

## Question 6

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.
2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.
3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

## Question 6

### *Criminal Procedure*

Polly, a uniformed police officer, (State actor) observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. (Polly may constitutionally stop (seize) the car) Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. (The driver of the car is not in custody as traffic stops are brief and routine in nature) Polly asked Dave, the driver, for his driver’s license and the car’s registration certificate, (Not an interrogation) both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: “Stay here. I’ll be back in a second.” Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave. (This is proper and customary)

As she was walking, Polly looked back and saw that Ted appeared (The examiners specifically use the word “appeared” to create an ambiguity as to what Ted is actually doing) to be slipping something under his seat. (Ted’s conduct may trigger some suspicion. However, Polly has no way of knowing what Ted is actually doing and his conduct does not rise to the level of giving Polly probable cause to search the vehicle. Also, there are no facts showing Polly believes Ted or Dave appear armed and dangerous. Thus, she is not acting in the interest of her own safety) Polly returned to Dave’s car, opened the passenger side door, looked under the seat, (Even though this is a place where a weapon could be hidden, it is likely an unreasonable search) and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine. (This unreasonable search is violative of the Fourth Amendment. There was no probable cause to search the car. Therefore, the cocaine is subject to the exclusionary rule)

Polly arrested Dave and Ted, took them to the police station, (Both suspects are “in custody” as they are not free to leave) and gave them *Miranda* warnings. Dave refused to answer any questions. (Dave has exercised his Fifth Amendment right against self-incrimination) Ted, however, waived his *Miranda* rights, (Dave has no standing to assert Ted’s constitutional rights) and stated: (Ted’s statements are “testimonial” in nature because they derived from a police interrogation to prove past acts with no ongoing emergency) “I did not know what was inside the bag or how the bag got into the car. (Exculpatory statements) I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet.” (Ted’s statements tend to implicate Dave or the very least infers that Dave might have placed it there since it is Dave’s car. If Ted does not testify at trial, then Dave will not be able to cross-exam Ted concerning those statements. This would violate Dave’s Sixth Amendment right to confront witnesses against him)

Dave and Ted have been charged jointly with possession of cocaine. (A joint trial with two criminal defendants raise certain issues. For example, the confrontation clause may be implicated if one defendant’s statement is introduced against the other. In addition, no attorney should represent both criminal defendants at the same trial even if they both consent, as a reasonable lawyer would understand the inherent grave conflict of interest) Dave and Ted have each retained an attorney. A week before trial, (The timing of Dave’s motion needs to be considered in whether to grant his request for a new attorney) Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon. (Sixth Amendment right to counsel)

## A Deeper Look Inside the Essay

This pure Criminal Procedure essay asked specific interrogatories and laid out the issues rather cleanly. If an applicant taking this exam were to search for a correct answer, it may never appear. For example, Dave's motion to suppress the cocaine is open to reasonable arguments and dispute. To say there is no right answer would be an understatement. However, a strong answer would balance the officer's conduct and discuss reasonable inferences based on past case law. As for the first part of call 2, there was a correct answer. Dave simply has no standing to challenge Ted's statement. As for the motion for a separate trial, that is a debatable issue once again. The last call had two main facts to use. The fact it was a week before trial and Dave was only dissatisfied seemed to justify denying the motion. This was a semi-complex essay.

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### 1. Dave's motion to suppress the cocaine

Dave's motion to suppress the cocaine should be granted because Polly, the police officer, did not have reasonable suspicion, probable cause or a warrant to search Dave's car. In addition, no exception to the warrant requirement applies.

Dave's motion will be based on the Fourth Amendment of United States Constitution.

#### *Fourth Amendment*

The Fourth Amendment protects the rights of the people to be secure against **unreasonable** searches and seizures. The Fourth Amendment applies to the states via the Fourteenth Amendment. Warrantless searches are per se unreasonable and are subject only to a few specifically established and well-delineated exceptions.

However, in order to raise a Fourth Amendment claim, a defendant must have standing and the violation must have occurred through a government agent or someone acting at their request.

#### *Standing*

Standing is a personal right and may only be asserted by one who is subjected to an unreasonable search or seizure. The defendant asserting the right must have a reasonable expectation of privacy as to the place searched or the item seized. A defendant cannot challenge a search against another.

Here, Dave is the owner of the car. This can be inferred from the fact that Dave was driving and the car's registration was given to the officer by Dave. An owner of a car has a reasonable expectation of privacy, although a lower expectation of privacy within his automobile. Therefore, Dave has standing to contest the search.

### *State Action / Government Conduct*

Additionally, one can only assert a violation of their constitutional rights against state actors. A private person (one not working as an agent for the government) cannot violate another's constitutional rights.

Here, Polly was a police officer working for the state. This issue is not in dispute.

### *Traffic Stop*

The original stop (seizure) was valid. A routine traffic stop is a seizure under the Fourth Amendment as to both the driver as well as the passenger. Here, Polly pulled over Dave's car. This was a valid seizure because Dave was speeding and weaving in and out of traffic in violation of the Vehicle Code. Thus, the seizure was proper. However, the main issue in dispute is the search of Dave's car.

### *Warrantless Search*

Under the facts of the case, Polly did not have a search warrant. Therefore, she must either have probable cause to search the vehicle or an exception to the warrant requirement must apply to validate the search of the car.

### *Automobile Exception*

An officer may conduct an automobile search of an entire vehicle, including the trunk if the officer has probable cause to believe the car itself contains contraband, instrumentalities, or evidence of a crime. Also, the police may search any container, even one belonging to a passenger, provided the container is large enough to hold evidence for which the police are searching.

The key to determine whether this exception will apply is whether Polly had probable cause to search the car.

### *Probable Cause*

A warrantless search may be conducted if an officer has probable cause to believe a crime has been committed. Probable cause exists when an officer has a reasonable amount of suspicion, supported by facts and circumstances sufficiently strong to make a reasonable prudent person believe that a crime has been committed. This is an objective concept and requires looking at the totality of the circumstances.

Here, there was no probable cause. The fact that Polly saw what "appeared" to be Ted slipping something under his seat, without anything more, is not sufficiently strong to believe that a crime has been committed. A reasonably prudent person, looking at all the facts and circumstances could conclude that Ted was adjusting his seat or simply dropped something. There is no strong reason to believe a crime has been committed.

The state may not argue that because Polly found cocaine that she did have probable cause. The reason is because probable cause is determined at the time of the search, and not after. Thus, it cannot be based on the findings and results of the unconstitutional search.

For those reasons, Polly had no probable cause and the automobile exception will not apply. Still, the prosecution may argue that the cocaine was in plain view.

### *Plain View*

When an officer is lawfully on the premises she may seize without a warrant an object of incriminating nature if it is in “plain view.” It must be immediately apparent upon observation to the officer to believe that the item is contraband or evidence of a crime.

This exception will also not apply as the cocaine was not in plain view and was not immediately apparent. Here, only a paper lunch bag was in plain view and that is arguable because Polly had to look under the seat to find it. Polly then pulled the bag out, opened it, and only then found the cocaine. It goes to follow, that the contraband was not in plain view as Polly needed to look inside to find out what was in the bag. As such, this exception is invalid.

Assuming Polly does not have probable cause to search the car, the state will argue, at a minimum, Polly had reasonable suspicion to do a stop and frisk in the car.

### *Reasonable Suspicion*

Reasonable suspicion is found when an officer has more than a vague suspicion of criminal activity. There must be specific and articulate facts, along with reasonable inferences, that a crime has been committed. In determining the reasonableness of the officer’s conduct, a court will balance the intrusion of the search with the need for the evidence. Essentially, a court will look at the totality of the circumstances.

Protection of police can justify protective searches when police have a reasonable belief that the suspect poses a danger. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of a car, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. *Michigan v. Long*, 463 U.S. 1032 (1983).

Here, it is questionable whether Polly had reasonable suspicion. The better argument is that Polly did not. No facts indicate that Dave or Ted were involved in any criminal activity or that they appeared to be armed and dangerous. Polly was not acting in the interest of her safety or on any reliable information that Ted had a weapon. In fact, Polly only saw Ted appear to slip something under his seat. This in and amongst itself may arouse some vague suspicion but is not enough to hold that Polly was justified in the search, which likely required a heightened standard. Since there are no specific, articulate or intelligible facts that support any reasonable inferences that a crime has been committed or that either man had a weapon, the court should find Polly had no reasonable suspicion.

#### *Other exceptions*

At no time did Dave or Ted give consent nor were they being lawfully arrested. In addition, there were no exigent circumstances to justify searching Dave's car. Thus, no other exceptions apply.

#### *Exclusionary Rule – Fruit of the Poisonous Tree*

The exclusionary rule extends not only to the direct products of an unconstitutional search and seizure but also to ancillary evidence that results from the illegal search. This is known as the fruit of the poisonous tree doctrine.

Here, the cocaine found in violation of Dave's Fourth Amendment rights is not admissible in his criminal trial. However, it could be used to impeach him should he take the stand and deny having any drugs in his car.

#### *How is this motion likely to fare*

Dave's suppression motion should be granted.

## **2. Dave's motion to suppress Ted's statement**

Generally, before a statement made to a police officer can be used against a criminal defendant at trial, *Miranda* warnings are required and the statement must be voluntary. However, Dave has no standing to challenge any of Ted's constitutional rights.

#### *Fifth Amendment - Miranda*

*Miranda* warnings are required when a defendant is "in custody" and "subject to interrogation" by the police. A person is in custody if they are deprived of freedom of action in any significant way. Interrogation is any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response.

Here, Ted was in custody because he was arrested and since the police asked him questions, he was being interrogated. However, Ted waived his *Miranda* rights so this is a moot point.

#### *Fourteenth Amendment - Voluntariness*

Under the Due Process Clause of the Fourteenth Amendment, the voluntariness of a confession is determined from the totality of all the circumstances, taking into account both the characteristics of the accused and the details of the interrogation.

Here, Ted voluntarily waived his rights. His statements were not obtained by police compulsion or threats.

#### *No Standing*

One's constitutional rights may not be vicariously asserted. This means one defendant cannot challenge another defendant's constitutional violation. Here, Dave has no reasonable expectation that Ted will remain silent. Thus, Dave does not have standing to suppress Ted's statements. However, Dave certainly may argue that Ted's statements cannot be used to implicate Dave at trial if Ted chooses not to testify.

#### Dave's motion for a separate trial

If Ted exercises his Fifth Amendment privilege against compelled self-incrimination and refuses to testify, then Dave will not have the opportunity to cross-examine him about his testimonial statements. Since this will violate Dave's Sixth Amendment right to confront witnesses against him, the court should exercise its discretion in granting Dave's motion for a separate trial.

#### *Motion for a Separate Trial*

When two defendants are jointly charged for an offense, they are not entitled to a separate trial as a matter of right. The granting of a separate trial is within the sound discretion of the court. If one defendant moves for a separate trial because the other defendant has made statements which makes reference to the moving defendant, but is not admissible in evidence against him, the court shall require that the statements not be admitted into evidence or effectively delete all references to the moving defendant. The court shall order a separate trial whenever it determines that it is appropriate to promote a fair determination of the guilt or innocence of a defendant.

In some instances, good cause exists for the granting of a separate trial, such as a confession by one defendant that could implicate the other. However, in the interests of judicial efficiency, severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a defendant, or prevent the jury from making a reliable judgment about his guilt.

Here, Dave and Ted have been jointly charged with possession of cocaine. It seems Dave believes that he will be prejudiced by joinder of his case with Ted because Ted made testimonial statements to the police during an interrogation. Ted's statements made reference to Dave. A close examination of Ted's exculpatory statements by inference inculcate Dave. Ted stated he didn't know how the bag got into the car and that he did not put it there. Since the jury will be apprised that the cocaine was found in Dave's car, it leads to a logic inference that since Ted didn't, then Dave must have.

If the prosecution decides to use the evidence against Ted, and Ted doesn't testify, then Dave will not have the opportunity to cross-examine him concerning his statements. This violates the Confrontation Clause unless all inferences as to Dave are effectively deleted. Thus, some of the evidence presented against Ted, may lead the jury to unfairly penalize Dave for Ted's statements. In essence, it would be difficult for the jury to separate the defendants in their minds and will find Dave guilty without a fair determination.

#### *Sixth Amendment – Right to Confront Witnesses - Confrontation Clause*

The Sixth Amendment states "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This means the accused is entitled to a face-to-face confrontation with a witness and to subject the witness to cross-examination.

In a joint trial, when the prosecution seeks to introduce a statement made by one defendant that implicates the other defendant, the court must sever the trial or delete all references to the other defendant unless the declarant is available to testify. *Bruton v. United States*, 391 U.S. 123 (1968). The redaction must not implicate the other defendant in any way and must not indicate the other defendant's involvement in the crime.

As stated above, if Ted does not testify, the court must delete all reference to Dave and may not implicate Dave's involvement in the crime in any way. If Ted does testify, the issue is moot because Dave will then have the opportunity to cross-examine Ted.

#### *How is this motion likely to fare*

On balance the court should probably deny the motion for a separate trial as the use of Ted's statements doesn't pose a serious risk of compromising Dave's right to a fair trial.

### **3. Dave's motion to discharge his present attorney and to substitute a new attorney**

While Dave is entitled to the right to counsel of his choosing, there is little basis to sustain his motion just because he is dissatisfied with his attorney a week before trial.

#### *Sixth Amendment – Right to Counsel*

The Sixth Amendment right to counsel applies at all critical stages after formal charges have been filed. The right to counsel impliedly assumes a defendant has the right to effective assistance of counsel.

### *Ineffective Assistance of Counsel*

The benchmark for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, Dave is simply dissatisfied with his attorney. Without more, it is not ineffective assistance of counsel.

### *Conflict of Interest with Attorney*

In order for a criminal defendant to claim a conflict of interest with his current attorney, the defendant must show that an actual conflict exists that was so severe that the conflict adversely affected the defendant's rights and that his attorney could not effectively represent him. In criminal cases, in order to exercise its discretion properly, the trial court must inquire into the nature and evaluate the merits of the defendant's complaints. No Sixth Amendment right is violated when a defendant is represented by a lawyer with whom the defendant dislikes.

Here, the only claim Dave has made is that he is simply "dissatisfied" with the attorney he retained. This came a week before trial. It seems this is a ploy to delay trial and install tactics not appropriate to this case.

### *How is this motion likely to fare*

Dave's motion to discharge his present attorney, without more, should be denied.

*This essay was written by Jason Tolerico (One-Timers Personal Bar Review Course ©). If you have any questions or wish to discuss this essay or any others, please feel free to contact me at (949) 500-7627 or [jtlaws@gmail.com](mailto:jtlaws@gmail.com). It is an open invitation. Any critique, feedback, compliments or additions to this essay are welcome. Your opinion is valued and respected. Thank you. You may also find this essay at [www.One-Timers.com](http://www.One-Timers.com)*

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Answering each call of the question specifically and addressing each issue within it as well as numbering precisely and making logical coherent arguments supported by the law **9%**

**1. Dave’s motion to suppress the cocaine **45%****

*Fourth Amendment*

*Standing*

*State Action / Government Conduct*

*Traffic Stop*

*Warrantless Search*

*Automobile Exception*

*Probable Cause*

*Plain View*

*Reasonable Suspicion*

*Other exceptions*

*Exclusionary Rule – Fruit of the Poisonous Tree*

*How is this motion likely to fare*

**2. Dave’s motion to suppress Ted’s statement **14%****

*Fifth Amendment - Miranda*

*Fourteenth Amendment - Voluntariness*

*No Standing*

**Dave’s motion for a separate trial **19%****

*Motion for a Separate Trial*

*Sixth Amendment – Right to Confront Witnesses - Confrontation Clause*

*How is this motion likely to fare*

**3. Dave’s motion to discharge his present attorney and to substitute a new attorney **13%****

*Sixth Amendment – Right to Counsel*

*Ineffective Assistance of Counsel*

*Conflict of Interest with Attorney*

*How is this motion likely to fare*