deputy Sue questioned her regarding a separate offense of vehicular homicide.

Therefore Amy's 6th A rights were not violated because the questions were in relation to a separate offense.

Miranda Rights Violation:

The issue is whether Amy was in custodial interrogation when she was questioned by Deputy Sue.

Miranda Warnings must be read to a suspect who is in custodial interrogation. Both factors must be met to trigger the Miranda right so interrogation cannot occur while in custody without a valid and effective Miranda warning. The warning must clearly state the right to remain silent, anything you say can and will be used against you, the right to an attorney, if you cannot afford one, one will be provided to you. So, consensual Contact?

Custody--A person is seized and in the custody of police if they do not feel like they have a reasonable right to leave. Here Amy consented to speaking with Deputy Sue so was not in custody at the time she admitted to having seen the bicyclist. She was in custody once she was arrested after the interrogation.

Interrogation--Interrogation exists when the police ask questions that may illicit an incriminating response. Here Amy consented to questions which reached the level of interrogation when Sue asked if she had struck the bicyclist.

Amy must be read her Miranda Rights after the interrogation when she is arrested as the consensual encounter has switched to a custodial situation at that point and interrogation is underway. If she is not read her Miranda Rights, any further discussion may be excluded from evidence as a violation of the Miranda Rule.

Exclusionary Rule:

The issue is whether the admission of Amy's statement admitting to having seen the bicyclist should be excluded due to a Miranda Violation.

Evidence obtained in violation of Miranda Rights may be excluded per the exclusionary rule. This is a judicial based remedy to deter police misconduct. The exclusion will be measured on a test of the value to society by suppression of the evidence vs the deterrent to the police. If it is found that the social value is higher than the deterrent value, the evidence will still be admitted even if a violation occurred. In a Miranda exclusion, only the self incrimination will be excluded and any resulting witness or physical evidence will be admitted.

Here, Amy was speaking consensually to Deputy Sue when she self incriminated so the evidence of her statement should be admitted.

In Conclusion:

Amy's 4th A rights were violated by the search of her car in the curtilage of her home therefore the evidence and resulting expert witness should be excluded. Amy's admission of seeing the bicycle was made during a consensual encounter prior to custody so should be admitted.

END OF EXAM

Great organization — essay is easy to follow. The law is correctly applied to the facts and conclusions make sense.

Good work! 98