

CRIMINAL PROCEDURE EXAMINATION: SPRING 2023

H. Johnson

STUDENT HONOR PLEDGE

By taking this examination, you promise to abide by the MSLAW honor code and the following:

You are not permitted to receive or give any unauthorized assistance on this examination.

This is a closed-book examination. You are not permitted to use papers, personal effects, electronic devices or any other matter to provide unauthorized assistance in completing this examination, create any unfair advantage in completing this examination, or otherwise frustrate the honest administration of this examination as a closed-book examination.

You are not permitted to speak or communicate with any other person taking this examination or anyone during the taking of the examination until all of your classmates have completed the examination, with the exception of the proctor.

You promise only to identify yourself by student number and not frustrate the anonymous grading system in any way.

You promise that you have no knowledge of the specific contents of the examination other than any instructions or information that may have been given out by your professor in advance.

The inclusion of your student number on your examination by you is your acknowledgement that you understand these requirements and promises and will abide by them.

STUDENT IDENTIFICATION NUMBER:

GENERAL INSTRUCTIONS:

The exam is *lengthy*. Take note of the point value of each section when budgeting your time. The basis of your answer should be Federal Law, unless otherwise asked for.

Extra credit will be awarded for Massachusetts law only where specifically asked for.

PART I INSTRUCTIONS: MULTIPLE CHOICE SECTION (30 POINTS): Answer all five (5) multiple choice questions. Do not explain your answers. No credit will be awarded for explanation of your answers.

PART II: DIRECTED ESSAY SECTION (70 POINTS): Answer only seven (7) of eight directed essay questions. Isolate the issues, state the applicable rules of law, apply the facts to the law, and support your conclusions in answering the questions, where appropriate. Be complete; but be concise. Some extra credit will be awarded for Massachusetts Law only where it is specifically asked for. No added credit will be awarded for answering extra questions. Limited extra credit will be awarded for the clarity and analysis of your writing. Be sure to answer all of the subheading questions asked on the question you choose to answer. Answer in essay form.

NOTE: Please be sure, if using software, to include your student identification number in the answer box on question you choose not to answer.

RELAX AND GOOD LUCK

PART I: MULTIPLE CHOICE: ANSWER ALL FIVE(5) QUESTIONS. (30 Points).

1. A federal grand jury was investigating drug trafficking in the jurisdiction. It subpoenaed a witness to testify, and the prosecutor advised the witness that he had a Fifth Amendment privilege not to testify. The witness asked that his counsel be allowed to advise him inside the grand jury room, but the prosecutor refused to allow the attorney inside. The witness, after speaking with his attorney outside the room, decided to testify and ended up making self-incriminating statements.

The witness was subsequently indicted for drug crimes. The indictment was based on the witness's grand jury testimony and on the evidence seized in an unconstitutional search of the witness's home.

The witness moved to dismiss the indictment.

Should the court dismiss the indictment?

- A. Yes, because the witness was denied his constitutional right to advice of counsel.
B. Yes, because the indictment was based on illegally seized evidence.
C. No, because the witness waived all his constitutional rights by testifying.
D. No, because the witness had no right counsel inside the grand jury room and the fact that illegally seized evidence is presented to a grand jury does not affect the validity of the indictment.
2. Two defendants were being tried together in federal court for bank robbery. The prosecutor sought to introduce testimony from the first defendant's prison cellmate. The cellmate would testify that the first defendant had admitted to the cellmate that he and the second defendant had robbed the bank. The prosecutor asked that the court permit the testimony of the cellmate and instruct the jury that the cellmate's testimony could be considered only as against the first defendant.
- Can the cellmate's testimony be admitted in a joint trial over the second defendant's objection?
- A. No, because the first defendant made the statement without *Miranda* warnings.
B. No, because the limiting instruction cannot ensure that the jury will not consider the testimony in its deliberation regarding the second defendant.
C. Yes, because the first defendant's statement was a declaration against his penal interest, an exception to the rule against hearsay as a matter of evidence law.
D. Yes, because the limiting instruction sufficiently protects the second defendant.
3. The police had, over time, accumulated reliable information that the defendant operated a large cocaine-distribution network, that he and his accomplices often resorted to violence, and that they kept a small arsenal of weapons in his home.

One day, the police received reliable information that a large brown suitcase with leather straps containing a supply of cocaine had been delivered to the defendant's home and that it would be

moved to a distribution point the next morning. The police obtained a valid search warrant to search the house for and seize the brown suitcase and the cocaine. The police went to the house of the defendant.

The police knocked on the defendant's door and called out, "Police! Open up! We have a search warrant!" After a few seconds with no response, the police forced the door open and entered. Hearing noises in the basement, the police ran down there and found the defendant with a large brown suitcase with leather straps. They seized the suitcase and put handcuffs on the defendant. A search of his person revealed a switchblade knife and a .45-caliber pistol. The defendant cursed the police and said, "You never would have caught me with the stuff if it hadn't been for that lousy snitch."

The police then fanned out through the house and looked in every room and closet. They found no one else, but one officer did find an Uzi automatic weapon in a box on a closet shelf in the defendant's bedroom.

In addition to charges relating to the cocaine in the suitcase, the defendant is charged with unlawful possession of weapons.

The defendant moves pretrial to suppress the use as evidence of the weapons seized by the police and of the statement he made.

As to defendant's statement, should his motion be granted?

- A. Yes, because the entry by forcing the door was not reasonable.
 - B. Yes, because the police failed to read the defendant his *Miranda* rights.
 - C. No, because the statement was volunteered.
 - D. No, because the statement was the product of a lawful public safety search.
4. Police officers received a tip that drug dealing was occurring at a certain ground-floor duplex apartment. They decided to stake out the apartment. The stakeout revealed that a significant number of people visited the apartment for short periods of time and then left. A man exited the apartment and started to walk briskly away. The officers grabbed the man and, when he struggled, wrestled him to the ground. They searched him and found a bag of heroin in one of his pockets. After discovering the heroin on the man, the police decided to enter the apartment. They knocked on the door, which was opened by the woman who lived there. The police politely asked if they could come inside, and the woman gave them permission to do so. Once inside, officers observed several bags of heroin sitting on a living room table. The woman is charged with possession of the heroin found on the living room table. She moves pretrial to suppress the heroin on the ground that it was obtained by an illegal search and seizure. Should the woman's motion be granted?
- A. No, because the tip together with the heroin found in the man's pocket provided probable cause for the search.
 - B. No, because the woman consented to the entry of the officers.
 - C. Yes, because the officers' decision to enter the house was the fruit of an illegal search of the man.
 - D. Yes, because the officers did not inform the woman that she could refuse consent to enter.

5. A defendant was validly arrested for the murder of a store clerk and was taken to a police station where he was given *Miranda* warnings. An interrogator asked the defendant, "Do you understand your *Miranda* rights, and are you willing to give up those rights and talk to us?" The defendant replied, "Yes." The defendant was then asked, "Did you kill the clerk?" The defendant replied, "No." Then the defendant was asked, "Where were you on the day the clerk was killed?" The defendant replied, "Maybe I should talk to a lawyer." The interrogator then asked, "Are you sure?" The defendant replied, "I'm not sure." The interrogator then asked, "Why would you want to talk to a lawyer?" The defendant replied, "Because I killed the clerk and I think I need a lawyer to defend me." At that point, interrogation ceased. The defendant was later formally charged with the murder of the clerk.

The defendant has moved to suppress the use of his statement, "...I killed the clerk..." on the grounds that this statement was obtained from him in violation of his *Miranda* rights.

Should the defendant's motion be granted?

- A. No, because although the defendant effectively asserted his right to counsel, the question, "Why would you want to talk to a lawyer?" did not constitute interrogation.
- B. No, because the defendant did not effectively assert the right to counsel, and his conduct prior to making the statement constituted a valid waiver of his *Miranda* rights.
- C. Yes, because although the defendant did not effectively assert the right to counsel, his conduct prior to making the statement did not constitute a valid waiver of his *Miranda* rights.
- D. Yes, because the defendant effectively asserted his right to counsel, and the question, "Why would you want to talk to a lawyer?" constituted custodial interrogation.

PART II: DIRECTED SHORT ESSAY QUESTIONS: CHOOSE ONLY SEVEN(7) OF EIGHT. (70 points).

1. Officer Opie is walking a foot patrol on Main Steet. Opie observes a man in a purple leisure suit, with the wide lapels and the whole bit, walking in front of a shop, "Roland's Rolex Watches," which carries the high-end, expensive and highly desirable watches. Opie observes the man in the leisure suit look into the window of the shop and repeatedly tap under his left arm. Opie, an experienced robbery detective, approaches the man in the leisure suit. Opie notices a large bulge under the man's left arm, beneath his suit jacket. Officer Opie grabs the man's shoulders from behind and spins him around. Opie pats the exterior of the coat and feels a hard object under the left arm which Opie thinks may be cocaine. Officer Opie reaches in and removes the item, which is in fact, a small, tightly packed quantity of cocaine.

The person, later identified as Fred Fashionable, says, "I was thinkin' about buying one of those beautiful watches when I sold the coke." Fred is later charged with "Possession of Cocaine with Intent to Distribute."

A Motion to Suppress the evidence of the cocaine is filed by Fred Fashionable's lawyer. Will it succeed? Why or why not?

2. Chip dislikes his neighbor, Pill. Chip thinks that Pill is a drug dealer. Chip approaches the head of the local police drug unit, Detective Daffy. Chip volunteers to wear a “wire,” a listening device which transmits any conversation within its range to a recorder at the police station. Daffy wires Chip up.

Chip goes to Pill’s house, knocks at the door and Pill answers. Pill, shocked and pleased to see his neighbor, one who he thought disliked him, invites Chip into the house. Chip and Pill, over a beer, engage in a wide-ranging conversation which includes, Heaven help us, politics, Major League Baseball and the pros and cons of dealing heroin as an occupation. Chip and Pill part, apparent friends. Chip returns to Detective Daffy and returns the transmitter. Later, Pill is charged with Possession with Intent to Distribute Heroin.

The prosecution wants to use Chip’s testimony regarding the conversation at Pill’s house and the recording of it.

Pill’s attorney files a motion to suppress the use of both.

One argument the prosecutor makes is that Chip was acting as a private citizen and therefore the evidence should not be suppressed. Discuss what the nature of that argument would be. Would that argument succeed in these circumstances? Why or why not?

Assuming that the prosecution is unsuccessful in the above argument, will the defendant succeed in his motion to suppress? Why or why not?

For extra credit, would there be any difference in the argument and/or result under Massachusetts law? Please explain.

3. Officer Dreamer of the Grapefruit Gulch Police Department believes, only based on a hunch, that Killjoy was involved in the robbery of the Tenth National Bank in town the previous month. Dreamer observes Killjoy operating a fuel-efficient hybrid car well within the speed limit, and otherwise lawfully, on Main Street. Officer Dreamer follows Killjoy and activates his cruiser’s blue lights. Killjoy sees the lights in his rearview mirror but continues to drive at the same speed.

Officer Dreamer removes his service revolver from its holster and, aiming the gun out the driver’s window at Killjoy, fires. The bullet grazes Killjoy’s ear resulting in a small cut. Killjoy continues driving and takes a few quick rights and lefts onto various streets and loses Officer Dreamer.

Twenty minutes later, Officer Dreamer comes upon the hybrid car, unoccupied on the side of the roadway. Dreamer approaches the car and observes a large bag marked, in black lettering, “Tenth National.” Killjoy is nowhere in sight. In accordance with police standard policy, Killjoy then searches the car and finds a gun, in a closed shoebox in the backseat area, which ballistic examination and bullet comparison later show was fired at the bank during the robbery.

Two weeks after the events on the road, Killjoy walks into the police station. Killjoy approaches Dreamer and says, “I done it, Dreamy. I knocked over the bank. The voices in my head told me to tell you. Arrest me.” Officer Dreamer then arrests Killjoy.

Killjoy is later charged with Bank Robbery, a statutory offense in the jurisdiction.

Killjoy's attorney files a motion to suppress the use of the marked money bag, the gun and also its use in the comparison involving the bullet from the bank, as well as any testimony about the gun and, also, to suppress the statement of Killjoy at the station.

One basis, among others, that the attorney raises for the suppression of the statement is that it was not voluntary due to Killjoy's mental illness. Will the motion to suppress the statement succeed on that basis? Why or why not?

What would the other likely grounds for the motion be? Discuss the issues and each piece of evidence and explain your conclusions as to whether or not the evidence should be suppressed.

For extra credit, with respect to the initial events in the vehicles, would Massachusetts analyze the issue differently? Please briefly explain.

For extra credit, would the analysis of the issue of the voluntariness of the statement be any different under Massachusetts Law? Please briefly explain.

4. Stickyfingers is under arrest for Larceny involving the theft of the Dope Diamond from the local museum. Stickyfingers is brought before Judge Jumpin for arraignment. Stickyfingers is arraigned and Judge Jumpin sets bail at five-hundred thousand dollars. Stickyfingers is also appointed an attorney, Chatter, to represent him. Stickyfingers is remanded in custody to the local jail.

The very evening after his arraignment, Detective Dribbles visits Stickyfingers in his cell. Dribbles reads Stickyfingers the *Miranda* warnings verbatim, from a card. Stickyfingers says nothing. Detective Dribbles then says, "Look, this ain't about the Dope Diamond. We're lookin' at you for a real professional job at 'Gilbert's Gorgeous Gems.' Place was broken into, and the Royal Ruby was stolen. Gilbert, the owner, saw a guy fitting your description runnin' out in the dark. Want to say anything?" Stickyfingers responds, "Nah. I'm just gonna stay silent. Period."

The next day, Stickyfingers is brought from the jail to the police station. There he is placed in a lineup with five other males about the same age and build as himself. Stickyfingers is the only one with a mustache. Gilbert, after looking at the lineup says, "Hard to be sure. But it's got to be the guy with the mustache. I noticed a mustache that night." Stickyfingers is brought back to the jail.

The following day, Detective Dribbles again visits Stickyfingers at the jail. Dribbles again reads the *Miranda* rights to Stickyfingers, verbatim from a card. Dribbles says, "Understand, Stick?" Stickyfingers nods in the affirmative. Dribbles asks, "Did you steal the ruby?" After twenty minutes of dead silence, Stickyfingers says, "Ya, I saw Gilbert that night. I was afraid he'd identify me. Did he?"

Subsequently, Stickyfingers is charged with the Larceny of the Royal Ruby from "Gilbert's Gorgeous Gems."

Stickyfingers' attorney on the Ruby case files a motion to suppress the out of court identification at the lineup and any proposed in-court identification. The attorney also moves to suppress the statement of Stickyfingers.

What would be the grounds for the motions? Discuss the law. Should the evidence be suppressed? Please explain as to each piece of evidence.

5. A. A state statute provides as follows: "In a felony criminal case a jury must consist of twelve members and in order for a jury to render a valid guilty verdict ten of such twelve members must vote to convict."

Is the state statute Constitutional? Why or why not? Please explain.

B. During a jury trial of a defendant on a robbery charge, after the prosecution has completed its case-in-chief, the judge says. "Well, there is not enough here to prove the identity of the robber. The court is dismissing this case." The prosecution wants to retry the case against the defendant. Can they? Why or why not?

C. In the process of empaneling a jury in a bifurcated murder trial, Judge Jelly excused, "for cause," four jurors, over defense counsel's objection, who stated, during the voir dire, that they had general or religious objections to the death penalty. The defendant was convicted in the first phase of First Degree Murder and in the second phase the jury imposed the death sentence.

Will the death sentence be found to be valid on appeal? Why or why not? Please explain.

6. A. What determines, under the Due Process Clause, incorporating the 6th Amendment, whether a defendant is entitled to a trial by jury? Please discuss the law and describe the standard.

B. Does the defendant have a Constitutional right to waive a jury and have a judge decide the case as opposed to a jury? Please explain.

C. What is the point where jeopardy attaches in a jury trial? In a bench trial?

7. Detective Drainpipe applies for a search warrant to search Horrible Hal's home at Fifty Pheasant Freeway in the town of Dodo. In the affidavit, Drainpipe describes information received from a "Confidential Informant," whom he does not name. He writes that "CI has provided information in the past that has led to three seizures of heroin and four seizures of cocaine and convictions of persons for possession of same. CI informs me that he visited Horrible Hal's residence at Fifty Pheasant Freeway two days ago and observed a very large quantity of heroin, of which CI is familiar with as a drug user, sitting on the kitchen table." Detective Drainpipe also writes that, "your affiant has conducted surveillance at the address himself and has observed individuals known to me personally to be heroin users enter the residence, and leave after a short time, consistent, in this officer's experience, with purchasing of illegal heroin." The warrant sought permission to search for "heroin and any paraphernalia used in illegal drug distribution."

Ultimately, the search warrant was issued and executed. A quantity of heroin was seized.

- A. Probable cause is the standard of proof, generally, required for a search warrant affidavit to be sufficient? Define it.
- B. Under Federal Constitutional analysis, what is the test used, particularly here, in the context of an unnamed informant to determine whether the search warrant affidavit presents probable cause? Define it.
- C. Using the appropriate test, does this affidavit present probable cause for the search? Why or why not. Please explain.
- D. Suppose that the police did not knock or announce their presence when executing the search warrant. Under Federal law, would this necessarily result in suppression? For extra credit, how does Massachusetts treat this issue under its law?

For extra credit, what would the test be, in the context of an unnamed informant, under Massachusetts law?

For extra credit, under the Massachusetts test, would the affidavit present “probable cause?” Please briefly explain.

- 8. Del is in trouble. Del is under indictment on a charge of Armed Robbery and about to face trial. Del is represented by Attorney Whisper. The prosecutor is Pummels. Pummels offers a plea deal to Whisper, to convey to his client, which will allow Del to plead guilty to the lesser included offense of Unarmed Robbery, with a reduced sentence. Whisper advises Del, quite wrongly based on case law in the jurisdiction, that since he had a replica gun, he could not be convicted of the offense of Armed Robbery and had nothing to lose by going to trial. Del, accepting Whisper’s advice, elects to take the case to trial. Del is convicted of Armed Robbery and sentenced to a lengthier term of imprisonment than that contemplated in the plea offer.

Del wants to raise the issue of Ineffective Assistance of Counsel on direct appeal which is permitted in the state. Why does the concept of I.A.C. even apply in the context of plea advice? What is the standard? Using the standard, apply the facts to the law and conclude whether or not Del will be successful, including what the remedy should be if he is.

Assume that the I.A.C. issue was litigated to its conclusion in state court with a finding favorable to the prosecution. What would the standard of review be in a Habeas Corpus proceeding in the local Federal District Court?

CRIMINAL PROCEDURE 2023

MIDTERM EXAMINATION

H. Johnson

20 % OF THE TOTAL CLASS GRADE: ONE HOUR (1) STANDARD TIME.

STUDENT HONOR PLEDGE

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You promise only to **identify yourself by student number** and not frustrate the anonymous grading system in any way.

You promise that you have no knowledge of the specific contents of this examination other than any instructions that may have been given out by your professor in advance.

The inclusion of your student number on your examination by you is your acknowledgement that you understand these requirements and will abide by them.

Student ID #

GENERAL INSTRUCTIONS:

The exam is lengthy. Take note of the point value of each section when budgeting your time. The basis of your answer should be Federal law, unless specifically otherwise specified.

SECTION I: MULTIPLE CHOICE (30 POINTS). ANSWER ALL THREE. DO NOT EXPLAIN YOUR ANSWERS.

SECTION II: SHORT TARGETED ESSAY (10 POINTS). ANSWER ONE OF ONE QUESTIONS.*

SECTION III: ESSAY SECTION (60 POINTS). ANSWER ONLY ONE OF TWO (1 OF 2) QUESTIONS. NO ADDITIONAL CREDIT WILL BE AWARDED FOR ANSWERING A SECOND QUESTION.*

***EXTRA CREDIT MAY BE AWARDED IN THE ESSAY SECTIONS FOR THE QUALITY OF YOUR WRITING AND ANALYSIS.**

***LIMITED EXTRA CREDIT MAY BE AWARDED FOR A DISCUSSION OF MASSACHUSETTS LAW, BUT ONLY WHERE SPECIFICALLY ASKED FOR.**

RELAX AND GOOD LUCK WITH IT.

SECTION I: MULTIPLE CHOICE - 30 POINTS. ANSWER ALL THREE(3) QUESTIONS.

1. A federal officer had probable cause to believe a woman had participated in a bank robbery. Two days after the robbery, the woman checked into a local hotel room. When the woman left for the evening, the hotel manager opened the hotel room door so that the officer could enter the room and look inside. The officer did not find any of the stolen money but did see, lying open on the bed, in plain view, a diary which described, on the visible page, the woman's participation in the robbery of the bank.

The woman was charged in federal court with the bank robbery. She moved to suppress the diary and the officer's observations of it.

Should the court grant the motion to suppress?

- A. Yes, because the officer had no warrant.
 - B. Yes, because admitting the diary or its contents would violate the *Miranda* rule.
 - C. No, because the hotel manager had actual authority to permit the police to search the room even though the woman was still a guest there.
 - D. No, because the officer reasonably relied on the apparent authority of the manager to allow the officer into the hotel room.
2. The police suspected a woman of growing marijuana, which is illegal in the jurisdiction, in her private residence. Drug officers went to her neighborhood in the middle of the night. Nothing unlawful could be seen from the street, so the officers walked into the neighbors' yard and looked through the woman's kitchen window, which had neither drapes nor shades. The officers observed what appeared to be marijuana plants being cultivated under grow lights in the kitchen. Using this information, the officers obtained a search warrant. The execution of that warrant netted numerous marijuana plants.

The woman was charged with possession of marijuana. She moved to suppress the marijuana plants recovered when the warrant was executed, claiming that the evidence supporting the warrant was obtained through a search that violated the Fourth Amendment.

Should the marijuana plants be suppressed?

- A. No, because regardless of the lawfulness of the police conduct beforehand, they did obtain a warrant to search the woman's home.
- B. No, because the woman could have no reasonable expectation of privacy concerning activities that she exposed to the view of her neighbors.
- C. Yes, because the officers' clandestine observations of the plants violated the woman's reasonable expectation of privacy concerning the activities occurring in her home.
- D. Yes, because no unlawful activities could be observed by the officers from any public vantage point.

3. In a city, a number of armed bank robberies were committed near closing time by a masked man wearing a white hooded sweatshirt and blue sweatpants. Police saw a man, wearing a white hooded sweatshirt and blue sweatpants, pacing nervously outside one of the city's banks just before it closed. The police stopped the man and frisked the outer layer of his clothing for weapons but found none. They asked the man what he was doing outside the bank and pointed out that he was wearing clothing similar to clothing worn by the perpetrator of recent robberies. After pausing for several moments, the man confessed. The police had not provided him with *Miranda* warnings. After being charged with the bank robberies, the man moved to suppress his confession. The parties agreed, and the court properly found, that the police had reasonable suspicion but not probable cause at all times before the man confessed.

Should the man's motion be granted?

- A. Yes, because the confession was the fruit of a Fourth Amendment violation, even though there was no *Miranda* violation.
- B. Yes, because the confession was the fruit of a *Miranda* violation, even though there was no Fourth Amendment violation.
- C. Yes, because the confession was the fruit of both a Fourth Amendment and a *Miranda* violation.
- D. No, because there was neither a Fourth Amendment nor a *Miranda* violation.

SECTION II: SHORT ESSAY - 10 POINTS: ANSWER THE POSED QUESTION.

Detective Drip of the Hayseed City Police Department thinks that Maggie may be involved in illegal cocaine dealing. Drip observes Maggie driving her fancy sports car on Main Street and follows her in her cruiser. Though Maggie does not commit any traffic infraction, Drip activates her blue lights to "stop" Maggie. Maggie sees the blue lights and speeds away. Drip gives chase and observes Maggie throw small clear-plastic bags containing white powder from her car window. The bags are later retrieved and determined to contain cocaine. Maggie is subsequently charged with Possession with Intent to Distribute Cocaine, a violation of a local statute.

Maggie, through counsel, brings a motion to suppress. Will Maggie be successful in her motion? Why or why not? Discuss the issues, rules of law, analyzing the facts and conclude.

For extra credit, would the result be any different under Massachusetts law? Why or why not?

SECTION III: ESSAY SECTION - 60 POINTS. CHOOSE ONLY ONE OF TWO (ONLY 1 OF 2) TO ANSWER. NO ADDITIONAL CREDIT WILL BE AWARDED FOR ANSWERING AN ADDITIONAL QUESTION.

1. Officer Aaron develops probable cause to arrest Bubba for the theft of the beloved elephant, Colossus, "Collie" for short, from the local zoo. Officer Aaron goes to Bubba's house and knocks on the door. When Bubba answers, Officer Aaron steps into the house and places the handcuffs on Bubba. Officer Aaron spies a small clear plastic bag containing what he recognizes to be heroin on a coffee table during the arrest and takes it. Officer Aaron asks, "Bub, is this your heroin?" Bubba responds, "Ya, got a little problem." Bubba is transported back to the local police station and booked. In accordance with a local statute, which permits the police to take a D.N.A.(deoxyribonucleic acid) sample in all felony arrests, Bubba is subjected to a buccal swab. The police also take Bubba's phone from his pocket. Bubba is brought to an interrogation room. There Officer Aaron says, "Bub, you don't have to say nothin', but if you do it could hurt you in court. You can get a lawyer, or if you're broke, we'll get you one. Got it?" Bubba nods in the affirmative. Aaron says, "We'll Bubba, we know you stole Collie. You were seen with him on Main Street." In fact, Bubba was never seen on Main Street with Colossus. Bubba responds, "Maybe I should get a lawyer." Aaron says nothing, and the room is silent for over twenty minutes. Aaron then says, "C'mon Bubba, we found Colossus. It looks like you took good care of him." Colossus had not been found at that point. Bubba responds, "Okay, I stole him. I just like animals. I'd never hurt him. I'm not saying nothing else." The conversation in the interrogation room was not recorded. Officer Aaron forgot to turn on the recorder. A few minutes later, Officer Aaron goes to Bubba's cell and asks, "Did you climb the fence at the zoo?" Bubba says, "Yup." A review of the contents of Bubba's phone shows a photo of Bubba, posing with Colossus, smiling. Bubba, not the elephant. Officer Aaron recognizes the area of the photo to be a field just behind Bubba's house. Police are immediately dispatched to the area and Colossus is found content and unharmed in an open, doorless shed located in the field. The interior of the shed, and Collie, are immediately visible from the field onto which the police entered. The police had climbed a fence with a no trespassing sign on it to gain entry to the field. In addition, as a matter of fact, a large search party that had been sent out earlier to look for the elephant was only a hundred yards from and approaching the field where Colossus was when they heard the second radio call notifying to suspend the search since Colossus had been found and ordering them to suspend the search. A comparison of the D.N.A. in the database matched with D.N.A. found on a once stolen, but recovered, bald eagle, Winford.

Bubba is ultimately charged with Possession of Heroin, and two counts of a statutory theft crime: one for Colossus and one for Winford.

Bubba, through counsel, files motions to suppress in the cases. The motions seek exclusion of a number of specific items, including the heroin found at Bubba's house, the statement regarding the heroin made by Bubba at his house and Bubba's statements

made at the police station. In addition, Bubba seeks to exclude the photograph of Bubba and Colossus retrieved from Bubba's phone and any observations or testimony made by the police about finding Colossus, or where he was, as well as any photographs of the elephant and, also, any actual use of the elephant itself as evidence. In addition, Bubba seeks suppression of the taking and use of his D.N.A. in the case involving Winford and using it in the police database for comparison.

Will Bubba be successful regarding the evidence? What, if any, are the issues raised by the hypothetical? Be sure discuss the issues, the rules of law, analyzing the facts and applying the appropriate standards and to conclude on suppression of the evidence.

For extra credit, *briefly* point out what issues would be handled differently under Massachusetts' law and *briefly* describe the Massachusetts view.

2. Hippy Hal travels the country in his campervan with his significant other, Hilda. Hal is spending the summer months at a rented campsite where he pays for water and electricity. The owner of the little campground, Kraemer, is a longtime police informant. Kraemer observes a cloud of smoke emanating from Hal's campervan and smells it to be marijuana, the odor of which he is familiar with. Marijuana is illegal in the jurisdiction. When Hal and Hilda go for a walk, Kraemer, on his own, slips into Hal's campervan and observes a big bag of marijuana, marked, "Summer High," in black ink. Kraemer then calls his contact at the police department, Detective Fish, and tells him what he saw and smelled. Fish prepares the search warrant application documents, including the affidavit in which he does not identify Kraemer by name but describes him only as a "Confidential Informant." He includes a description of the information which Kraemer, "CI," had provided in previous cases only as "things that turned out to be true," without going into any detail. Fish also describes the information given to him by Kraemer, "CI," of those observations and smells both outside and inside the campervan by him that day, in the affidavit. He describes the location, giving the campground address, with which he, Fish, is familiar. Fish also describes the individual campsite number where Hal's campervan is located, as told to him by CI. He also describes the items sought in the search warrant as "all marijuana and anything that might have to do with illegal drugs."

Magistrate Mopey, upon being presented with the documents stands and exclaims, "Marijuana is a curse! It must be eradicated!" Mopey signs the search warrant. Detective Fish, who is accompanied by other officers and Magistrate Mopey, who insists on coming along, goes to the campsite and knocks at the campervan door. Hilda answers the door. Fish says, "We want to search your campervan." Before Detective Fish can mention the warrant, Hilda says, "Sure. Come on in." Hal, standing with her, incensed, exclaims, "You cannot come in!" Fish then observes Hal strike Hilda in the face with a closed fist. Fish immediately enters, removes Hal and places handcuffs on him and says, "I'm arresting you for assault and battery." Assault and battery is a misdemeanor in the jurisdiction. Just before he is placed in the cruiser, about 200 yards from the campervan, Fish searches Hal and finds an illegal handgun in his waistband.

Detective Fish goes back to the campervan and shows Hilda the search warrant. She says, "I told you could come in with or without a warrant. You don't need that thing." A search reveals the bag of marijuana, which the police take. The police also find, a few minutes after finding the marijuana, a bust of Theodore Roosevelt sitting on a bed area dresser. Detective Fish is aware, from police briefings, that such a bust had been stolen from the local library. Fish takes the "TR" bust.

Hal is charged with Assault and Battery, Possession of Marijuana, Possession of an Illegal Handgun and Receiving Stolen Property, the Theodore Roosevelt bust. Hal, through counsel, brings a motion to suppress the marijuana, the gun and the bust. Will Hal's motion succeed? Why or why not? Be sure to discuss the issues, the rules of law, analyzing the facts and concluding on suppression of the evidence.

For extra credit, *briefly* point out what issues would be handled differently under Massachusetts law and briefly describe the Massachusetts view.

CRIMINAL PROCEDURE EXAMINATION: SPRING 2022

H. Johnson

STUDENT HONOR PLEDGE

By taking this examination, you promise to abide by the MSLAW honor code and the following:

You are not permitted to receive or give any unauthorized assistance on this examination.

This is a closed-book examination. You are not permitted to use papers, personal effects, electronic devices or any other matter to provide unauthorized assistance in completing this examination, create any unfair advantage in completing this examination, or otherwise frustrate the honest administration of this examination as a closed-book examination.

You are not permitted to speak or communicate with any other person taking this examination or anyone during the taking of the examination until all of your classmates have completed the examination, with the exception of the proctor.

You promise only to identify yourself by student number and not frustrate the anonymous grading system in any way.

You promise that you have no knowledge of the specific contents of the examination other than any instructions or information that may have been given out by your professor in advance.

The inclusion of your student number on your examination by you is your acknowledgement that you understand these requirements and promises and will abide by them.

STUDENT IDENTIFICATION NUMBER:

GENERAL INSTRUCTIONS:

The exam is *lengthy*. Take note of the point value of each section when budgeting your time. The basis of your answer should be Federal Law, unless otherwise asked for.

Extra credit will be awarded for Massachusetts law only where specifically asked for.

PART I INSTRUCTIONS: MULTIPLE CHOICE SECTION (30 POINTS): Answer **all five (5)** multiple choice questions. Do not explain your answers. No credit will be awarded for explanation of your answers.

PART II: TRUE OR FALSE SECTION (10 POINTS): Answer **all four (4)** true or false questions. Do not explain your answers. No credit will be awarded for explanations.

PART III: DIRECTED ESSAY SECTION (40 POINTS): Answer **only two (2)** of three directed essay questions. Isolate the issues, state the applicable rule of law, apply the facts to the law, and support your conclusions in answering the questions, where appropriate. Be complete; but be concise. Some extra credit will be awarded for Massachusetts Law only where it is specifically asked for. No added credit will be awarded for answering extra questions. Limited extra credit will be awarded for the clarity and analysis of your writing. Be sure to answer all of the subheading questions asked on the questions you choose to answer. Answer in essay form.

NOTE: Please be sure, if using software, to include your student identification number in the answer box on questions you choose not to answer.

PART IV: SHORTER DIRECTED ESSAY QUESTION SECTION (20 POINTS): Answer only two (2) of three shorter essay questions. Be complete; but be concise. No added credit will be awarded for answering extra questions. Some extra credit may be awarded for the clarity of your legal analysis and writing. Be sure to answer all of the subheading questions posed on the questions you choose to answer. Answer in essay form, if possible. (Note: If you select question three (3), please be aware that it contains two hypotheticals. You must address both and answer the questions that follow each.)

Note: Please be sure, if using software, to include your student identification number in the answer box on questions you choose not to answer.

RELAX AND GOOD LUCK

PART I: MULTIPLE CHOICE QUESTIONS: 30 %.

ANSWER ALL FIVE (5) QUESTIONS. NO CREDIT WILL BE AWARDED FOR EXPLANATIONS. DO NOT EXPLAIN YOUR ANSWERS.

1. A state grand jury investigating a murder learned that the key suspect might have kept a diary. The grand jury issued a subpoena duces tecum requiring the suspect to produce any diary. The subpoena made clear that the grand jury was seeking only the diary and not any testimony from the suspect. The suspect refused to produce the diary, citing the privilege against self-incrimination.

Under what circumstances, if any, could the grand jury compel production of the diary over the suspect's Fifth Amendment privilege?

- A. It may compel production without granting immunity because the suspect was not compelled to write the diary.
 - B. It may compel production if the suspect is granted use and derivative use immunity from the act of production.
 - C. It may compel production only if the suspect is granted transactional immunity.
 - D. It may not compel production of a private diary under any circumstances, the Supreme Court has definitively ruled.
-
2. A defendant was lawfully arrested without a warrant for a bank robbery. He was not given *Miranda* warnings but was immediately taken to a police station where he and five other men were placed in a lineup to be viewed by the bank teller. Each man was required to say the words spoken by the bank robber: "Give me all your money. I've got a gun." After all the men in the lineup spoke these words, the teller identified the defendant as the robber.

The defendant subsequently moved to suppress the testimony of the teller, claiming the lineup violated the privilege against self-incrimination. At a suppression hearing, the teller testified that she had not gotten a good look at the robber's face, because the robber had been wearing

a hat pulled down over most of his face, but that she was certain that the defendant was the robber because she had recognized his voice at the lineup.

Should the defendant's motion be granted?

- A. No, because being required to speak at the lineup, while compelled, was not testimonial or communicative.
- B. No, because the testimony of a witness based on firsthand observation is not subject to exclusion as fruit of the poisonous tree.
- C. Yes, because the defendant was compelled to speak at the lineup, and this compelled speech led to the witness's identification testimony.
- D. Yes, because the defendant was never informed of his *Miranda* warnings.

3. A defendant was charged with manslaughter. At a preliminary hearing, the magistrate dismissed the charge on the grounds that the evidence was insufficient. The prosecutor then brought the case before the grand jury. After hearing the evidence presented by the prosecutor, the grand jury refused to return an indictment. The prosecutor waited a few months until a new grand jury had been impaneled and brought the case before that grand jury, which returned an indictment charging the defendant with manslaughter. The defendant moves to dismiss the indictment on double jeopardy grounds.

Should the motion be granted?

- A. No, because jeopardy had not attached.
- B. No, because there had been no conviction or acquittal.
- C. Yes, because any proceeding after the preliminary hearing would violate double jeopardy.
- D. Yes, because bringing the case before the second grand jury was a violation of double jeopardy.

4. A defendant was charged with the capital offense of first-degree murder, for which the only available penalties were death or life in prison without parole. During the jury selection, the trial court, over the defendant's objection, granted the prosecution's for-cause challenge of five prospective jurors who indicated, upon questioning by both parties, that they were personally opposed to the death penalty and that they thought they could never vote to impose it. The jury convicted the defendant and, following a separate sentencing hearing, sentenced him to death.

On appeal the defendant's only argument was that excusing the prospective jurors violated his federal constitutional right to be tried by a jury chosen from a fair cross section of the community.

How should the appellate court rule on the conviction and the death sentence?

- A. Affirm both.
- B. Affirm the conviction, but reverse the death sentence and remand the case for a new sentencing hearing before a different jury.

- C. Affirm the conviction, but reverse the death sentence and remand for resentencing to life in prison.
 - D. Reverse both.
5. After a liquor store was robbed, the police received an anonymous telephone call naming a store employee as a perpetrator of the robbery. Honestly believing the actions were permitted by the U.S. Constitution, the police talked one of the employee's neighbors into going into the employee's home with a hidden tape recorder to engage him in conversation about the crime. During the conversation, the employee admitted committing the robbery. The employee was charged in state court with the robbery. He moved to suppress the recording on the grounds that the method of obtaining it violated his constitutional rights under the state and federal constitutions. Assume that a clear precedent from the state supreme court holds that the conduct of the police in making the recording violated the employee's rights under the state constitution, and that the exclusionary rule is the proper remedy for this violation.

Should the court grant the employee's motion?

- A. No, because the employee's federal constitutional rights were not violated, and this circumstance overrides any state constitutional provisions.
- B. No, because the police were acting in the good faith belief that their actions were permitted under the federal constitution.
- C. Yes, because the making of the recording violated the state constitution.
- D. Yes, because it is clear that the recording would violate the federal constitutional rights of the neighbor.

SECTION II: TRUE OR FALSE: 10 %.

ANSWER ALL FOUR (4) OF THE FOLLOWING QUESTIONS. NO CREDIT WILL BE AWARDED FOR EXPLAINING YOUR ANSWERS. DO NOT EXPLAIN YOUR ANSWERS.

- 1. The Sixth Amendment, based on the language of the amendment, as incorporated onto states' proceedings via the Due Process Clause of the Fourteenth Amendment, guarantees that a state

defendant, in a serious criminal case, has an absolute right to waive a jury and have the issue of guilt or innocence decided by a judge in a “bench trial.”

TRUE OR FALSE

2. It is not Constitutional error for a trial court to accept a guilty plea from a defendant where the case is strong against the defendant, the defendant enters the plea to avoid a greater sentence, and the plea is knowingly, intelligently, and voluntarily made, even if the defendant is unable or unwilling to admit participation in the crime.

TRUE OR FALSE

3. In the context of a search warrant, the Good Faith Exception to the Exclusionary Rule permits evidence which is found pursuant to the search warrant to be admitted against a defendant in a criminal case, as long as the police officer-affiant honestly, though unreasonably, subjectively believed that the warrant affidavit presented probable cause and believed that the warrant was valid at the time it was presented to the issuing magistrate.

TRUE OR FALSE

4. If police officers, when executing a search warrant, fail to comply with the knock and announce requirement of the Fourth Amendment all evidence found will be automatically excluded as a result of the violation under federal constitutional law.

TRUE OR FALSE

SECTION III: DIRECTED ESSAY SECTION: 40 %.

ANSWER ONLY TWO (2) OF THE FOLLOWING THREE QUESTIONS. BE SURE TO ANSWER ALL OF THE SPECIFIC DIRECTED QUESTIONS FOLLOWING EACH HYPOTHETICAL. NO CREDIT WILL BE AWARDED FOR AN EXTRA ANSWER. WHERE APPLICABLE, USE “IRAC.” SOME EXTRA CREDIT MAY BE AWARDED FOR THE CLARITY OF YOUR LEGAL WRITING AND ANALYSIS.

1. Lake Bubbles is a beautiful summer vacation spot in the State of Agitation, the fifty-first state in the Union. Each summer Robbie rents a little campsite area from the landowner, Lookinout, and parks his small van-sized camper, with a “pop-top” roof, there beside the lake. Robbie connects the van to the electrical outlet via an extension cord. The electricity is part of the deal. Robbie, a habitual marijuana user, sits by the lake in a lawn chair, fishing line in the water, puffing on a marijuana cigarette and relaxing. Marijuana is illegal to possess in the State of Agitation.

Robbie is approached by Lookinout, who says, “I went into your camper this morning and saw a big bag of marijuana near the stove. Stop with the marijuana or I’ll get in trouble and lose my business. Keep it up and I’ll call the cops.” Robbie, rather soothingly, assures Lookinout that he will stop smoking. But, the very next day, Lookinout observes Robbie sitting by the shore, fishing line in the water, smoking marijuana again. Lookinout calls Officer Atticus, identifies himself, and tells him about his observations in the van and of Robbie smoking. Officer Atticus arrives at the lake and approaches the van, as Lookinout waves him on with his arm. Atticus knocks on the van door which is opened by Wilma. Atticus says, “Ma’am, step aside. I believe an illegal substance may be in the van. I intend to search.” Wilma steps aside. Officer Atticus searches the van and finds no marijuana but does find a handgun, in a drawer in the little kitchenette area, with the serial number defaced, the possession of which is a crime in Agitation. Officer Atticus takes the gun.

Upon leaving the van with the gun, Officer Atticus observes Robbie coming out of the Lake Bubbles Clubhouse, one of those log cabins where all the campers can cook and use the restrooms. Officer Atticus goes to the clubhouse and searches it. In a kitchen drawer, next to the marshmallows and chocolate, he finds a large bag of marijuana.

It turns out that Wilma was once in a relationship with Robbie, but that it had ended years before. She was actually in the van to steal some hotdogs.

- a. Did the information Lookinout provided to the police constitute “probable cause” for the police to search the camper-van? What is probable cause? What is the Federal standard used in determining whether hearsay information presents probable cause? Discuss it and apply it to Lookinout’s information in this case and conclude whether Officer Atticus had probable cause to search the camper-van.

For extra credit, would the standard of evaluation be different under Massachusetts law?

- b. Would, in a motion to suppress, the court be able to even consider the information from Lookinout, based on how he entered into the camper-van? Define a search in the Federal constitutional sense. Would the “fruits” of Lookinout’s entry into the van be excluded? Why or why not?
- c. Under the circumstances, would the police have needed a search warrant for a lawful search of the camper-van, in any event? Why or why not?
- d. How might Wilma’s role affect the outcome, at least arguably, if, indeed, a search warrant was required or, if not, Officer Atticus lacked probable cause to search? Please discuss the

issues presented. Would her role affect the outcome in such circumstances? Why or why not?

- e. Did Officer Atticus act lawfully in taking the gun, assuming he was properly in the van to search for marijuana? Please explain the issues and apply the facts here to them, concluding.
 - f. Can Robbie bring a successful motion to suppress the bag of marijuana found by the police in the Clubhouse? What are the legal issues? Please discuss them and conclude, based on the hypothetical and the law.
2. Officer Abner suspects Brutus of the murder of Cal. Officer Abner arrests Brutus and charges him, via a complaint application, for the murder. Brutus is arraigned on the Murder and is appointed Attorney Addled. Due, mainly, to the weakness of the case, Magistrate Manfred releases Brutus upon the posting of \$5,000 cash bail. The case is continued for a preliminary hearing a month later.

Overwhelmed by an attack of conscience, Brutus returns to the police station, some eight days after his arrest, and asks to give a statement. Brutus is brought to the interrogation room by Officer Abner and placed in handcuffs. Officer Abner also informs the cuffed Brutus that he is free to leave if he wants. Officer Abner reads Brutus the *Miranda* warnings, correctly, from a card. Brutus initially says nothing. Officer Abner asks, "Bruty, old fellow, did you kill Cal?" Brutus responds, "I'm thinkin', now, maybe I shouldn't say nothin'." Officer Abner asks again, "Bruty, I know you killed him. Just admit it and you'll feel a whole lot better." Brutus says nothing for over an hour. Then he exclaims, "Ya, I killed Cal. He made fun of my pet frog, Croak."

It is later determined that Officer Abner did not have probable cause to arrest Brutus on the murder charge, though the judge found it was a close call. Brutus is indicted for the murder.

Prior to his later murder trial, Brutus, through counsel, files a motion to suppress the confession, which includes the following grounds:

- a. Brutus' first argument is that, since the arrest was not based on probable cause, his later confession was the "fruit of the poisonous tree" of the unlawful arrest. Generally discuss the arrest standards. What are the factors used to determine whether a later confession is the fruit of an illegality? Apply them to the facts here. Will Brutus be successful on this basis? Why or why not?
- b. Brutus' second argument for exclusion of the confession involves the *Miranda* issue. Brutus argues, firstly, that he asserted his right to remain silent and that Officer Abner did not respect the assertion. What are the standards on a claim of violation of an asserted right to silence in the *Miranda* setting? Assuming *Miranda* is applicable, would Brutus be successful on this argument? Why or why not?

- c. Thirdly, alternatively, Brutus also argues that his actions did not constitute an express waiver of his right to silence. Is that the only type of waiver that is valid? Discuss waivers, in general and in this context, assuming *Miranda* is applicable, and apply the facts here to the law in that regard and conclude on the issue of whether Brutus adequately waived his “*Miranda* rights.”
 - d. The prosecutor argues that no *Miranda* warnings were even necessary here. In what circumstances are *Miranda* warnings required, though? What are the thresholds for the “*Miranda* setting?” Please define them and discuss them, and conclude with respect to the circumstances here as to whether the *Miranda* warnings were necessary? Please explain your answer.
 - e. Brutus also argues that, apart from *Miranda*, his Due Process rights were violated and that, therefore, the statement should be excluded. Explain the likely argument. Define the standards. Is Brutus likely to succeed on this basis? Why or why not?
 - f. Brutus, lastly, argues that his Sixth Amendment Right to Counsel was violated since the police talked to him without counsel present. Discuss the Sixth Amendment issue, the standards, and conclude whether Brutus, in the circumstances, will succeed on this basis.
3. Basil has long been rumored to be the biggest heroin dealer in town. Basil is observed by Detective Cal, of the local police drug enforcement unit, operating his fancy sports car at a speed of thirty-five miles per hour in a posted twenty-five miles per hour zone. Speeding is a traffic offense in the state. Though Detective Cal would normally not be involved in traffic enforcement, since he was aware of the rumors, he put on the blue lights to “stop” Basil’s sports car.
- Basil sees the blue lights behind him and accelerates away. Detective Cal briefly gives chase and observes, as he is following Basil, Basil throw small, clear plastic bags containing brownish powder from the sports car. Detective Cal terminates the pursuit, stops and get out of his police vehicle and walks up to the bags. Cal, based on his training and experience immediately recognizes the powder in the bags as heroin. Detective Cal picks up the bags and secures them in the evidence locker at the station.
- Basil is later charged with the statutory offense of “Trafficking in Heroin.”
- Basil brings a motion to suppress the heroin, through counsel.
- a. Will he succeed? Please explain the issues, the legal standards and your conclusion.

For extra credit, would your analysis be different under Massachusetts law? Please explain.

- b. What, if any, relevance is the fact that Detective Cal's subjective motivation was to investigate Basil for drugs and normally would not be involved in traffic enforcement at all? Please generally discuss the concept and place it in context here.

For extra credit, how does Massachusetts law view this issue?

PART IV: SHORTER DIRECTED ESSAY QUESTIONS: 20%.

ANSWER ONLY TWO (2) OF THE FOLLOWING THREE QUESTIONS. NO CREDIT WILL BE AWARDED FOR ANSWERING EXTRA QUESTIONS. BE COMPLETE, BUT BE CONCISE. SOME EXTRA CREDIT MAY BE AWARDED FOR THE CLARITY OF YOUR LEGAL WRITING AND ANALYSIS.

1. Biff, who is indigent, is charged in a state court with the violation of a state statute, "Possession of a Member of an Endangered Species," here it's a "Leapin' Lizard." The possible penalty for possession under the statute is three months in jail.
 - a. Biff seeks a trial by jury, which is not permitted in the state on the charged offense. Is Biff entitled to a trial by jury, constitutionally, here as a matter of right? What is the standard? Please explain your answer.
 - b. Suppose Biff's request for the appointment of counsel is denied. Biff represents himself at a trial. Biff is convicted and receives a ten-day jail sentence. On appeal, Biff argues that being forced to represent himself, in the circumstances, violated the Constitution. Is Biff correct? What provision of the Constitution is involved? Explain the standard and your answer.

2. Mabel is represented by Attorney Olive. During plea discussions on a charge of Larceny, Attorney Olive repeatedly advises Mabel that if she pleads guilty to the charge and agrees to the sentence recommended by the prosecutor, which is one to three years in state's prison, she will serve no longer than a month incarcerated. In fact, state law is clear that Mabel will serve at least one full year before she is eligible for parole. After this consultation with Attorney Olive, Mabel pleads guilty and is sentenced to one to three years, pursuant to the agreement. The evidence on the charge was extremely strong against Mabel.

On her arrival at the prison, during processing, Mabel is shocked to learn that she must serve one full year before parole eligibility.

Mabel wants to argue that Attorney Olive's representation amounted to Ineffective Assistance of Counsel, and, that as a result, her plea was involuntary.

- a. What are the standards to be applied in an I.A.C. case, generally, under *Strickland v. Washington*? Discuss the legal standards and apply them to the facts here and conclude on Mabel's chances of success.
- b. Explain why, if the prosecutor argued that an I.A.C claim would not apply to the plea stage of the proceedings, he or she would be wrong.

3. NOTE: IF YOU SELECT QUESTION 3, BE SURE TO BE AWARE THAT THERE ARE TWO HYPOTHETICALS. YOU MUST ADDRESS BOTH AND THE QUESTIONS THAT FOLLOW EACH.

A. Dapper is on trial for murder. After ten days of jury deliberations, the deliberating jury sends Judge Jumpin a note which indicates that eleven of the twelve agree on a verdict. Judge Jumpin asks that the jury be brought to the courtroom. Over Dapper's objection, Judge Jumpin accepts the verdict, eleven of twelve voting for guilt.

1. Were Dapper's rights violated? What is the provision of the constitution in question? Please discuss the issue.

B. Bennie and Claude are co-defendants in a robbery case. Bennie gave a full confession implicating Claude, as participating in the robbery. At the joint trial of both defendants, the prosecutor offers, as evidence, Bennie's confession, which she wishes to use against both Bennie and Claude.

1. Generally, is this permissible? Why or why not?
2. Would it make a difference if the judge gave a limiting instruction to the jury that they could only consider the confession against Bennie, who made it? Why or why not?
3. Under what circumstances, if any, is it possible that such a confession could be used in evidence in a joint trial? Please discuss the issue and explain your answer.

CRIMINAL PROCEDURE EXAMINATION: SPRING 2021

H. Johnson

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You promise only to identify yourself by student number and not frustrate the anonymous grading system in any way.

You promise that you have no knowledge of the specific contents of the examination other than any instructions or information that may have been given out by your professor in advance.

The inclusion of your student number on your examination by you is your acknowledgement that you understand these requirements and promises and will abide by them.

STUDENT IDENTIFICATION NUMBER:

GENERAL INSTRUCTIONS:

The exam is *lengthy*. Take note of the point value of each section when budgeting your time. The basis of your answer should be Federal Law.

Extra credit will be awarded for Massachusetts law only where specifically asked for.

PART I INSTRUCTIONS: MULTIPLE CHOICE SECTION (30 POINTS): Answer **ALL FIVE (5)** multiple choice questions. No credit will be awarded for explanation of your answers.

PART II: DIRECTED ESSAY SECTION (70 POINTS): Answer **only FOUR OF SEVEN** directed essay questions. Isolate the issues, state the applicable rule of law, apply the facts to the law, and support your conclusions in answering the questions. Be complete; but be concise. Limited extra credit will be awarded for Massachusetts Law only where it is specifically asked for. No added credit will be awarded for answering extra questions. Limited extra credit will be awarded for the clarity and analysis of your writing.

NOTE: Please be sure to include your **student identification number** in the **answer box** on questions you choose **not to answer**.

PART III: EXTRA CREDIT SECTION (UP TO 10 POINTS): Answer both substantive questions asked as to both Federal and Massachusetts law for extra credit.

RELAX AND GOOD LUCK

PART I: MULTIPLE CHOICE: ANSWER ALL FIVE (5) QUESTIONS. (30 POINTS).

1. In a city, a number of armed bank robberies were committed near closing time by a masked man wearing a white hooded sweatshirt and blue sweatpants. Police saw a man wearing a white hooded sweatshirt and blue sweatpants pacing nervously outside one of city's banks before it closed. The police stopped the man and frisked the outer layer of his clothing for weapons, but found none. They asked the man what he was doing outside the bank and pointed out that he was wearing clothing similar to clothing worn by the perpetrator of recent robberies. After pausing for several moments, the man confessed. The police had not provided him with any *Miranda* warnings up to that point. The man was then placed under arrest.

After being charged with the robberies, the man moved to suppress his confession. The parties agreed, and the court properly found, that the police had reasonable suspicion, but not probable cause, to frisk and then to detain the man at all times before the man confessed.

Should the man's motion be granted?

- A. Yes, because the confession was the fruit of a Fourth Amendment violation, even though there was no *Miranda* violation.
 - B. Yes, because the confession was the fruit of a *Miranda* violation, even though there was no Fourth Amendment violation.
 - C. Yes, because the confession was the fruit of both a Fourth Amendment and a *Miranda* violation.
 - D. No, because there was neither a Fourth Amendment violation nor a *Miranda* violation.
2. On October 22, a police officer submitted an application for a warrant to search 217 Elm Street for cocaine. In the application, the police officer stated under oath in the affidavit that he believed there was cocaine at the location because of information supplied to him on the morning of October 22 by an informer. He described the informer as a cocaine user who had previously supplied accurate information concerning the use of cocaine in the community and summarized what the informer had told him as follows: the previous night, October 21, the informer was in the defendant's house at 217 Elm Street. The defendant gave her cocaine. She also saw three cellophane bags containing cocaine in the bedroom.

The warrant was issued and a search was conducted on October 22. The search turned up a quantity of marijuana, which is illegal in the jurisdiction, but no cocaine. The defendant was arrested and charged with possession of marijuana. The defendant moved to suppress the use of the marijuana as evidence contending that the informer was not in 217 Elm Street on October 21 or any other time.

If, after hearing evidence, the judge concludes that the statement attributed to the informer is incorrect, should the judge grant the motion to suppress?

- A. Yes, simply because the affidavit contains a material statement that is false.
- B. Yes, because of the false statement and the fact that no cocaine was found at the house.

- C. Yes, but only if the court finds that the informer's statement was a deliberate lie on the part of the informer.
 - D. Yes, but only if the court finds that the affiant included the statement in the affidavit knowing it was false or included it with a reckless disregard for the truth.
3. Boyfriend shot and seriously wounded his live-in girlfriend and fled the scene. Landlord having witnessed the scene called the police. On her way to the hospital, the girlfriend told the police that the boyfriend was hiding at his cousin's house. The police obtained a valid arrest warrant for the boyfriend and went to the cousin's house. On arriving, the police kicked in the door and without a search warrant entered the house and arrested the boyfriend. On searching the boyfriend after his arrest, police found a vial of heroin in the boyfriend's shirt pocket. The boyfriend was charged with attempted murder and possession of heroin. In a pretrial motion, he moved to suppress the heroin, claiming that the initial intrusion into the house was unconstitutional rendering the subsequent search and seizure illegal.

Should the court grant the motion?

- A. No, because the police found the heroin during a search incident to a valid arrest warrant and the boyfriend lacked "standing" to contest the search of the cousin's house.
 - B. No, because the search of the cousin's house was valid under the exigent circumstances exception.
 - C. Yes, because the police entered the house without a search warrant or consent.
 - D. Yes, because the vial could not have felt like a weapon.
4. A defendant was charged with manslaughter. At a preliminary hearing, the magistrate dismissed the charge on the grounds that the evidence was insufficient. The prosecutor brought the case before the grand jury. After hearing the evidence presented by the prosecutor, the grand jury refused to return an indictment. The prosecutor waited a few months until a new grand jury had been impaneled and brought the case before that grand jury, which returned an indictment, charging the defendant with manslaughter. The defendant moves to dismiss the indictment on double jeopardy grounds.

Should the motion be granted?

- A. No, because jeopardy had not attached.
 - B. No, because there was no conviction or acquittal.
 - C. Yes, because any proceeding after the preliminary hearing would violate double jeopardy.
 - D. Yes, because bringing the case before the second grand jury was a violation of double jeopardy.
5. Two defendants were being tried together in federal court for bank robbery. The prosecutor sought to introduce testimony from the first defendant's cellmate. The cellmate would testify that the first defendant had admitted to the cellmate that he and the second defendant had

robbed the bank. The prosecutor asked the judge to instruct the jury that the cellmate's testimony could be considered only against the first defendant.

Can the cellmate's testimony be admitted in a joint trial over the second defendant's objection?

- A. No, because the first defendant made the statement without *Miranda* warnings.
- B. No, because the limiting instruction cannot ensure that the jury will not consider the testimony in its deliberations regarding the second.
- C. Yes, because the first defendant's statement was made against his own interest.
- D. Yes, because the limiting instruction sufficiently protects the second defendant.

PART II: ANSWER ONLY FOUR (4) OF SEVEN (7). (70 POINTS).

***Be sure to include your student identification number in the answer box on questions you choose not to answer.**

1. (ANSWER a, b and c)

a. Hillary has been convicted by a unanimous jury in the State of Agitation, the fifty-first state in the Union, of the crime of Robbery. In accordance with Agitation law, the first level of appellate review is a matter of right. Hillary is indigent and has applied for the appointment of an attorney to represent her in the appeal. In accordance with a statute, a judge must review the transcript of the trial to make a determination of whether or not there is "some value" to the appeal before the state appoints counsel.

Is the statute requiring judicial review of the merits of the appeal claim before the appointment of counsel Constitutional? What are the Constitutional principles involved? Discuss the issue, the law and conclude analyzing the facts here.

b. The State of Dred, the fifty-first state in the Union, has a statute that permits conviction in a serious criminal case if a jury vote is 10 to convict with 2 voting not guilty. Is the statute Constitutional? What is the principle? Explain your answer.

c. Dan is under investigation for embezzlement. Detective Complacent is leading the investigation. Complacent decides, because of the amount of work that will be required in the investigation, to put the matter aside for a while. After two-and-one-half years, Detective Complacent decides he must act and completes the investigation within a month, and Dan is indicted for the statutory felony of "Embezzlement. You represent Dan. Dan wants to raise the issue of a violation of the Speedy Trial Right. What are the factors for consideration of whether or not a defendant's Right to a Speedy trial have been violated? Would the Speedy Trial right apply in these circumstances? Why or why not? What would be some of the other grounds to challenge the indictment regarding the delay in these circumstances? Explain the concepts.

2. Bobo is suspected of committing an armed robbery at the Pleasant Pines National Bank. Bobo is arrested by Pleasant Pines Police Officer Pill. Bobo is brought to the police station. At the station, Bobo is placed in a lineup with 5 other males. Bobo's height is five feet and three inches tall. The other five members of the lineup are well over six feet, five inches tall. Also, the others all have dark hair. Bobo has blonde hair.

Three witnesses from the bank are brought behind the one-way glass together. One says, "The short guy on the left is him." The other two chime in, "Ya. Ya. That's him."

Bobo is charged with the armed robbery.

Bobo, through counsel, files a motion to suppress the results of the out-of-court identification procedure at the police station. Will the motion to suppress be successful? Why or why not? Explain your answer.

What if the above-described identification procedure took place after Bobo had been indicted and arraigned on the armed robbery charge and his appointed attorney, Chatter, was not notified of the procedure? What other issues would that present? Identify the issue(s), the law and analyze the facts to reach your conclusion(s). Would your analysis on this point be the same if the identification was via a photographic array as opposed to an in-person lineup? Why or why not?

3. Chilblain is arrested by Officer Cutter of the Peyton Place Police Department for a felony larceny charge. Officer Cutter did not see the larceny, which involved the theft of a valuable painting by the noted Dutch artist, Remboom. However, Officer Cutter had received an anonymous call. The caller told Officer Cutter he had seen the painting in the local train station that very day, tucked behind the newsstand. The caller indicated that Chilblain showed it to him and stated, "I stole this from the museum. They'll never find it here. I have no connection with this place." Officer Cutter retrieved the painting, which was right where the caller said it would be, and then arrested Chilblain without an arrest warrant for a statutory charge of Felony Larceny.

At the station, Officer Cutter said the following to Chilblain: "Chil, you can keep quiet. If you say somethin' it'll go against you in court. You can get a lawyer. If you're broke we'll get you a lawyer." Chilblain nodded. Cutter says, "Do you wanna talk? Tell me about the painting." Chilblain says, after a ten-minutes of silence, "Ya, I took the Remboom. Hey, it's what I do."

During the ten-minute delay period, Officer Cutter had received notice in his earpiece from the desk officer that Chilblain's attorney, Addy, was at the station and asking to immediately speak to her client. Officer Cutter ignored the request.

Addy files a motion to suppress Chilblain's statement. Will it be successful? What are the issues presented by the hypothetical? Explain your answer discussing the issues presented, the rules of law, applying the facts and concluding.

For extra credit, with respect to the issue of counsel attempting to reach her client, what is Massachusetts law on the point?

4. Officer Strident is a stickler. Peter Piper passes Officer Strident's stationary position, traveling well within the speed limit. Strident had previously heard Peter Piper was selling illegal drugs. Officer Strident pulls his cruiser behind Piper and follows him. Piper looks in the rearview mirror and sees the cruiser behind him, fumbles, and loses control of the sports car, which completely crosses the center line of the roadway into the oncoming lane. Failure to stay in one's lane is a traffic offense in the jurisdiction. Officer Strident puts on the blue lights. Peter Piper pulls his sports car to a stop. Officer Strident approaches the car. Strident orders Peter, who is alone in the vehicle, to step from the car. Peter does. Officer Strident requests a license and registration from Peter. Peter complies and hands them to him. Officer Strident returns to his cruiser and consults the database regarding Peter's license status. The computer reveals that Peter's right to operate is suspended due to an unpaid ticket. In the state, operating after suspension of license carries only a fine as a penalty, but is an arrestable offense under the statute. To be on the safe side, Officer Strident radios Officer Cannie, who is the handler for drug-sniffing dog, Ulf. Officer Cannie is across town and it will take him about twenty-minutes to get to Strident's location. Officer Strident decides to wait and orders Peter to remain outside the car. After about twenty minutes, indeed, Cannie and Ulf arrive and Cannie walks Ulf around Peter's car. Ulf, whose certificates of training are all up-to-date, sniffing, signals positively that there are drugs in the trunk. Officer Strident reaches in and, using the lever in the passenger compartment, opens the trunk. There he finds a large bag of heroin. Peter is placed under arrest. Peter's sports car is towed from the scene to the police garage where the contents are inventoried, in accordance with written department policy. A closed container, found behind the back seat of the car, is opened, per policy, and an illegal firearm, a sawed-off shotgun, is found therein.

Peter Piper's attorney files a motion to suppress the heroin and the shotgun. Will the motion be granted as to the heroin? Why or why not? How about the shotgun? Why or why not? Note the issues presented by the hypothetical, the rules of law and apply the facts and conclude as to each.

5. Del is in trouble. Del is under indictment on a charge of Armed Robbery and about to face trial. Del is represented by Attorney Whisper. The prosecutor is Pummels. Pummels offers a plea deal to Whisper, to convey to his client, which will allow Del to plead guilty to the lesser included offense of Unarmed Robbery with a reduced sentence. Whisper advises Del, quite wrongly based on case law in the jurisdiction, that since he had a replica gun, he could not be convicted of the offense of Armed Robbery and had nothing to lose by going to trial. Del, accepting Whisper's advice, elects to take the case to trial. Del is convicted of Armed Robbery and sentenced to a lengthier term of imprisonment than that contemplated in the plea offer.

Del wants to raise the issue of Ineffective Assistance of Counsel. Why does the concept even apply in the context of plea advice? What are the issues to be considered under the Federal test? Using the standard, apply the facts to the law and conclude.

6. Officer Optic believes Cal Cultivator is growing marijuana, which is illegal to grow or possess in any amount in the state, in his basement. Optic acts to gain information so that he can apply for a search warrant at Cal's place. Firstly, Optic dresses up as a census taker, complete with false identity card. Officer Optic approaches Cal's door and knocks. Cal allows Optic into the residence on the pretense that he is a census taker, along with Cal's drug-sniffing dog, Nasal, whom Optic identifies as his therapy dog. In the brief conversation, Optic identifies his occupation as farmer, with a smile. Nasal sits and waves his paw, signaling the presence of drugs in the house. Though Cal is curious, he says nothing about Nasal's machinations. After a few moments, the visit ends as Nasal and Optic leave.

Optic proceeds to plan. Optic approaches Cal's neighbor, Cranky. Optic convinces Cranky to permit him, Optic, to sit on his, Cranky's, porch that night. As darkness settles in, Cranky can see into the basement window of Cal's residence from the Cranky's porch. Officer Optic sees Cal, through the window, lovingly tending some plants beneath a bright lamp. To get a better look, Officer Optic uses his binoculars which reveal the well-tended, apparently thriving marijuana plants in great detail.

The extremely thorough Officer Optic then takes the police department drone, with its little police decal, out and flies the drone at a height of four-feet off the ground and within a couple of feet of Cal's residence, snapping pictures outside the cellar window of the marijuana grow.

As a last measure, Officer Optic obtains a court order, with the assistance of the prosecutor, for the records of the local town electric company for customer usage information from Cal's address. The statute permits the issuance of the order based on only "a reasonable showing that the evidence may be relevant to a criminal investigation." Optic obtains the order and, consequently, the records. Cal's electric bills over the last months are astronomical.

Officer Optic intends to apply for a search warrant for Cal Cultivator's house. Has Optic violated Cal's Constitutional rights to this point based on the above facts? Discuss the standards and the issues, the rules of law, and apply the facts to conclude on the issues presented.

7. Aggie is arrested for a statutory crime of Theft, allegedly committed in the town of Pomp. Aggie is arraigned before Judge Jumpin and a bail of \$10,000 dollars is set, in part due to her considerable previous record. At her request, Aggie is appointed Ogden as her attorney at the arraignment. Aggie cannot make the bail and is held at the county jail. In order to find out more about the theft, the police arrange to have an informant, Ellie Ears, placed in the cell with Aggie. Ellie's instructions are to "listen, but do not ask any questions." Ellie says, "Hey, Aggie, are you going to beat the charge?" Aggie responds, "Well, I did steal the money. It's up to my lawyer Ogden to get me off."

Later, Aggie is visited by Detective Drainpipe from the nearby town of Circumstance Police Department. Drainpipe gives Aggie her *Miranda* warnings, reading them verbatim from a card. Aggie says, "I understand." Detective Drainpipe then says to Aggie, "Look, I don't want to ask about the theft in Pomp. But did you break into the mayor's house in

Circumstance and take his big-screen television. He won't shut up about missing the Red Sox." Aggie replies, "Yes. I didn't know it was the mayor's house. I like the Sox, too." Aggie is later charged on the Circumstance Burglary and Theft.

Aggie is represented by Ogden on both sets of charges. Ogden files a motion to suppress the statement to the informant on the first case and a second motion to suppress the statement to Detective Drainpipe on the second case.

Will either or both of the motions be successful? Why or why not? What are the issues, the rules of law? Apply the facts and conclude on each.

PART III: EXTRA CREDIT. ANSWER BOTH QUESTIONS. (UP TO 10 POINTS).

1. Describe the difference in the Massachusetts and Federal tests for determining whether an unnamed informant's information included in an affidavit in support of a search warrant presents probable cause. Discuss each test in your comparison.
2. Describe, in the context of a search warrant, the Federal standard for the "Good Faith Exception" to the Exclusionary Rule. What is Massachusetts law on the issue?