

violations, Snipes replied: "There are other things besides traffic laws." When defense counsel asked: "Isn't it true that you were interested in getting into that car to look for drugs;" Snipes replied, "That is possible."

Snipes stated that his questioning of Halper produced a single inconsistency with the information provided by Late (none of which involved any admissions of criminal wrongdoing). Late had said that he was employed as a janitor at a Walgreens, but Halper said that Late was unemployed. Snipes testified that as the conversation progressed, Halper became increasingly "nervous," and that Halper's "neck began to throb." According to Snipes, he then asked Halper for consent to search the car and Halper said, "okay." Snipes admitted that he did not use a written form for consent to search although he carried such a form in his patrol car; he did not advise Halper of Miranda rights or advise him that he was not required to give consent to the search; and that he did not attempt to obtain consent from Lionel Late despite the fact that he knew that Late was the owner of the car.

Snipes testified that Halper voluntarily got out of the car and waited silently outside the car with his dog while the car was searched. Snipes found a leather pouch on the floor of the back seat on the passenger side of the car. He opened the pouch in front of Halper and discovered two baggies of a white powdery substance that Snipes believed, and further testing confirmed, was cocaine. Snipes did not question Halper further and Halper said nothing to Snipes as the officer led him inside where Halper was placed in jail on charges of possession of cocaine.

Halper testified at the suppression hearing that, after he had received the car keys from Late, and he had started the car to drive to the bank; Officer Snipes arrived and told him to stop because "he had to search the car for narcotics." Halper testified that Snipes never asked him for permission to search and that Snipes asked him questions as he searched the car although Miranda warnings were never given. At the joint trial of Halper and Late on charges of cocaine possession, Halper testified on his own behalf that he had never seen the cocaine in Late's car and that he had never possessed, used, purchased, or sold cocaine. On cross-examination, the prosecutor asked Halper why he hadn't told Officer Snipes that the cocaine wasn't his when Snipes arrested him. Defense objections to this question were overruled and Halper stated that he "thought that it was better to talk to a lawyer before he said anything because he didn't want to get his friend in trouble."

On the same afternoon as the arrests of Late and Halper, Officer Snipes went to the jail cell where Lionel Late waited in custody, hoping that Halper would return with \$604. Without giving any warnings to Late, Snipes told Late that he had found cocaine in his car and that he "might as well admit it." Late told Snipes that the cocaine in a leather pouch belonged to him and to Halper. An hour later, Snipes took Halper to an interrogation room and asked him if he would give a complete statement about his involvement with drugs. Snipes gave Late a complete set of warnings required by 38.22 Texas Code of Criminal Procedure. Late's statement was transcribed by a stenographer who was present in the interrogation room. The written statement began with a statement of the complete warnings required by 38.22 Texas Code of Criminal Procedure. Late signed the statement in which he again admitted that he and Halper had purchased the cocaine that was in a leather pouch in Late's car at the time the car was stopped by Officer Snipes.

In the written statement, Late also admitted that more of the cocaine purchased by Late and Halper was located at Halper's apartment. Based upon this

information, Officer Snipes obtained a search warrant for the apartment at the address named by Late. Officers executing the warrant the next day, observed Halper's name on the mail box for apartment #6F, the apartment number given by Late in the written statement. The officer's knocked on the door to #6F, but when no one answered, they forced the door open. (The officer's had not expected anyone to answer because they had been told that Halper lived alone and Halper was in jail). The officer's went directly to a desk in the bedroom where Late had said the cocaine was stored. The officer's found a leather pouch in a desk drawer that contained several baggies of cocaine. Although the officers continued to search the apartment for 2 more hours, nothing of interest was discovered.

The day after Halper and Late were indicted for possession of cocaine with intent to deliver, on April 1, 1994, Officer Snipes took the "mugshot" photographs that had been taken of Halper and Late on the day that they were both arrested and presented them to several informants who worked for the police department. One of the informants stated that he recognized the two men as individuals who had purchased cocaine from an individual whom the police had been keeping under surveillance, Michael Miller. The informant stated that he had been in Miller's apartment on the night of March 12, 1994 when the two men in the photographs had given a large amount of cash to Miller in exchange for what appeared to be cocaine. The informant stated that the two men had been in the apartment for more than an hour while the informant was there and that he had observed them both at close quarters. The informant testified that he had attempted to pay close attention to the appearance of the two men because he was paid to help obtain evidence for drug convictions, although he had made no written record of a description of the two men nor had the informant notified anyone in the police department about the two men who were introduced by their first names as "Lionel and Howard." The informant stated that he was certain that the photographs were of the two men that he had met in Miller's apartment.

Only two photographs were shown to the informant, who testified at trial because he was no longer doing undercover work for the police department. After Howard Halper testified at trial that he had never possessed, used, purchased, or sold cocaine; the prosecution presented testimony by the informant that he had observed two men, whom he identified as the defendants Howard Halper and Lionel Late, purchase cocaine from Michael Miller on March 12, 1994 at Miller's apartment. The informant also testified that he had identified Halper and Late when photographs of them were presented to him on April 1, 1994. Defense objections to this testimony was overruled.

On appeal from convictions of Halper and Late on charges of possession of cocaine with intent to deliver, the appellants argue that the convictions should be reversed on 5 grounds:

- (1) Appellants argue that the trial court erred by denying the motion to suppress and admitting evidence of the cocaine found in Lionel Late's car;
- (2) Appellant Howard Halper argues that the trial court erred by overruling his attorney's objection to the cross-examination concerning his failure to tell Officer Snipes that the cocaine belonged to Late when Halper was arrested;
- (3) Appellants argue that the trial court erred by denying defense motions to suppress the written statement given by Lionel Late;

(4) Appellants argue that the trial court erred by denying defense motions to suppress the cocaine found in the desk at the apartment of Howard Halper;

(5) Appellants argue that the trial court erred by overruling defense objections to the identification of Halper and Late at trial and the testimony concerning the informant's identification of their photographs prior to trial.

In a brief memorandum, identify likely defense and prosecution arguments on these 5 points of law and how you would rule on them if you were an appellate court judge. Be sure to explain your conclusions.

PART II. Essay Question

You have 90 minutes to answer this portion of the exam, which consists of a five-part essay question worth 50 points (five 10-point questions). Please write your answer in the bluebook(s) that will be provided to you with the exam question. Please write your answer with a blue or black ink pen or type your answer. For part two of the exam only, you may use your textbook, notes, or any other material that you have prepared, borrowed, or purchased. Good luck!

Part Two. Essay Question. 50 Points

Waldo White, a police officer in the small town of Pleasanton, Texas received an anonymous phone call stating that Bill Black had killed his wife and the police should investigate. The caller, who sounded to White like a woman, hung up without providing any additional information. White knew just about everybody in town, including Bill and Martha Black, who attended Waldo's church. Waldo knew that Bill and Martha had purchased a home with a couple of acres of land five years earlier and had lived quietly in Pleasanton since that time. Waldo recalled that he had seen Bill in church without Martha last Sunday, which Waldo considered to be unusual because Martha's attendance at church was generally more regular than Bill's.

Waldo decided to drive to the Black home. Bill Black invited Waldo inside after he knocked on the door. The two men conversed about the hot summer weather for a few minutes until Waldo mentioned that he hadn't seen Martha for awhile. Waldo observed Bill carefully as he responded. It appeared to Waldo that Bill became very nervous, began to sweat, and to avoid eye contact with Waldo. Bill said that Martha had decided to visit her Mother, who lived in a cooler climate and who had been ill recently. When Waldo asked where Martha's mother lived, Bill seemed to hesitate before answering and then said: "Iowa, er I mean Ohio." When Waldo asked how long Martha would be visiting in Iowa, Bill said that he wasn't sure but that it might be for a long time. Bill didn't correct Waldo about the state Martha was visiting. Waldo said nothing for a minute and Bill said, "I'm not sure that she is coming back, we've been having some marital problems." In fact, Bill stated that he planned to sell their house and move back to his home in Texarkana, Texas.

Waldo said that he was sorry to hear about the family problems, wished Bill good luck, and left. Waldo was suspicious about Bill's behavior and decided to investigate further. Waldo called a neighbor of the Black's who stated that she knew that Martha Black's mother had died 5 years ago. The next day, Waldo observed a "for sale" sign in front of the Black home. When there was no response to his knock, Waldo called the realtor who was listed on the sign and found out that Bill had left town and had given his brother's address in Texarkana as a forwarding address.

Waldo was convinced that Bill had killed his wife and he decided to borrow a bulldozer from his brother who worked for a construction company and dig holes in the backyard of the Black home. After digging about 8 holes and finding nothing, Waldo uncovered the body of Martha Black while digging the ninth hole, which was about 30 yards from the back door of the house in a yard with an enclosed fence.

Waldo immediately called police officers in Texarkana and asked them to arrest Bill Black, stating that they should start looking for him at the home of Bill Black's brother. Police officers went to the home and were informed by the wife of Bill's brother that Bill and his brother were visiting an old high school friend a few blocks away. The Texarkana officers, who did not have a warrant of any kind, went to the home and knocked on the door. When someone opened the door, several officers pushed inside looking for Bill Black who they hoped to identify by the picture that had been faxed to them by Waldo White. When the officers saw a man who looked like Bill Black, they walked up to him and conducted a pat-down search. The arresting officer detected a hard object in Bill's pocket and reached in and removed a gun (through ballistics tests, the gun was later determined to be the gun that had been used to kill Martha Black). The man in question was Bill Black and he identified himself for the officers.

The arresting officers took Black into custody and transported him to the local police station. The officers gave Black warnings that complied with the requirements of 38.22 Texas Code of Criminal Procedure. Bill responded by saying, "I don't think I should talk until I've had a chance to talk to somebody." The officers did not ask Bill any questions and he was transported to the jail in Pleasanton without being asked any questions. The next day, Bill Black appeared before a judge, who again warned him of the rights contained in 38.22, set bail at an amount that made it financially impossible for Bill to obtain a bail bond, and inquired whether Bill had an attorney. Bill said that he did not and requested the court to provide him with one. The court determined that Bill was indigent and appointed a local attorney to represent Bill and the attorney visited him in jail the same day, advising Bill not to make any statements about the alleged offense without contacting her.

Despite this advice and despite new warnings that conformed to the statutory language in 38.22, when Waldo White suggested that Bill "could do the Christian thing and seek forgiveness," Bill admitted that he had killed his wife but that he had done so in self-defense after she attacked him with a knife. Bill became very emotional and also admitted that he had killed Martha's sister Nancy Niles, who lived in San Antonio, because she had been visiting on the night of the killing and she had threatened to call the police. Bill said that he had panicked and killed Nancy and had thrown her body into a creek.

White and a team of officers went to the creek and found the body of Nancy Niles and an autopsy demonstrated that she died from gunshots inflicted by the same gun that had killed Martha Black. As the officers worked to retrieve Nancy's body, a 17-year-old, Paul Peters, came up to Waldo White and told him that he had seen a man throw a large bundle into the creek on July 17th, which Waldo knew was the night of the double murder. Peters said that he was about one hundred feet away from the man but that he could see pretty well because there was a full moon that night. Peters described the man as being about six feet tall and a having a medium build. Waldo White showed Peters a photograph that he had in his pocket of Bill Black (the same one that he had faxed to the officers in Texarkana). Peter's studied the picture for a minute and said, "I think that's the guy I saw." Peters later informed the prosecutor that he would testify in court that he saw Bill Black, the man Peters saw in the picture given to him by Waldo and who he later saw on television news reports, on the night of July 17th dumping a large, heavy bundle into the creek.

Prior to Bill Black's double murder trial, Black's appointed counsel files motions to suppress the following evidence:

(1) any testimony concerning the discovery of the body of Martha Black in the Black backyard and the results of the autopsy and scientific tests conducted on the body;

(2) the gun found in Bill Black's pocket when he was arrested in Texarkana;

(3) Black's statement to Waldo White that he had killed Martha and that he had killed Nancy;

(4) any testimony concerning the discovery of the body of Nancy Niles in the creek and the results of the autopsy and scientific tests conducted on the body;

(5) any testimony concerning the identification of the photograph of Bill Black by Paul Peters and any identification at trial by Peters of Black as the man who dumped a large, heavy bundle in the creek on the night of July 17th.

As the trial judge, write a brief memorandum ruling on these motions and explaining the reasons for your rulings.

[End of Part Two].

PART II. Essay Question

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Part Two. Essay Question. 50 Points

Police Officer Carl Clemons, a member of the San Antonio Police Department, was parked on the side of the road on a Friday night in an area in which several taverns were located. It was shortly after mid-night when a green Ford automobile pulled beside Officer Clemons's marked police vehicle. The driver of the Ford, a middle-aged man, told the officer that he had just observed a black Cadillac with two men weaving all over Elm Street, which was parallel to the street where Officer Clemons was parked. The man said that two men were in the vehicle, and that the driver was wearing a cowboy hat. The man said that the Cadillac had nearly hit his car. Although the man did not notice the driver's license number of the car, he told Officer Clemons that the car had a bumper sticker that referred to the "Texas A & M Aggies."

Officer Clemons asked the driver to pull off to the side of the road and wait while he investigated. Clemons assured the driver that he would return shortly and that the driver should wait until he returned. Officer Clemons observed the driver pull over to the side of the road as Clemons sped away. After less than two minutes of Officer Clemons's arrival on Elm Street, Clemons observed a black Cadillac with two male occupants. The driver of the car wore a cowboy hat. Although Clemons did not see a bumper sticker relating to Texas A & M University, the back window of the car had a sticker advertising "Aggie Pest Control." Despite the fact that the Cadillac was not speeding and Officer Clemons did not observe the car violating any traffic laws, Clemons activated his siren and lights.

The black Cadillac pulled over immediately. When Clemons spoke with the driver of the car, he noticed that the driver, Tex Talbert, had slurred speech, blood-shot eyes, and the odor of alcohol on his breath. Clemons ordered Talbert out of the car. Talbert complied and was placed in Clemons's squad car after failing a field sobriety test and after a pat-down search in which nothing was detected by Clemons that aroused his suspicion. Clemons also ordered the passenger, Peter Pass, out of the car. In a pat-down search of Pass, Clemons detected a hard metallic object in Pass's coat pocket. Clemons removed a metal case that appeared to be for eye glasses and opened it. Inside, Clemons saw a clear baggie containing a white powdery substance that Clemons believed was cocaine. Later testing validated Clemons's belief. Pass was also arrested and placed with Talbert in back of Clemons's squad car.

By this time, back-up officers had arrived to secure the scene. One of the officers was dispatched to find the man who drove the Ford and had provided information about the black Cadillac. However, the man had apparently left and was never located by the police. Police officers on Elm Street conducted a search of the black Cadillac, which they learned was registered to Talbert. The officers did not ask for permission to search the vehicle, but removed the keys from the ignition in order to open the locked glove compartment and trunk. In

the glove compartment the officers found several more baggies containing a white powdery substance that later tested positive as cocaine. In the trunk of the car, officers found several stereo components and a small color television as well as a wallet containing money and credit cards bearing a name other than Talbert's or Pass's. A serial number taken from the television matched a television that had been stolen in a recent burglary.

In the squad car, Clemons gave warnings to both Talbert and Pass that fully complied with the requirements of Miranda and 38.22 of the Texas Code of Criminal Procedure. When Clemons asked if either of the men wished to make a statement, Pass did not respond at all and Talbert said: "First I should talk to my cousin Mary who is a law student at St. Mary's University." Clemons did not question either man until they had been transported to the police station and fingerprinted and photographed. However, about an hour after the arrest, Clemons took Talbert to an interrogation room and again gave Talbert the identical warnings that had been recited by Clemons in the squad car. This time, Talbert agreed to talk and admitted that he and Pass had purchased a kilo of cocaine both for their own use and to sell. Clemons asked no questions about the stolen items in the trunk. Talbert's oral statement was transcribed and a transcript of the statement was signed by Talbert after he read it and agreed that it was accurate. The written form signed by Talbert contained a full set of the admonishments required by 38.22 of the Texas Code of Criminal Procedure.

The day after both Talbert and Pass were indicted on charges of burglary and possession of cocaine with intent to deliver (approximately one month after their arrests), but before counsel had been appointed, Officer Clemons went to Pass's jail cell and, after providing a full set of warnings that complied with 38.22, asked Pass if he wished to make a statement concerning the burglary that he and Talbert had committed. Pass responded, "I want to talk to Talbert first." Clemons agreed to take Pass to Talbert's cell and allow them to talk, but Clemons stated that he would have to remain in the cell with both men. After Clemons escorted Pass to Talbert's cell, Pass asked Talbert if they should make a statement to the police. Talbert responded, "We might as well. They found the stolen goods in my car."

A week after the indictment, two photographs of Talbert and two photographs of Pass that were taken at the jail on the night of the arrest were placed in a photographic line-up along with mug-shot photographs of five other men, two of whom resembled Talbert and one resembled Pass. Only Talbert and Pass had two photographs each in the nine photograph line-up. A neighbor who lived next door to the home that Talbert and Pass allegedly burglarized reviewed the photographs and stated that one of the photographs of Talbert and one of the photographs of Pass "looked like" the two men that he had seen running from his neighbor's home on the night of the burglary. Neither the attorney for Talbert nor the attorney for Pass were invited to attend the identification proceeding. Although the neighbor only learned later that his neighbor's home had been burglarized, the neighbor-witness stated that he had watched both men carefully for several seconds from his driveway, a distance of about 50 feet because he had never seen either in the neighborhood before. Although the incident occurred in the evening, there was a full moon that night and there was a bright street light directly in front of the neighbor's home. The neighbor had earlier said that one of the men was about six foot, two inches tall and the other was about five foot six inches tall and that both men had "medium builds." On the night of the burglary, the neighbor had stated that he had not been able to see the faces of either men for a long enough period of time to describe their facial characteristics. Talbert is exactly six feet tall and weighs 220 pounds while Pass is five and a half feet tall and weighs 135 pounds.

Assume that the defense has filed several suppression motions prior to the joint trial of Talbert and Pass for burglary and possession of cocaine with intent to deliver. Assume further that, as a research assistant to the trial judge, you have been asked to write a brief memo concerning the admissibility of the following anticipated evidence that is the subject of defense motions to suppress:

- (1) the cocaine found in the pat-down search of Pass;
- (2) the cocaine and stolen goods found in the search of Talbert's car;
- (3) the statement by Talbert admitting his involvement with Pass in cocaine possession and delivery;
- (4) the possible testimony by Clemons concerning the statement he heard by Talbert made to Pass concerning the burglary;
- (5) the potential testimony by the neighbor concerning his identification of the photographs of Talbert and Pass and his potential in-court identification of them as the men that he had seen running from the burglarized home.

Be sure to explain your conclusions.