QUESTION 5

On June 15, 1997, Dave Defendant and Alex Accomplice entered Mega Store and shopped for about one hour. As Defendant and Accomplice approached Mega's exit, Mike Manager stopped them and ordered them to come with him to his office in the back of the store. With the door shut, Manager accused Defendant of stealing diamond earrings, questioning him for twenty minutes. Defendant stated that he did not take anything from the store, but he refused to be searched saying, "We're wearing shorts and T-shirts. Any fool can see we don't have anything." Manager then questioned Accomplice, who simply stared at him and said nothing. After a few more minutes, Manager allowed both to leave the store.

Defendant and Accomplice went straight to the parking lot and got in Defendant's brand new sports car. Defendant drove and Accomplice sat in the right front passenger seat. Defendant sped out of the parking lot, turning left in front of Olive Officer, a local police officer. Officer followed Defendant for two blocks, noticing that Defendant's right tail light was not working, in violation of a city ordinance. Officer thought Defendant looked suspicious because he appeared too young to be driving such an expensive car. Because of this suspicion about Defendant, Officer activated her lights and siren to stop Defendant.

Defendant immediately stopped his car. Officer approached Defendant and said, "Where did you get a car like this, kid?" Although Officer could see that neither Defendant nor Accomplice was armed, she ordered both to exit the car and stand on the sidewalk while Officer wrote a citation for the broken light. After checking for outstanding warrants, and finding none, Officer handed Defendant the traffic citation, and asked him to consent to a search of the vehicle. Defendant agreed. During her search, Officer found two pairs of diamond earrings under the front seat – one under the driver's side and one under the passenger's side. The earrings matched the description of jewelry just reported stolen from Mega Store. Officer then arrested Defendant and Accomplice.

On the way to jail, Officer remarked, "Nice day, isn't it, guys? I love it when it gets above 70." Accomplice then said, "You can't arrest us; we paid for those earrings!"

QUESTIONS:

1. Explain whether the statements Defendant made to Manager may be suppressed at trial.

2. Explain whether the statements Accomplice made to Officer may be suppressed at trial.

3. Explain whether the diamonds may be suppressed at trial.

DISCUSSION FOR QUESTION 5

DEFENDANTS STATEMENTS TO MANAGER

Miranda warnings are required for any person before a police custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436 (1966). The warnings are not required when there is no government conduct. See, e.g., Illinois v. Perkins, 496 U.S. 292 (1990). Mike Manager is not a police officer and was not acting under color of state law. Therefore, Manager was not required to give Miranda warnings before asking questions of Defendant. Defendant's statements to Manager are admissible despite the absence of Miranda warnings.

ACCOMPLICE'S STATEMENTS TO OFFICER

Police officers are required to give Miranda warnings before questioning any arrestee. However, Officer did not interrogate Accomplice before his statement. Although interrogation can include not only questions, but also any statement designed to elicit an incriminating response, asking about the weather does not fall into that category, and Alex's statement is admissible.

DIAMONDS

1. Traffic Stop

If Olive's initial stop of the vehicle was invalid, then all the flows from that illegality must be suppressed as "fruit of the poisonous tree." Olive's reason for stopping the car - that Dave seemed too young to be driving an expensive car - was not a legitimate basis on which to stop a vehicle. However, an officer's motive for a traffic stop does not invalidate otherwise objectively justifiable conduct under the Fourth Amendment. Whren v. United States, 116 S.Ct. 1769 (1996). An officer's subjective intent in making a stop is irrelevant under the Fourth Amendment. Whren. If a police officer has probable cause to believe a violation has occurred, the stop is valid. Whren. The broken brake light provided an objective reason for the stop, which is therefore permissible under the Fourth Amendment, despite Olive's invalid subjective reason.

Police officers have discretion to order passengers out of cars stopped for routine traffic violations even when an officer has no reason to suspect a passenger has committed a crime or threatens the officer's safety. Maryland v. Wilson, 117 S.Ct. 882 (1997). Oliver did not act inappropriately in ordering Dave and Alex from the car.

2. Consent

Any warrantless search without probable cause must fall within an exception to the Fourth Amendment. Although there is an automobile exception, this requires probable cause, which Olive clearly did not have. The other relevant exception is that the search was conducted pursuant to a knowing and voluntary consent. A police officer may ask motorists detained for traffic violations for permission to search their cars without advising them that they have the right to refuse. Ohio v. Robinette, 136 L.Ed.2d 347 (1996). Olive did not violate Dave's rights by asking for his consent or by searching pursuant to that consent.

3.Standing

To challenge a search under the Fourth Amendment, the defendant must have standing. This means that the defendant must have a reasonable expectation of privacy in the place searched or of the item seized. A defendant can only challenge the search if it violates his or her own reasonable expectation of privacy. Rakas v. Illinois, 39 U.S. 128 (1978). Defendant had a reasonable expectation of privacy in his car, but Alex had none. Dave has standing to challenge the search; however, the seizure of the diamonds violated none of Alex's constitutional rights, and are clearly admissible against Alex. Accordingly, the diamonds are admissible against both Dave and Alex.

Examinee # _____

Final Score _____

SCORESHEET FOR QUESTION 5
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1.	Recognize Miranda issues.	1. _____
2.	Miranda applies to custodial interrogations.	2. _____
3.	Recognize issue of government action/color of state law.	3. _____
4.	Miranda requires interrogation (statement designed to elicit a response).	4. _____
5.	To challenge a search under the Fourth Amendment, a defendant must have standing.	5. _____
6.	Alex has no standing to challenge the search of the car because he has no reasonable expectation of privacy under Dave's front seat.	6. _____
7.	Officer's subjective reasons for the stop are irrelevant if there is an objective reason to support the stop.	7. _____
8.	Recognize issue that Officer had a lawful reason/probable cause for the stop because of the broken light.	8. _____
9.	A police officer may order the driver and the passengers of a stopped vehicle to exit the vehicle during a traffic stop.	9. _____
10.	To be valid, a police search must be pursuant to a warrant and probable cause, unless it falls within a recognized exception to the Fourth Amendment.	10. _____
11.	Recognize consent an exception to the Fourth Amendment.	11. _____
12.	The police need not advise a suspect that he has the right to refuse to consent.	12. _____

QUESTION 6

Sam Jones was found shot to death in his house. His wallet and a pistol with his name on it were missing, but there was no sign of a forced entry. Officers Brown and Richards talked to the neighbors who could only tell them that they had seen no one but a plumber from A-1 Plumbing at Jones' house that day. Brown contacted A-1 and determined that the plumber who was at Jones' house was Mark Smith.

Officers Brown and Richards then went to Smith's house. As they approached the house, they observed a man leaving through the front door. When the man identified himself as Smith, Richards pushed him up against the wall and patted him down. Richards felt what he thought was a pistol and removed it from Smith's pocket, at which time he noticed it had Sam Jones' name on it. Continuing with the pat down Richards felt a wallet, pulled it out of Smith's pocket, looked at its contents, and discovered a credit card issued to Sam Jones.

QUESTION:

Discuss the admissibility of the pistol and the credit card at Smith's murder trial.

DISCUSSION FOR QUESTION 6

The pistol and credit card could be excluded from evidence at Smith's trial if they were the fruit of an illegal search and seizure under the Fourth Amendment. Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407 (1963); Murray v. U.S., 487 U.S. 533, 536-37, 108 S.Ct. 2529, 2533 (1988). Whether the officers violated the Fourth Amendment depends on how much information they had and how intrusive their conduct was.

The first issue concerns how much information the officers had. In order to make a valid arrest the officers needed probable cause to believe that a crime had been committed and the person being arrested committed it. In order to make an investigatory stop, however, the officers only need a reasonable or articulable suspicion. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Here, it seems doubtful that they had probable cause to believe Smith murdered Jones. The fact that Smith was at the murder scene that day, that no one else was seen, and that the murderer was possibly let in the house would, however, seem to lead to a reasonable suspicion of Smith's involvement. Thus the officers were justified in engaging in an investigatory stop of Smith.

The inquiry then turns to how extensive a search can be conducted pursuant to an investigatory stop. Under Terry v. Ohio the officers are permitted to conduct a limited frisk of the person for weapons if there is reasonable suspicion to believe the person is armed and presently dangerous. Since the officers had a reasonable suspicion that Smith may have been involved in the murder, it seems fair to say they could also believe Smith was armed and dangerous. The frisk for a weapon, then, was valid, and the gun would subsequently be admissible in court.

The search which discovered the wallet could not be justified under Terry because it went beyond a limited search for weapons. However, because the officers first found the pistol with Jones' name on it, the officers would have probable cause to arrest Smith for the murder of Jones. Upon arrest the officers could conduct a more extensive search incident to arrest which would allow them to look in Smith's wallet. In the case of a lawful custodial arrest, full search of arrestee's person is not only an exception to the warrant requirement of the Fourth Amendment but is also a "reasonable" search under that Amendment. U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973).

Examinee # _____

Final Score _____

SCORESHEET FOR QUESTION 6
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

SCORE SHEET

1.	Evidence will be suppressed if seized in violation of Fourth Amendment.	1. _____
2.	Probable cause is needed for an arrest.	2. _____
3.	Reasonable or articulable suspicion of criminal activity is needed for an investigatory stop.	3. _____
4.	A stop is less intrusive than an arrest.	4. _____
5.	A frisk is allowed if there is reasonable suspicion that a person is presently armed and dangerous.	5. _____
6.	The frisk is limited to a search for weapons.	6. _____
7.	The search of the wallet could not be justified as a frisk.	7. _____
8.	The search of the wallet could be justified as a search incident to arrest.	8. _____

QUESTION 4

Officer Oliver was staking out a burnt out, boarded up building that was used as a drop off point for drug transactions. A little after midnight, Officer saw Dave Defendant go into the house. He had seen Defendant go in and out of the house on previous occasions. Fifteen minutes later, Defendant came out carrying a small package and placed the package in the trunk of his car. After Defendant got in the car, but before he could drive off, Officer stopped him. Officer then searched the car and found the package in the trunk. It contained a kilo of heroin. Officer then arrested Defendant.

QUESTION:

Discuss Defendant's constitutional rights with regard to prosecution for possession of a controlled substance.

DISCUSSION FOR QUESTION 4

Under the Fourth Amendment exclusionary rule, evidence derived from a warrantless search must be suppressed unless it fits within one or more of the six exceptions to the warrant requirement. Michigan v. Tyler, 436 U.S. 499 (1978). Here, because Officer Oliver did not obtain a *warrant to* search Dave's car, the exceptions must be examined.

The first possible exception is for a "search incident to a lawful arrest." Weeks v. U.S., 232 U.S. 383 (1914). The question whether a search prior to the actual arrest fits with this exception has been left open by the Supreme Court. Michigan v. Long, 463 U.S. 1032 (1983). Even if the exception covered such situations, it would not apply here because it only extends to searches of the passenger compartment, and not to the trunk. New York v. Belton, 453 U.S. 454 (1981).

The second possible exception is the "stop and frisk" exception, which requires the officer to have an articulable and reasonable suspicion of criminal activity and is limited to a protective frisk for weapons. Terry v. Ohio, 392 U.S. 1 (1968). When the suspect is in an automobile, the protective frisk extends to the passenger compartment of the car. Michigan v. Long, 463 U.S. 1032 (1983). Here, Officer Oliver's previous observations of Dave going in and out of the house and seeing Dave bring a small package out constituted an articulable and reasonable suspicion of criminal activity. Ker v. California, 374 U.S. 23 (1963). Nonetheless, there is no indication he thought Dave was armed, and, in any event, his search went beyond the passenger compartment.

The third possible exception is the "plain view" exception. Coolidge v. New Hampshire, 403 U.S. 443 (1971). To fit within this exception 1) the police must legitimately be on the premises, 2) inadvertently discover the fruits of the crime, and 3) see the evidence in plain view. Id. Here Officer Oliver was legitimately on the premises and stopped Dave because he had an articulable and reasonable suspicion that criminal activity was taking place. However, he could not have inadvertently seen the heroin in plain view, as it was wrapped up in the trunk.

The fourth exception is the "consent" exception, which requires that consent be voluntarily given before a search commences. Zap v. U.S., 328 U.S. 624 (1946). Here, no consent was given.

The fifth exception is the "hot pursuit/evanescent evidence" exception. Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966). It does not apply here because Officer Oliver did not have to pursue Dave and there was no reason to believe that the heroin was going to be destroyed immediately.

The final possible exception is the "automobile" exception, which requires that the officer have probable cause to believe the vehicle contained evidence or instrumentalities of a crime before he searches it. Carroll v. U.S., 267 U.S. 132 (1925). It is not limited to the passenger compartment, but extends to the trunk and packages within it. U.S.v. Ross, 456 U.S. 798 (1982). Here, because Officer Oliver had probable cause prior to the search, see Ker v. California, 374 U.S. 23 (1963), and the heroin was found in the trunk, the automobile exception is met and the heroin is admissible.

44067

Essay 4 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Fourth Amendment prohibits search and seizure absent a warrant or an exception. 1. _____

2. Exclusionary Rule prohibits the admission of evidence seized in violation of the 4th Amendment. 2. _____

No warrant, so seizure must fit within one of six exceptions:

3. Search incident to a lawful arrest exception. 3 _____

   3a. Search incident to a lawful arrest exception only encompasses search of passenger compartment and not trunk. 3a. _____

4. Stop and frisk exception. 4. _____

   4a. Police must have articulable and reasonable suspicion of criminal activity. 4a. _____

   4b. Limited to protective frisk for weapons. 4b. _____

   4c. Further limited to the passenger compartment of a vehicle. 4c. _____

5. Plain view exception (not applicable). 5. _____

6. Consent exception (not applicable). 6. _____

7. Hot pursuit or evanescent evidence exception (not applicable). 7. _____

8. Automobile exception. 8. _____

   8a. Police must have probable cause to believe vehicle contains evidence of crime before the search is made. 8a. _____

   8b. Covers entire car, including packages in trunk. 8b. _____

QUESTION 8

Vicki Verity was at home when Sam Smooth knocked on her door and asked to use her phone. Despite some apprehension, she let him use the phone, but watched him closely. Upon finishing his call, Sam pulled out a knife, grabbed Vicki, threatened her, and assaulted her. After Sam left Vicki's, she called the police and gave a detailed description of Sam including his height, weight, age, and his hair color and length. She also reported that he had an earring in his ear, and the type of clothing he was wearing.

An officer responding to Vicki's call observed a male who matched the description perfectly. He stopped and called to Sam who was across the street. Sam came across the street and the officer placed him under arrest. Sam was taken to the police station and photographed.

Another officer brought Vicki to the police station. She was informed that an arrest had been made of a suspect matching the description she had given. She identified Sam from a photo line-up. He was the only person wearing clothes exactly matching her description. After she identified Sam's picture, a police officer told her she had picked the person they had arrested.

At a suppression hearing approximately two months after the assault, Vicki identified Sam as her assailant. She testified that she had observed him for approximately ten minutes before and during the assault, and the in-court identification was based on that observation. She was certain that Sam was the person who had assaulted her.

QUESTION:

Discuss the constitutional issues that Sam's attorney can argue in favor of suppressing Vicki's identification of Sam, the prosecution's response, and the court's likely rulings.

DISCUSSION FOR QUESTION 8

An out-of-court pretrial identification by a witness of an accused can be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it denies a defendant due process of law under the Fourteenth Amendment. Stovall v. Denno, 388 U.S. 293, 301- 02, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, ___ (1967); People v. Monroe, 925 P.2d 767, 771(Colo. 1996. A valid due process claim for suppression of identification testimony must involve a pretrial procedure, which is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. ___, 971 (1968); Monroe, id. To determine whether such a violation occurred, a court should examine the totality of circumstances surrounding the identification. Stovall, 388 U.S. at 302, 87 S.Ct. at 1972-73; Coleman v. Alabama, 399 U.S. 1, 4-5, 90 S.Ct. 1999, 2000-2001, 26 L.Ed.2d 387 (1970); Monroe, id. If the court finds that the identification is sufficiently tainted, subsequent in-court identification must be suppressed unless the state can prove by clear and convincing evidence that the in-court identification of the accused is based upon a source independent of the illegal lineup identification. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Discussion of the photo line-up should recognize the possibility that it was tainted. The array may have been unrepresentative because Sam was the only one wearing clothing exactly matching Vicki's description. The fact that Sam was photographed in the same clothes he wore upon his arrest, which were part of the description, could be a problem. The officer advising Vicki that a person matching her description had been arrested may have been unduly suggestive. An unconstitutional photo lineup would subsequently taint any in court identification of the defendant by the victim. The examinee should therefore discuss the subsequent identification offered by the victim at the suppression hearing. .

In Wade, supra, the Supreme Court established that an independent basis for an in court identification was necessary when the out of court identification was questionable or excluded. 388 U.S. at 239-40, 87 S.Ct. at 1938-39. Monroe, 925 P.2d at 669-70. A defective out of court identification therefore does not require suppression of an in court identification if there is an independent basis. The test that has evolved is whether the prosecution can show under the totality of the circumstances that the identification was reliable, even though the out of court identification was suggestive. Neil v. Biggers, 409 US 188 (1972). The factors to be considered in making this determination are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty of the witness; (5) the length of time between the crime and the confrontation. See also Manson v. Braithwaite, 432 U.S. 98 (1977), Stovall v. Denno, 388 U.S. 293 (1967), Simmons v. U.S., 390 U.S. 377 (1968) and People v. Huguley, 577 P2d 746 (Colo. 1978).

21686

Essay 8 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. An improper identification of the defendant violates his or her XIVth Amendment right to due process. 1.____

2. Lack of an attorney at the lineup may give rise to 6th amendment (right to counsel) challenge. 2.____

   2a. Courts, however, have found that the 6th amendment does not apply to photo lineups. 2a.____

3. An identification is constitutionally improper when:

   a. the identification is unnecessarily suggestive, and 3a.____

   b. there is a substantial likelihood of misidentification. 3b.____

4. The claim of an impermissibly suggestive identification must be evaluated in light of the totality of the surrounding circumstances. 4.____

5. Here, those things might be:

   a. Officer advising Vicki the police had arrested a person matching her description, 5a.____

   b. Sam's picture being only one with clothes matching description and his being photographed in clothes he was arrested in. 5b.____

   c. Officer telling Vicki she had identified the person police arrested. 5c.____

6. An in-court identification may be allowed if it has a source sufficiently independent of any unconstitutional pretrial violations. 6.____

7. Factors to be considered if there is an independent basis for the in-court identification are:

   a. the witness' opportunity to view the criminal at the time of the crime, 7a.____

   b. the witness' degree of attention, 7b.____

   c. the accuracy of the witness' prior description of the criminal, 7c.____

   d. the level of certainty of the witness, and 7d.____

   e. the length of time between the crime and the confrontation. 7e.____

8. Discussion of court's likely rulings. 8.____

QUESTION 9

David is currently being tried for burglary and other related charges. He had gone to Victoria's house, entered through a basement window, and removed a computer and some files. David and Victoria are married, but in the middle of an acrimonious divorce and living apart. When he was arrested, David claimed that he was confused about whether the computer belonged to him or to Victoria.

Several weeks before this incident, David was arrested for embezzling money from his employer. In connection with that case, he was sent to the state mental hospital for a psychiatric evaluation and later was released. There was no report issued from that evaluation.

When attempting to impanel a jury for David's trial for the burglary, David's attorney used his first four peremptory challenges to excuse four women. When he attempted to utilize his fifth peremptory challenge to excuse another woman, the prosecutor objected, claiming that David's attorney had improperly exercised his peremptory challenges to reduce the number of women on the jury. David's lawyer explained that he wished to excuse the juror because she had indicated that she was divorced, and he had not had an opportunity to question her about the circumstances of her divorce.

After a jury was empaneled and David's trial had begun, Victoria testified about David's misconduct during the marriage, including his failure to make mortgage payments and pay their bills. On cross-examination, the defense learned that Victoria had made statements consistent with this testimony to the police when, prior to trial, she was questioned about the burglary. David's attorney moved for a mistrial on the ground that the prosecution had not disclosed the statements to the defense prior to trial.

QUESTION:

1. Assuming the trial judge knows about David's mental evaluation, discuss the appropriate action(s) she should take.

2. Discuss how the trial judge should rule on the prosecutor's objection and the standards which apply to these circumstances.

3. Discuss how the trial judge should rule on the motion for a mistrial.

DISCUSSION FOR QUESTION 9

Question 1

Due process prohibits the trial of a defendant who is incompetent to stand trial. A defendant is competent to stand trial if, at the time of the trial, he is capable of understanding the nature and course of the proceedings against him and of participating and assisting in his defense and cooperating with defense counsel. Dusky v. United States, 362 U.S. 402 (1960). If there is evidence that a defendant may be incompetent, the trial judge has a constitutional obligation to conduct further inquiry and determine whether, in fact, the defendant is incompetent. Pate v. Robinson, 383 P.2d 375 (1966). There is, however, an initial presumption of competency. Once competency is raised, most states require a criminal defendant to prove that he is not competent to stand trial by a preponderance of the evidence. It does not violate due process to require the defendant to prove that he is incompetent. Medina v. California, 505 U.S. 437 (1992).

Here, the judge is aware that David had been sent to the state hospital for an evaluation in connection with the other case, and David claims that he was confused at the time of the offense about who owned the computer he took, there is no indication that he was incompetent at the time of trial. Thus, there is probably not enough evidence to give rise to a sufficient doubt of his competency at the time of the trial to require the court to suspend the proceedings and make a competency determination.

Question 2

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that a prosecutor's use of peremptory challenges purposefully to eliminate prospective jurors on the basis of race is a violation of the equal protection clause of the Fourteenth Amendment. This holding was later extended to prohibit the exclusion of prospective jurors on the basis of gender. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Here, although it is the defendant, not the prosecution, whose peremptory challenges are allegedly discriminatory, it is still unconstitutional to use peremptory challenges in a discriminatory manner. Georgia v. McCollum, 505 U.S. 42 (1992).

A trial court should follow a three-step process in evaluating claims of racial or gender discrimination in jury selection. Batson, supra; People v. Cerrone, 854 P.2d 178 (Colo. 1993). First, the party who made the Batson objection (here, the prosecution) must make a prima facie showing of purposeful discrimination. Such a showing can be made with facts or circumstances that raise an inference that the exclusion of potential jurors was based on race or gender. Second, if the requisite showing is made, the burden shifts to the party attempting to utilize the peremptory challenge (here, the defendant) to articulate a gender-neutral explanation for excluding the juror in question. The proffered reason need not be reasonable, as long as it is race or gender-neutral. Purkett v. Elem, 115 S.Ct. 1769 (1995). Third, if a neutral explanation is presented, the objecting party (here, the prosecution) should be given an opportunity to challenge the showing of neutrality. The trial court must then determine whether the neutral reason is a pretext for purposeful discrimination. People v. Cerrone, supra; People v. Saiz, 923 P.2d 197 (Colo. App. 1995), cert. denied, ___ U.S. ___, 117 S.Ct. 715, 136 L.Ed.2d 634 (1997).

Here, David's lawyer's pattern of striking women from the venire raises an inference of purposeful discrimination and satisfies step one of the Batson analysis of making a prima facie case of gender discrimination. The proffered explanation (that he had not questioned the juror about her

divorce and was concerned about the circumstances) is gender-neutral, and satisfies his burden at step two of the Batson analysis of presenting a gender-neutral reason for the peremptory challenge. The prosecution may challenge that reason, but it is the court which must decide whether the proffered reason is a pretext for gender-discrimination. A determination either way would be reasonable and not an abuse of discretion. It was arguably reasonable for defense counsel to be concerned about a juror who might also have gone through a hard-fought divorce.

Question 3

The prosecution has a duty to disclose material exculpatory evidence to the defendant. Brady v. Maryland, 373 U.S. 83 (1963). Failure to disclose such evidence violates the due process clause, and a conviction arising from a case where exculpatory evidence has not been disclosed will be overturned if "there is a "reasonable probability that, had the evidence been disclosed to the defense, he result of the proceeding would have been different." Kyles v. Whitely, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667 (1985).

Here, because the information the prosecution failed to disclose was not exculpatory, there was no constitutional duty to disclose it. Moreover, there is no reasonable probability that had the Victoria's statements to the police been disclosed to the defense, the result of the trial would have been different. Her statements were not about the offense with which David is charged, and the information she provided was within David's knowledge. Thus, David cannot claim that he was surprised by the testimony. (Even if the prosecution had a duty to disclose the information, a mistrial would not be warranted because defendant was not prejudiced by the nondisclosure.)

21741

Essay 9 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Issue spotting: competence 1. _____

2. Test of competence: capable of understanding the nature and course of the proceedings against him and of assisting in his defense and cooperating with defense counsel. 2. _____

3. Competence -- applies to the time of trial 3. _____

4. If there is evidence that a defendant may be incompetent, the trial judge has a constitutional obligation to conduct further inquiry and determine whether in fact the defendant is incompetent. 4. _____

5. Issue spotting: discriminatory use of peremptory challenges violates Constitution. 5. _____

6. Gender is constitutionally protected classification. 6. _____

7. Prohibition applies to both prosecution and defense. 7. _____

Three part test:

8. Prima facie showing of discriminatory purpose. 8. _____

9. Constitutionally neutral explanation. 9. _____

10. Pretext. 10. _____

11. Issue spotting: prosecution's disclosure of exculpatory evidence. 11. _____

12. Here, non-disclosure not outcome determinative. 12. _____

QUESTION 8

Detective Smith lawfully arrested Dan Defendant at his house for the murder of John Jones. On the way to the police station, Smith pulled the patrol car into an alley, took out his pistol, and laid it on the front seat within view of Defendant. Smith read Defendant his Miranda rights and then told him that they would not be going anywhere until Defendant told him about the murder. When Defendant said that he wanted to see an attorney, Smith showed him a picture of Johnny Cochran. Defendant then said he would like a light for his cigarette. Smith responded, "Speaking of light, how would you like to shed a little on the murder of John Jones?" Defendant then confessed to the murder.

QUESTION:

Discuss whether Defendant's confession can be used against him at his trial for the murder of John Jones.

DISCUSSION FOR QUESTION 8

Miranda warnings need only be given if the suspect is subjected to custodial interrogation. Defendant was clearly in custody since he had been arrested and was being transported to the police station. He also was interrogated under the definition in Rhode Island v. Innis, 446 U.S. 291 (1980) because he was subjected to "either express questioning or its functional equivalent" which can be "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." Smith's statement that they would not go anywhere until Defendant made a statement and his request to shed a little light on the murder clearly amount to interrogation.

The facts state that Smith did properly give Defendant the Miranda warnings. However, under Edwards v. Arizona, 451 U.S. 477 (1981) all interrogation must cease once a suspect exercises his Miranda right to counsel, which Defendant did. The only way a statement can be properly obtained from a suspect after he has invoked his right to counsel is if he initiates a conversation in which he expresses "a willingness and a desire for a generalized discussion about the investigation." Defendant only asked for a light for his cigarette and did not initiate a generalized discussion about the investigation. Smith's response was interrogation and thus, the statement was obtained in violation of Miranda and must be suppressed during the prosecution's case in chief. If Defendant testifies, however, he could be impeached by a statement taken in violation of Miranda. Harris v. New York., 401 U.S. 422 (1971).

The confession may also have been involuntary and thus excludable under the due process clause. The voluntariness test essentially requires that the police subject the suspect to some type of coercive conduct that is sufficient to overcome the free will of the suspect. Culombe v. Connecticut, 367 U.S. 568 (1961) and Colorado v. Connelly, 479 U.S. 157 (1986). Smith stopped the car in an alley, where presumably no one would see them, and laid his gun on the seat and told Defendant that they would not be going anywhere until he confessed. Defendant could clearly have felt that some harm would come to him if he did not confess and thus, his free will may have been overborne when he confessed. If his confession was involuntary, it not only cannot be used in the prosecution's case in chief, but it also cannot be used to impeach Defendant if he testifies. Mincey v. Arizona., 437 U.S. 385 (1978).

21686

Essay 8 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1.	Custodial interrogation triggers Miranda.	1. _____
2.	Defendant here was in custody.	2. _____
3.	Interrogation equals actions or questions likely to elicit incriminating response.	3. _____
4.	Defendant here interrogated.	4. _____
5.	No interrogation after Miranda right to counsel asserted.	5. _____
6.	Further interrogation permissible if Defendant initiates discussion about investigation.	6. _____
7.	Defendant here did not initiate discussion about investigation.	7. _____
8.	Miranda violation requires suppression of statement.	8. _____
9.	Statement taken in violation of Miranda may be used to impeach.	9. _____
10.	Issue spotting - whether Defendant's statement is constitutionally voluntary.	10. _____
11.	Statement involuntary if coerced.	11. _____
12.	Defendant here coerced.	12. _____
13.	Involuntary statements are inadmissible.	13. _____
14.	Involuntary statements may not be used to impeach.	14. _____

QUESTION 6

State Patrol Officer Flora Serna, patrolling a highway in the state of Alpha, stopped a car traveling well in excess of the posted speed limit. Excessive speeding is a crime in Alpha punishable with imprisonment for up to three months.

In the car was the driver and a woman passenger. Upon stopping the vehicle, Serna ordered both persons out of the car. As the driver got out, Serna noticed smoke and smelled what she believed to be marijuana. As the passenger got out, Serna noticed she had a purse in her hand. Serna searched both the driver and the passenger. In the driver's shirt pocket Serna found a warm marijuana cigarette. In the passenger's purse Serna found a gun.

Serna next searched the car. In the console between the front seats Serna found a hypodermic needle. In the trunk of the car she found heroin.

The driver was charged with illegal possession of marijuana and heroin.

QUESTION:

Applying Federal Constitutional law, discuss what evidence will be admissible in the driver's trial.

DISCUSSION FOR QUESTION 6

Officer Serna witnessed a speeding motorist. Under federal and state law, crimes punishable by less than one year's imprisonment are misdemeanors. 18 U.S.C. §1 (1); United States v. Watson, 423 U.S. 411 (1976). Speeding is a misdemeanor, and officers who witness misdemeanors may arrest without a warrant. *Watson*. When Serna stopped the automobile she had probable cause to make an arrest. The stop is legal.

Serna is permitted to order the driver out of the car during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977). Serna may also order the passenger out, even though the passenger is not under arrest or suspected of any crime. Maryland v. Wilson, 519 U.S. 408 (1997). Serna's viewing of the smoke inside the automobile does not constitute a search. The Fourth Amendment does not apply if no "legitimate expectation of privacy" has been invaded. Katz v. United States, 389 U.S. 347 (1967). *See* Minnesota v. Dickerson, 508 U.S. 366 (1993) ("[I]f contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment . . . ."). Serna's search of the driver is permissible as a search incident to arrest. United States v. Robinson, 414 U.S. 218 (1973). Consequently, the marijuana cigarette found on the driver is admissible against the driver in his criminal trial.

Pursuant to arrest, Serna may also search the passenger compartment of the vehicle, New York v. Belton, 453 U.S. 454 (1981). The recovery of the hypodermic needle therefore was appropriate. Serna's search of the trunk, however, must be supported by probable cause to believe the trunk contains fruits of a crime, contraband, or evidence of a crime. Carroll v. United States, 267 U.S. 132 (1925). The prosecution can point to the marijuana smoke in the car, the marijuana cigarette found in the driver's pocket, and the hypodermic needle found in the console of the car, to support its claim of probable cause to believe the trunk contained contraband.

The gun found in the passenger's bag may also be included in the calculation of probable cause. Arguably, however, the search was not part of an otherwise lawful automobile search. *See* Chadwick v. United States, 433 U.S. 1 (1977) (search of bag without warrant unconstitutional); *compare,* California v. Acevedo, 500 U.S. 565 (1991) (search of bag in car constitutional if supported by probable cause); Wyoming v. Houghton, 526 U.S. 295 (1999) (search of passenger's bag in car constitutional if supported by probable cause). But even if Serna's search of the passenger's bag may have been unconstitutional, the driver lacks "standing," or a "legitimate expectation of privacy" in the passenger's bag, to contest the legality of that search. Rakas v. Illinois, 439 U.S. 128 (1978). Therefore it is likely that the gun may be considered in calculating probable cause to support the search of the trunk.

Probable cause must be assessed in the totality of the circumstances, and requires a "fair probability" or "substantial basis" to conclude wrongdoing has occurred. Illinois v. Gates, 462 U.S. 213 (1983). The smoke, combined with a warm marijuana cigarette, suggests recent drug use; the gun suggests the automobile may contain further contraband. Together, these pieces of evidence comprise sufficient cause to support Serna's warrantless search of the trunk. The heroin is admissible against the driver, as is the marijuana cigarette, the needle, the gun, and Serna's testimony about the smoke.

21610

Essay 6 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Fourth Amendment is implicated here. 1. _____

2. Fourth Amendment protects against unreasonable searches and seizures. 2. _____

3. Fourth Amendment generally requires warrants based on probable cause. 3. _____

4. The exception here is a crime committed in presence of law enforcement (speeding). 4. _____

5. Police officers are permitted to order driver and passengers out of car during traffic stop. 5. _____

6. Evidence of marijuana smoke is admissable. 6. _____

   6a. Because of plain view doctrine. 6a. _____

7. Recovery of warm marijuana cigarette is admissable. 7. _____

   7a. Allowed to search driver because of evidence of illegal activity or as incident to lawful arrest. 7a. _____

8 Search of passenger compartment lawful (seizure of needle & gun). 8. _____

   8a. Automobile exception. 8a. _____

9. Driver, in any event, has no standing to object to the admission of gun seized from passenger. 9. _____

10. Recovery of heroin in trunk was lawful only if supported by probable cause to believe the car contained illegal controlled substances. 10. _____

QUESTION 9

Larry Lessor owns and manages rental apartments. One of his tenants is Richard Renter. On the first day of September, Lessor sent a certified letter to Renter informing him that on September 15 maintenance workers would enter his apartment to repair an air duct in the ceiling. Under the terms of the lease, Lessor had the authority, with two weeks prior written notice, to enter Renter's apartment to make necessary repairs.

On September 15, the maintenance workers entered Renter's apartment. The air duct which needed repair was above a closet which was locked. The workers summoned Lessor to unlock it. When the closet was opened, Lessor found an artificial light and a substantial number of small plants in individual containers which he knew to be marijuana.

Lessor immediately notified the city police department which sent Officer Olivia to the scene. Officer first questioned Lessor, who described the light and plants in detail. Lessor then unlocked Renter's apartment so that Officer could enter. She did so alone and observed the marijuana plants inside the closet. Officer took all the marijuana plants and the artificial light and placed them in her patrol car. She instructed Lessor to lock Renter's apartment.

Officer then applied for a search warrant for the apartment. In her affidavit, she did not mention any facts she learned following her entry into the apartment, instead relying only on the information she received from questioning Lessor. A local magistrate found probable cause to support the application and issued the search warrant. Upon executing the warrant, Officer found marijuana seeds and books on how to grow marijuana under Renter's mattress.

Renter was charged with a number of drug offenses. At a suppression hearing prior to trial, Renter's attorney moved to suppress the physical evidence seized as a result of the search, along with the testimony of Lessor and Officer.

QUESTION:

Discuss whether Renter's motion to suppress will be granted.

DISCUSSION FOR QUESTION 9

I. Fourth Amendment

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. A warrantless search is presumed to violate the constitutional provisions forbidding unreasonable searches and seizures, especially where there is a warrantless intrusion into a home. See Payton v. New York, 445 U.S. 573, 586, (1980). The Fourth Amendment specifically prohibits warrantless and nonconsensual entries into person's home to search for contraband unless probable cause and exigent circumstances necessitating immediate police action are shown to exist. Id; See also Michigan v. Tyler, 436 U.S. 499, 509-12,(1978); United States v. United States District Court, 407 U.S. 297, 313,(1972) (remarking that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

To overcome the presumption that a warrantless search is invalid, the prosecution has the burden of establishing that the warrantless search is supported by probable cause and is justified under one of the narrowly defined exceptions to the warrant requirement. See Stoner v.California 376 U.S. 483, United States v. Jeffers 342 U.S. 48,72.

II. Exclusionary Rule

If law enforcement officials conduct an unconstitutional search or seizure, any illegally obtained evidence is subject to the exclusionary rule, which seeks to deter such wrongful action. See United States v. Calandra, 414 U.S. 338, 347, (1974); Mapp v. Ohio, 367 U.S. 643, 655. This prohibition applies as well to the fruits of the illegally seized evidence. See Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

III. Lessor's "Search" of the Closet

The Fourth Amendment protection against unreasonable searches and seizures applies only to governmental action, and not to independent searches by private citizens. United States v. Jacobsen, 466 U.S. 109 (1984); Burdeau v. McDowell, 256 U.S. 465 (1921). The evidence shows that Lessor's discovery of the marijuana was unrelated to any governmental action. His activities on the leased premises were solely in pursuit of his private interests as owner and landlord. His lease with the defendants gave him the right, as landlord, to enter. Therefore, Renter cannot challenge Lessor's actions or the admission of his observations up to the point when he invited Officer onto the premises to show her what he had found.

II. Officer's Initial Search of the Closet

Officer lacked a warrant, so presumptively her search was illegal unless her conduct can be justified under one of the "exceptions" to the warrant requirement:

A. Consent

The prosecutor could argue that Lessor's consent to the search rendered the initial search legal. Consent obviates the need for a warrant or for particularized suspicion. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). However, a landlord's invitation to police officers to enter rented house, and her ensuing consent to their request to search premises does not justify an officers' warrantless entry and subsequent search. It

is well settled that a landlord cannot consent to a search of a tenants' premises by governmental authorities. Chapman v. United States, 365 U.S. 610 (1961).

Renter's motion could be granted as to the evidence seized and any observations made by Officer following her entry into the apartment. Even though Lessor had authority to enter the apartment to make repairs, he could not consent to Officer's search. Further, because Officer knew that Lessor was the lessor, and not the tenant, Officer could not claim that she believed she had "apparent authority" to search the room. Consequently, Officer's initial search of the closet likely violated the federal constitution.

B. Exigency

Another exception to the warrant requirement applies when exigent circumstances exist that necessitate immediate police action. Courts have recognized exigent circumstances exceptions in the following three situations: (1) the bona fide "hot pursuit" of a fleeing suspect; (2) the risk of immediate destruction of evidence; and (3) a colorable claim of an emergency which threatens the life or safety of another. People v. Higbee, 802 P.2d 1085, 1088 (Colo.1990). In these three instances, evidence discovered in the course of a warrantless search is admissible if the prosecution establishes both probable cause to support the search and exigent circumstances justifying the warrantless entry. Horton v. California, 496 U.S. 128, 137 (1990); Illinois v. McArthur, 531 U.S. 326, 337 (2001) (Souter, J., concurring). Finally, the scope of the intrusion must be strictly circumscribed by the exigency justifying the initiation of the warrantless intrusion. Id., see also Terry v. Ohio, 392 U.S. 1, 25-26 (1968).

Exceptions (1) and (3) appear not to be relevant as there is no indication of "hot pursuit" or a colorable claim of emergency. Because drugs can easily be destroyed, however, Officer could claim that if she were to decline to search the room, the evidence could be lost. This argument would likely fail. The scope of the intrusion here was not strictly circumscribed by the exigency justifying warrantless intrusion. Officer secured the apartment without difficulty following her entry, and there are no facts that would tend to show an immediate risk of destruction of the evidence.

C. Independent Source

Under the independent source exception to the exclusionary rule, "the unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality." Murray v. United States, 487 U.S. 533 (1988). The prosecution probably could make this argument successfully here.

Officer obtained a valid warrant without reference to the information she received after she illegally entered the apartment. Given the information available from Lessor, his direct observations of the marijuana and the concealed nature of the plants' location, it appears that probable cause supported the warrant. The independent source doctrine therefore should justify the denial of the motion to suppress and support the admission of the plants and the artificial light.

D. Inevitable Discovery

The prosecution might also make an argument that the Inevitable Discovery doctrine might justify denial of the suppression motion here. Under the inevitable discovery exception, evidence initially

obtained lawfully. Nix v. Williams, 467 U.S. 431, 104 (1984).

This argument is less convincing. In Nix, the Defendant told police of the location of his victim's body as the result of an unconstitutional interrogation. At the time of the constitutional violation, police searching for the victim's body were in very close proximity to it, and the ultimate location was within their designated search area.

Here, there were no parallel police activities other than those of Officer that arguably could have led to the discovery of Renter's marijuana.

IV. Conclusion

In conclusion, Officer's initial, warrantless search appears to be unconstitutional. It was not a consent search and was not permitted by an exigency. Thus, presumptively the subsequently seized marijuana is fruit of the poisonous tree. The search, however, can likely fit within the independent source exception to the exclusionary rule. Renter's motion will likely be denied.

21741

Essay 9 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Recognition that the Fourth Amendment protects against unreasonable searches and seizures. 1. _____

2. Recognition that the Fourth Amendment specifically prohibits warrantless and nonconsensual entries and seizures by police. 2. _____

3. Recognition that evidence obtained pursuant to an unconstitutional search or seizure is subject to the exclusionary rule. 3. _____

4. Recognition that Lessor is a private citizen and not a government agent. 4. _____

   4a. Lessor's testimony is admissible. 4a. _____

5. Consent exception. 5. _____

   5a. Landlord's consent not valid for this exception. 5a. _____

6. Exigent circumstances exception. 6. _____

   6a. Here , no facts to support hot pursuit, risk of immediate destruction of evidence, or emergency. 6a. _____

7. Independent source exception. 7. _____

   7a. Evidence may be admissible because it could have also been discovered by means independent of the illegality. 7a. _____

8. Inevitable discovery exception. 8. _____

   8a. No facts to indicate evidence would have inevitably been discovered by other lawful means. 8a. _____

QUESTION 3

Carl was indicted for possession of cocaine. He could not make bail, so he was placed in jail to await trial. The police suspected that Carl had information concerning the killing of a police officer that had occurred during a drug raid. Through an arrangement with jail personnel, a police officer posing as a minister came to visit Carl in his jail cell. After several visits, the undercover officer/minister was able to gain Carl's confidence. During a casual conversation with Carl, the officer/minister asked Carl if there was anything that was bothering him; "anything he wanted to get off his chest?" Carl said there was, and admitted that he had killed a police officer in a drug raid.

Later, when Carl was charged with murder, his lawyer made a motion to suppress the incriminating statement that Carl made in jail. In his motion to suppress, Carl's lawyer claims the statement is inadmissible because it was obtained in violation of the U.S. Constitution.

QUESTION:

Discuss potential Constitutional claims that Carl may have.

DISCUSSION FOR QUESTION 3

Fourth Amendment Claim. This claim is tenous as a defendant has no legitimate interest protected under the Fourth Amendment from a misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971). Moreover, a prisoner has no constitutionally protected expectation of privacy in his prison cell. *Hudson v. Palmer*, 468 U.S.517 (1984).

Fifth Amendment Right to Counsel Claim. The warning and waiver requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) apply to a "custodial interrogation." Although the defendant clearly was in custody and was questioned by a police officer, *Miranda* only applies to situations in which the suspect knows he is conversing with a government agent. *Illinois v. Perkins*, 496 U.S. 292 (1990). When he does not know that he is talking to a government agent, the pressure that results from the interaction of custody and interrogation with which *Miranda* was concerned simply does not exist. *Id.* Therefore there was no need to advise Carl of the privilege against self-incrimination and the right to consult an attorney.

Sixth Amendment Right to Counsel Claim. Deliberate attempts by the State to elicit incriminating statements from an accused after an indictment, and in the absence of counsel, violates the Sixth Amendment right to counsel. *Massiah v. United States*, 377 U.S. 201 (1964). The right to counsel as to the possession of the cocaine charge attached when Carl was indicted on that charge. But, the investigation of a new or different offense to which the right of counsel has not yet attached is not precluded. *Maine v. Moulton*, 474 U.S. 159 (1985). Accordingly, Carl's Sixth Amendment right to counsel was not violated because no charges had been filed in the killing of the police officer. Carl will not be able to suppress his statement on this ground.
Illinois v. Perkins, 496 U.S. 292 (1990).

Due Process Voluntariness. The Due Process Clause, as a means of suppressing confessions, typically applies to situations in which the suspect's will is overborne by coercion or pressure by the police. *See, e.g., Ashcraft v. Tennessee,* 322 U.S. 143 (1944). Police deception or trickery in itself probably is insufficient. *Frazier v. Cupp*, 394 U.S. 731 (1969) (misrepresentation that another had already confessed was relevant but did not in itself make an otherwise voluntary confession inadmissible). In *Leyra v. Denno*, 347 U.S. 556 (1954), a confession was involuntary when it was obtained by a police psychiatrist representing himself as a general practitioner brought in to relieve the suspect's acutely painful sinus attack. Police deception, if egregious enough to shock the sensibilities of a civilized society, would likely result in suppression of any statement obtained thereby. *See Moran v. Burbine*, 475 U.S. 412 (1986). Thus, a due process violation represents Carl's best chance of success.

21382

Essay 3 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen
and write numbers clearly

1. No 4th amendment expectation of privacy when statement voluntarily made to another. 1. _____

2. *Miranda* may apply here. 2. _____

3. *Miranda* requires custody. 3. _____

4. *Miranda* requires official interrogation. Carl did not know questioner was a police officer. 4. _____

5. 6th amendment right to counsel may attach here. 5. _____

6. Deliberate attempts to elicit incriminating statement from already indicted defendant violates 6th amendment right to counsel (cocaine charge). 6. _____

7. Right to counsel is offense specific. Therefore, no 6th amendment violation with regard to murder charge. 7. _____

8. 5th amendment due process is violated by police conduct that makes confession involuntary, i.e. obtained by coercion, pressure, or deception. 8. _____

9. Police deception, if egregious enough, would result in suppression. 9. _____

QUESTION 6

Investigating a murder, police came to suspect Tom and Jerry. The police believed that the two had broken into a house, been surprised by the owner, and killed him. The police further believed that Tom and Jerry hid the evidence of the crime in the house where Tom lived with his mother.

When the police contacted Tom's mother and asked her for permission to search the house, she consented. In the den police found and seized a DVD player that matched one taken from the victim's house. In Tom's bedroom the police found a shirt, stained with blood, belonging to Jerry.

The next day the police arrested Tom and Jerry. After receiving his Miranda warnings, Tom invoked his right to counsel. Nevertheless, on the way to the police station, Tom said, "I guess it's all over for me now." The arresting officer asked Tom what he meant. Tom then confessed to the killing.

Tom and Jerry are to be tried separately for the murder. Each defendant wishes to suppress the following evidence of the crime: the DVD player, Jerry's shirt, and Tom's confession.

QUESTION:

Discuss, under the U.S. Constitution, whether their motions to suppress will be granted.

DISCUSSION FOR QUESTION 6

The suppression motions filed by Tom and Jerry raise issues under both the Fourth and Fifth Amendments to the federal constitution.

JERRY'S MOTIONS

Only those defendants who have a "reasonable expectation of privacy"have standing to raise constitutional issues about the admissibility of particular pieces of evidence. *Rakas v. Illinois*, 439 U.S. 128 (1978).

DVD player

Jerry cannot move to suppress this piece of evidence. It was seized from Tom's house. No facts suggest that Jerry lived there. As a result, Jerry lacks a reasonable expectation of privacy in Tom's home, and cannot assert a constitutional issue.

Jerry's shirt

Even though the seized shirt belongs to Jerry, the likely answer is that Jerry lacks standing to contest its seizure. The shirt was found in Tom's bedroom. Without evidence that Jerry stayed in Tom's bedroom, Jerry is without a reasonable expectation of privacy in the room's contents. The fact that the shirt belongs to Jerry does complicate the answer. *Rakas* specifically grants standing where defendant can claim a "property" interest in the seized item. Subsequent decisions, however, suggest that ownership itself does not suffice to confer standing, and that the complainant must have a legitimate expectation of privacy in the area that was searched. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Minnesota v. Carter*, 525 U.S. 83 (1998) (for business guest, no expectation of privacy in another's house). Thus, the better answer is that Jerry lacks standing to contest the admissibility of his shirt.

Tom's confession

Jerry also lacks standing to contest this piece of evidence. Only Tom's rights were arguably violated, not Jerry's.

TOM'S MOTIONS

DVD player

Fourth amendment protections regarding search and seizure can be waived by valid consent to police action. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Non-defendants may also grant valid consent to the police provided they have actual authority to do so. *United States v. Matlock*, 415 U.S. 164 (1974). Actual authority rests in those persons who have joint access to or control over an area for most purposes, so that it is reasonable for that person to grant consent in his own right and for the cohabitant to have assumed the risk that the other might permit the search. *Id.* As a result, the mother's consent to the police request to search will be valid as to the DVD player, which was discovered in the den, a common area over which both Tom and his mother had access and control.

Jerry's shirt

This motion raises two questions. First, does Tom have "standing" to contest the admissibility of this evidence? Second, did Tom's mother's consent apply to Tom's bedroom? Neither answer is clear.

As to the first question, Tom obviously has an expectation of privacy for things in his bedroom. However, the item police seized was owned by Jerry. It cannot be said that, by leaving an article of clothing in a friend's room, Jerry abandoned it, as with trash. *California v. Greenwood*, 486 U.S. 35 (1988). In addition, the shirt was not left in a public place. *United States v. Hedrick*, 922 F.2d 396 (7th Cir. 1991) (trash on private property but in a place where public had access). So Jerry retained his property interest in the shirt. Nonetheless, the privacy invaded belonged to Tom, as the shirt was his bedroom. Given the paramount importance the Supreme Court has given to the privacy interests that attach to the place that is searched, *see Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Minnesota v. Carter*, 525 U.S. 83 (1998), the better answer is that Tom has standing to raise his suppression motion.

On the second question, the better answer is that Tom's mother had actual authority to consent to the search of Tom's bedroom. Courts generally allow parents with control over the entire premises to consent to the search of the entire house, including a minor's bedroom, *see, e.g., United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975). Consent will not be valid if it is clear that part of the premises is exclusively reserved for a child, *see, e.g., In re Scott K*, 595 P.2d 105 (Cal. 1979). No facts in the problem suggest that Tom's bedroom is an area exclusively reserved for him, nor that Tom is a minor.

Contrary to the conclusion above, if it is determined that Tom's mother lacked actual authority over Tom's bedroom, the police may still rely on her consent to search the bedroom if it is "apparent" that she had authority. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Apparent authority exists when it is reasonable for the officers to believe that the mother had actual authority to consent. Again, without facts indicating that Tom's bedroom was closed off from the rest of the house, or that Tom's mother was otherwise prohibited from accessing the bedroom, then the police were reasonable in concluding that Tom's mother granted them valid consent to search the bedroom.

Tom's confession

Tom was taken into custody and given his Miranda warnings, and he validly invoked his right to counsel. Tom then volunteered a statement, is questioned, and confessed. His volunteered statement ("It's all over for me now") probably is admissible. After invocation of one's Miranda rights, the suspect may "re-initiate" a conversation about the crime and thus have been deemed to have waived his invoked rights. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (suspect re-initiated by saying, "What is going to happen to me now?"). Here, Tom clearly made a statement about the crime and his involvement in it and then he re-initiated the conversation. Nonetheless, despite his "re-initiation" it is possible that Tom did not waive his rights for constitutional purposes. *Bradshaw* instructs that a waiver after re-initiation is complete only if the suspect subsequently makes a knowing and voluntary waiver of his rights. In *Bradshaw*, after re-initiation the suspect was given a new set of Miranda warnings and agreed to waive them. In this case, Tom was simply questioned without further warnings. A waiver

cannot be found solely from the voluntariness of a post-warnings confession. *Tague v. Louisiana*, 444 U.S. 469 (1980). But circumstances can reveal that the suspect understood his rights and thus freely waived them. *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996) (suspect acknowledged understanding his rights).

It is likely that Tom voluntarily waived his rights after re-initiation. His prior invocation of the right to counsel suggests that Tom knew and understood his rights. Suspects who choose to speak while knowing of their right not to speak have waived their rights. Thus, the confession will likely be admissible against Tom.

21610

Essay 6 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Fourth Amendment protects against unreasonable searches and seizures. 1. _____

2. Defendant has standing to challenge admission of evidence only if his own constitutional rights have been violated. 2. _____

3. Tom has reasonable expectation of privacy in his house, and has standing to object to seizure of DVD. 3. _____

4. Tom's mother had actual authority to consent to search of the house. 4. _____

5. *As to DVD*, because no reasonable expectation of privacy of Jerry's was violated by the seizure of the DVD, Jerry has no standing to object to its admission. 5. _____

6. Tom may have greater expectation of privacy in Tom's room and has standing to contest admissibility of Jerry's shirt. 6. _____

7. Tom's mother had apparent, if not actual, authority to consent to search of Tom's room. 7. _____

8. As to Jerry's shirt, although Jerry has property interest in the shirt, he has no privacy expectation that society is prepared to view as reasonably sufficient to confer standing. 8. _____

9. Tom has standing to assert his confession was unconstitutionally obtained. 9. _____

10. Miranda applied to custodial interrogation here. 10. _____

11. Upon assertion of right to counsel, interrogation must cease. 11. _____

12. But if defendant re-initiates conversation or makes a spontaneous statement, then a defendant may have waived earlier assertion. 12. _____

13. The subsequent confession may not be a product of voluntary waiver. 13. _____

14. As to Tom's confession, no constitutional rights of Jerry's were implicated by Tom's confession, so Jerry has no standing to object. 14. _____

QUESTION 6

While on duty in uniform in a bus terminal, Officer Harriet observed a male youth carrying a shopping bag on the other side of the terminal. Unlike typical passengers, the youth did not seem to have any travel luggage, nor did he appear to be waiting for a bus departure. Instead, the youth was walking slowly around the terminal with no apparent destination in mind.

Thinking that the young man might be involved in mischief, Harriet started walking toward him. The young man saw Harriet coming, quickly changed direction, and began rapidly walking away. As the youth's pace quickened, so did Harriet's. Just before Harriet reached the young man, he broke into a run. Harriet said "Excuse me," but the youth kept running, and tossed the shopping bag he was carrying into a garbage can. Moments later, Harriet caught up to him and placed her hand on the young man's shoulder, commanding him to stop.

Harriet quickly frisked the young man. In his jacket pocket Harriet discovered a cigarette pack and inside it, Harriet saw several marijuana cigarettes. Harriet immediately placed handcuffs on the young man and then recovered the shopping bag from the garbage can. Inside the bag she discovered a radio which she later learned was stolen.

QUESTION:

Discuss whether the stolen radio and the marijuana will be admissible in a criminal trial.

DISCUSSION FOR QUESTION 6

The interaction between Officer Harriet and the young man escalates from an encounter, to a stop, then to an arrest. Each phase of the interaction justifies certain actions and interventions by the officer, provided that they are supported by requisite cause.

Stolen Radio

Before she initiated any forcible intervention, Harriet, even though she is a uniformed officer, was permitted to act with the liberty of a private citizen. Thus, she may observe people in public view, and may approach people consensually to ask them questions. United States v. Mendenhall, 446 U.S. 544 (1980) (person not seized within the meaning of the Fourth Amendment until reasonable person would believe not free to leave); Florida v. Royer, 460 U.S. 491 (1983) (person in airport terminal not seized at time officers make initial approach and ask questions). Harriet needed no level of cause or suspicion to justify her actions at that point.

By the same reasoning, the young man's conduct in walking away should, presumptively, not be held against him. A consensual encounter must be mutual; a citizen is as free to refuse consent as the officer is to seek it. Florida v. Bostick, 501 U.S. 429 (1991) (bus passenger free to terminate encounter).

Just as Harriet was about to catch him, the young man broke into a run and tossed his shopping bag into the garbage. If this conduct occurred during the encounter phase of the interaction, then the evidence found in the bag will be admissible. Because Harriet needed no suspicion to encounter the young man, he would have no claim of police misconduct. The young man will argue, however, that prior to his discard of the bag, Harriet had effectively stopped him, and had done so without the required reasonable suspicion. Her illegal stop would render evidence found pursuant to the stop, here the stolen radio, inadmissible in the subsequent criminal prosecution. Sibron v. New York, 392 U.S. 40 (1968).

Two arguments justify the admission of the stolen radio. First, Harriet had not yet stopped the young man. Although she had quickened her walking pace as she approached the youth, leading him to break into a run to avoid imminent capture, a suspect is not stopped until he submits to a lawful police command to stop or is physically restrained. California v. Hodari D., 499 U.S. 621 (1991) (fleeing suspect not stopped until tackled by officer). Thus, the youth discarded the stolen radio during an encounter, and cannot argue police misbehavior.

Second, even if Harriet's conduct in pursuing the young man effectively constituted a stop, arguably her stop was lawful. The young man did appear to be out of place in the bus terminal, without travel luggage, and behaving in a way that suggested criminality. Police officers may conduct a lawful stop where based on reasonable suspicion. Although it is a close case, arguably Harriet had sufficient suspicion here to stop the young man to confirm or dispel her concerns. Terry v. Ohio, 392 U.S. 1 (1968) (stop justified where officer observed several suspects walking back and forth in front of a store front). Evidence discovered lawfully during a valid stop will not be suppressed.

Marijuana Cigarettes

When Harriet placed her hand on the youth's shoulder, clearly he had been stopped. At this point the stop appeared lawful because Harriet had reasonable suspicion. Along with the out of place appearance of the youth discussed above, Harriet had two additional facts that supported suspicion. First, the youth sought to avoid the encounter by flight. Although people are technically free to refuse encounters, the manner of that refusal can itself give rise to suspicion. Illinois v. Wardlow, 120 S.Ct. 673 (2000) (flight upon seeing police officer is suspicious). Second, the young man's hurried discard of the shopping bag clearly indicated an attempt to hide incriminating evidence.

Harriet was permitted to frisk the youth, as he had been lawfully stopped, if she had grounds to suspect he was armed and dangerous. *Terry*, *supra*. A full scale search for evidence is not permitted under *Terry*, however. Minnesota v. Dickerson, 508 U.S. 366 (1993). Harriet had no valid safety rationale to look inside the cigarette pack. As a result, the discovery of the marijuana is unconstitutional, and the marijuana evidence will be suppressed.

The prosecutor will make two arguments to try to admit the marijuana - both should fail. First, the prosecutor will argue that the search of the cigarette pack was pursuant to arrest. Officers may search arrestees. Chimel v. California, 395 U.S. 752 (1969). The search may precede the arrest. Rawlings v. Kentucky, 448 U.S. 98 (1980). To arrest, officers need probable cause that the suspect has committed a crime. United States v. Watson, 423 U.S. 411 (1976). At the time of the search of the cigarette pack, Harriet did not have probable cause to arrest. She had yet to discover the stolen radio or the marijuana.

The prosecutor's second argument to avoid exclusion of the marijuana would be to claim an exception to the exclusionary rule. Evidence will not be suppressed if its discovery was inevitable. Nix v. Williams, 467 U.S. 431 (1984). The prosecutor will argue that, even had she not opened the cigarette pack, Harriet inevitably would have recovered the shopping bag and discovered that the radio it contained was stolen. Thus she would have placed the young man under arrest for having the stolen radio. Then, she would have lawfully discovered the marijuana pursuant to a search incident to the arrest. Harriet, however, was unaware that the radio was stolen until much later in time. Although Harriet certainly could have investigated the ownership of the radio further at the bus terminal, she could not at that time have arrested the young man for possession of a stolen item. Without significantly more information, she lacked probable cause. Federal courts look to what the officer reasonably would have done, and not possibly could have done, in assessing the inevitability of the discovery of evidence. See United States v. Feldhacker, 849 F.2d 293 (8th Cir. 1988) (reasonable limits to prosecution hypotheticals); United States v. Allen, 159 F.3d 832 (4th Cir. 1998) (lawful discovery must have been likely, not just hypothetically possible). Thus, it is likely that this argument will be rejected and that the marijuana will be suppressed.

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2004 BAR EXAM
Regrade

ESSAY Q6

SEAT

ISSUE		YES	NO
1.	Recognition that the question involves the Fourth Amendment.	1. ○	○
2.	Fourth Amendment not implicated by consensual encounters.	2. ○	○
3.	Stop occurs when one reasonably believes he is not free to leave.	3. ○	○
4.	One is not stopped until he submits to police's commands or show of authority.	4. ○	○
5.	No reasonable expectation of privacy in discarded or abandoned property.	5. ○	○
6.	Stop occurred when officer placed hand on youth.	6. ○	○
7.	Stop only proper if supported by reasonable and articulable grounds for suspicion.	7. ○	○
8.	Frisk permissible when supported by reasonable and articulable grounds to believe suspect is armed or dangerous; purpose is officer safety.	8. ○	○
9.	Scope of frisk limited to recovery of suspected weapons.	9. ○	○
10.	Recovery of cigarette pack was beyond permissible scope of frisk, therefore marijuana should be suppressed.	10. ○	○
11.	Recognition of possible inevitable discovery claim.	11. ○	○

QUESTION 3

Drake beat and seriously injured his wife. When police officers arrived at the scene, Drake walked up to them and said, "I'm guilty. I did it. Arrest me." One of the officers asked, "What is it that you did?" Drake again said that he was guilty and that he knew he was going to jail. While the officers were waiting for medical assistance to arrive, Drake commented that he should have killed his wife.

A few minutes later, Drake started screaming and behaving erratically. Drake was then handcuffed, taken to the police station, and arrested. After one of the officers read Drake his "Miranda" rights, Drake said "I messed up. I'm sorry. I don't want to say any more." Although the officer had advised Drake that he had the right to an attorney, Drake did not request one.

An hour later, an officer returned to the room where Drake was being held. The officer did not re-advise Drake of his rights, but reminded him that he was still under "Miranda." The officer asked whether Drake wanted to make a statement. The officer also told Drake that he understood that Drake had assaulted his wife because he suspected her of having an affair. The officer said that if Drake was really sorry, he would make a statement. Drake then signed a form waiving his "Miranda" rights and gave a full confession.

Drake filed a pre-trial motion to suppress all of his statements.

At the trial, Drake was acquitted of the attempted murder charge, but was convicted of battery. He appealed his conviction, claiming that he had ineffective counsel. The prosecutor told defense counsel that if Drake prevailed on appeal, and had his convictions overturned, Drake would be re-tried on all of the original charges, including the attempted murder charge. The prosecutor also told defense counsel that if Drake was reconvicted of battery, the prosecutor would request that Drake receive a longer sentence than the one originally imposed.

QUESTIONS:

1. Discuss how the court should have ruled on Drake's motion to suppress.

2. Assume that Drake appealed his convictions and they were reversed. Discuss the permissible scope of the new trial and the sentence that could be imposed if Drake is reconvicted.

DISCUSSION FOR QUESTION 3

Motion to Suppress

There are two distinct constitutional bases for the requirement that a confession or inculpatory statement be voluntary in order to be admissible into evidence: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment privilege against self-incrimination. People v. Rivas, 13 P.3d 315 (Colo. 2000). Most examinees will probably only address the latter.

Under the Due Process voluntariness test, the trial court must take into consideration the totality of the circumstances under which the statement was made in determining whether it was made voluntarily or was the result of coercive police conduct. People v. Rhodes, 729 P.2d 982 (Colo. 1986). This test applies to any out-of-court statement made by the accused, whether or not the statement was made during a custodial interrogation. People v. Rivas, supra.

The Fifth Amendment privilege against self-incrimination prohibits the admission of inculpatory statements made during the course of a custodial interrogation unless the prosecution establishes by a preponderance of the evidence that the person making them has been advised of his rights under Miranda and has made a voluntary, knowing, and intelligent waiver of those rights. People v. Rivas, supra; People v. Blankenship, 30 P.3d 698 (Colo. App. 2000).

Only if the totality of the circumstances surrounding the custodial interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that a valid waiver has been made. People v. Owens, 969 P.2d 704 (Colo. 1999); People v. Blankenship, supra.

A. Statements Drake made at the scene of the crime were not the result of an improper custodial interrogation.

1. First statement "I'm guilty. I did it. Arrest me." This statement constituted Drake's initial encounter with the police. He was thus neither in custody nor subject to interrogation or coercion by the police when he made the statement.

2. Second Statement made in response to officer's question "What is it that you did?" The facts specifically indicate that Drake was not handcuffed and arrested until after he made all of the at-the-scene statements, and nothing in the facts suggests that he had any objective basis for believing he was not free to leave. He was thus not in custody when he responded to the officer's question "What is it that you did." Accordingly, although the statement was made in response to the officer's question, and even if the question constituted police interrogation, Drake's response was not made during a custodial interrogation.

3. Third Statement "I should have killed my wife." Drake's comment that he should have killed his wife was likewise not the result of a custodial interrogation. He was not in custody when he made the statement, and he made it spontaneously

(not in response to any coercion or improper police questioning).

The examinees should thus conclude, with respect to both the Due Process Clause and the Fifth Amendment, that under the totality of circumstances test all three of Drake's at-the-scene statements were voluntarily made and should not be suppressed. See People v. Requejo, 919 P.2d 874 (Colo. App. 1996).

B. Statements Drake made after being advised of his Miranda rights

There is no indication in the fact pattern that Drake's Miranda advisement was incorrect or incomplete. Accordingly, the examinees should not discuss that issue.

A confession or inculpatory statement is involuntary if coercive police conduct, physical or mental, plays a significant role in inducing the accused to make it. People v. Valdez, 969 P.2d 208 (Colo. 1998); People v. Gennings, supra.

Similarly, in order for a waiver of Miranda rights to be valid, the prosecution must prove that the waiver was knowingly, intelligently, and voluntarily made. A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. People v. Gray, 975 P.2d 1124 (Colo. App. 1997). Coercive police conduct includes not only threats or physical abuse, but also subtle forms of psychological coercion. People v. Valdez, supra; People v. Branch, 805 P.2d 1075 (Colo. 1991); People v. Grant, 30 P.3d 667 (Colo. App. 2000), aff'd, 48 P.3d 543 (Colo. 2002). The determination whether governmental conduct is actually coercive and induces a challenged waiver or statement must be made by assessing the totality of the circumstances under which the waiver or statement was made. People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000).

Police may resume questioning after a defendant has invoked his right to remain silent or indicated that he does not want to make a statement if they wait a sufficient amount of time before reinitiating questioning and don't badger or coerce the defendant into talking. Because he had been arrested and was at the police station when he made the post-advisement statements, Drake was obviously in custody. The examinees should simply note that Drake was in custody and should not discuss the issue. The examinees also should not discuss whether there was a violation of Drake's Sixth Amendment right to counsel because the police advised him of his right to an attorney, but he never requested one.

1. First post-advisement statement "I messed up. I'm sorry." The statement Drake made immediately after he was advised of his rights but before he told the officer he didn't want to say more was spontaneous and was not made in response to any police interrogation or coercion. The court should conclude that this statement was voluntary and deny the motion to suppress it.

2. Waiver of Miranda rights and the full confession made after the officer reinitiated questioning. The court could rule either way with respect to Drakes waiver of his rights and the statements he made when the officer came back into the room an hour after Drake had said he did not want to make any more statements. Other examinees will conclude that: (a) the officer waited a sufficient amount of time before resuming questioning, (b) the officer's interrogation style did not rise to the level of coercion, and (c) under the totality of the circumstances, the waiver and subsequent statements were voluntary and should not be suppressed. To be balanced, these examinees should acknowledge that the officer's "soft technique" of commenting that if Drake were "really sorry" he would make a statement and telling him that he understood the motive for the crime may have created an atmosphere in which Drake was more likely to make an inculpatory statement. But the conclusion that the officer's method of interrogation was not coercive is a legitimate one.

Procedure Upon Re-Trial and Re-Conviction

Under the Double Jeopardy Clause of the Fifth Amendment, once jeopardy attaches, the defendant may not be retried for the same offense. Drake was convicted by a jury, and jeopardy attached when the jury was sworn in. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). One of the exceptions to the general rule is that a defendant may be retried after a successful appeal, unless the ground for reversal was insufficient evidence to support the guilty verdict. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Here, the reversal was based on the ground that Drake received ineffective assistance of counsel, not that the evidence was insufficient to support his convictions. Accordingly, he may be re-tried on all of the charges he was convicted of after the first trial without violating his right against double jeopardy. However, the attempted murder charge may not be reinstated because Drake was acquitted of that charge.

In addition to double jeopardy concerns, a defendant may not be "punished" for exercising his right to appeal. Thus, prosecutorial vindictiveness against a defendant for having exercised his appellate rights must play no part in the sentence he receives upon reconviction. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); People v. Williams, 916 P.2d 624 (Colo. App. 1986). The Double Jeopardy Clause does not prohibit imposition of a harsher sentence on conviction after retrial, but if after successfully appealing a conviction, the defendant receives a more severe sentence than the one originally imposed, it is presumed that the sentence was the result of prosecutorial vindictiveness. People v. Williams, supra.

Here, the prosecution told Drake's lawyer that if he prevailed on appeal, they would request a harsher sentence upon his reconviction. This threat is an obvious attempt to discourage Drake from pursing the appeal, and following through on the threat would constitute prosecutorial vindictiveness. Accordingly, unless some other legitimate reason is presented for imposing a longer sentence, Drake may not receive a sentence that exceeds the one originally imposed.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2005 BAR EXAM
Regrade

ESSAY Q3

SEAT

ISSUE		POINTS AWARDED
1.	Issue Recognition: Miranda warnings.	1. o
2.	Legal test: Miranda warnings are triggered by custodial interrogation.	2. o
3.	Issue Recognition: Due Process Clause of the Fourteenth Amendment.	3. o
4.	Legal test: Due Process Violation requires, in the totality of circumstances, state action (law enforcement) overbearing the will of the accused.	4. o
5.	"I'm guilty. I did it. Arrest me." - no Miranda violation.	5. o
6.	"I'm guilty. I did it. Arrest me." - no Due Process violation.	6. o
7.	Response to officer's question, "what is it that you did," defendant repeated he was guilty and going to jail - no Miranda violation.	7. o
8.	Response to officer's question, "what is it that you did," defendant repeated he was guilty and going to jail, - no Due Process violation.	8. o
9.	Defendant's statement that he should have killed his wife - no Miranda violation.	9. o
10.	Defendant's statement that he should have killed his wife - no Due Process violation.	10. o
11.	"I messed up. I'm sorry. I don't want to say any more." - no Miranda violation.	11. o
12.	"I messed up. I'm sorry. I don't want to say any more." - no Due Process violation.	12. o
13.	Defendant's "full confession" after signing waiver of Miranda rights.	
	13a. Waiver of Miranda rights must be knowing, intelligent and voluntary.	13a. o
	13b. Did the police fail to scrupulously honor the defendant's assertion of his right to remain silent? If so, then Miranda violated.	13b. o
	13c. In the totality of the circumstances, was the statement the product of the police Officer overbearing the defendant's will? If so, then Due Process violated.	13c. o
14.	Defendant's retrial on battery after appeal is not barred by Double Jeopardy.	14. o
15.	No retrial on attempted murder - prior acquittal bars retrial.	15. o
16.	The imposition of a harsher sentence upon reconviction gives rise to presumption that it is the product of vindictiveness.	16. o

QUESTION 6

An armed robber held up Vince Victim's jewelry store. The robber wore no mask or any other disguise. Victim, despite being very frightened during the robbery and not very composed, provided the police with a general description of the robber. Based on Victim's description, the police were able to produce a composite sketch of the robber.

Police officer Jim Detective was assigned to the case. Detective examined the sketch, but was unable to match it with a picture of any known criminal. Nevertheless, Detective focused his suspicion on Donald Suspect, a petty shoplifter. Detective followed Suspect for the next few days, but did not observe Suspect engaging in any criminal activity. One day, while tailing Suspect in his car, Detective noticed that Suspect had a rear tail light out. Detective turned on his lights and siren and forced Suspect to pull over. Detective immediately asked to see Suspect's license and registration, which were in order. Detective then questioned Suspect about the armed robbery; Suspect denied knowledge and participation. At that point, Detective decided to take Suspect to the police station for further questioning on "suspicion of robbery."

At the station, Detective arranged a photographic array which included pictures of Suspect and a number of other persons, all of whom had characteristics similar to the composite sketch. Victim was brought in to view the array. The only thing that Detective said to Victim was: "Do you see the robber?" Victim immediately pointed to Suspect's picture and identified Suspect as the perpetrator of the crime.

After the identification, Detective arranged a live lineup (a/k/a "in-station lineup") involving Suspect. The participants in the lineup were all similar in appearance to the composite sketch, and all were similarly dressed. Detective again simply asked Victim: "Do you see the robber?" Victim again identified Suspect as the robber. No attorney was present for Suspect.

Suspect was charged with armed robbery. At trial, the prosecution sought to have Victim identify Suspect as the perpetrator of the robbery.

QUESTION:

Discuss any objections defense counsel should have raised.

DISCUSSION FOR QUESTION 6

This case presents important questions regarding police investigatory power, particularly the power of police to "stop" and search citizens as well as their authority to conduct lineups.

OBJECTIONS

I. Suspect's Sixth Amendment Right to Counsel was violated.

The initial issue is whether Detective violated Suspect's Sixth Amendment right to counsel by either the photographic lineup or the actual lineup. In *United States v. Wade*, 388 U.S. 218 (1967), the Court held that the Sixth Amendment right to counsel applies to lineups because they involve a "critical stage" at which the absence of counsel can lead to a "suggestive lineup." *Id.* Because of the suggestiveness, a witness' identification may be tainted and may result in "irreparable mistaken identification." *Id.* In other words, the witness' perception may be unalterably affected by the suggestiveness and the in-court identification may reflect nothing more than the suggestiveness of the lineup. *Id; see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 228-232 (Thomson/West 2004).

The difficulty for Suspect, in this case, is that the Sixth Amendment does not attach until adversary proceedings commence. In *Moore v. Illinois*, 434 U.S. 220 (1977), the Court held that the right to counsel applies only to post-charging lineups. In other words, until a defendant has been formally charged with a crime, there is no right to counsel. In this case, at neither the photographic lineup nor the regular lineup, had Suspect been charged. Therefore, under *Moore*, Suspect did not have a right to counsel. Further, under *United States v. Ash*, 413 U.S. 300 (1973), there is no right to counsel at photographic lineups.

II. Due Process violation.

Even if an in-court identification does not violate the defendant's right to counsel, it can be excluded if admission would violate due process. *See Stovall v. Denno*, 388 U.S. 293 (1967); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 232-235 (Thomson/West 2004). Unlike the Sixth Amendment right to counsel, due process considerations apply to both pre-indictment and post-indictment lineups. The question is whether the pre-trial identification was unduly "suggestive" and created the potential for "irreparable mistaken identification" at trial. *See Stovall v. Denno*, 388 U.S. 293 (1967); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 232-235 (Thomson/West 2004).

In evaluating due process claims, courts consider a variety of factors. In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court indicated that a variety of factors were relevant in determining whether an identification is "reliable." Although *Neil* dealt with a confrontation rather than a

lineup, the factors it identifies are relevant to lineups a well: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

In this case, it is difficult to argue that an in-court identification would violate due process. There are factors suggesting that the jewelry store owner did not get a good view of the robber. The owner was very frightened and not very composed during the robbery. On the other hand, at the photographic lineup, which was not conducted in a suggestive manner, the owner readily picked Suspect out as the perpetrator. He repeated the identification at the in-station lineup. Under the circumstances, especially given that there were no suggestive factors at work in the in-station lineup; it is difficult to argue that an in-court identification would be unduly affected by suggestivity that would produce irreparable mistaken identification. On the contrary, it can be considered "reliable."

III. Fruit of the Poisonous Tree

This problem also involves so-called "Fruit of the Poisonous Tree" issues. Under the Fourth Amendment, when evidence is "derived" from unconstitutional police conduct, the exclusionary evidence rule requires exclusion of the derivative evidence. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 228-232 (Thomson/West 2004).

In this case, the lineup may have been "derived" (a "poisonous fruit") from illegal action (the "tree"). As a general rule, police are not allowed to stop an individual without a "reasonable suspicion" that the individual is involved in criminal activity without violating the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648 (1979). In other words, the police cannot pull citizens over to engage in a "fishing expedition," and cannot pull them over simply to check their driver's licenses and registration forms. In this case, however, Suspect had a defective tail light. Thus, Detective had adequate grounds to stop him. However, the facts indicate that Detective decided to take Suspect to the station on "suspicion" of armed robbery. Under the Fourth Amendment, a mere "suspicion" of criminal activity is not sufficient to force a defendant to go to the police station or to participate in a lineup. *See Dunaway v. New York*, 442 U.S. 200 (1979). In general, "probable cause" is required for these actions. *Id.; see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 131-134 (Thomson/West 2004). Even if it could be argued that Detective had a "reasonable suspicion" that Suspect was involved in criminal activity, it does not rise to the level of probable cause. Accordingly, it can be argued that the in-station lineup was the "fruit" of the illegal seizure.

The difficulty is that, absent evidence that the in-station lineup was unduly "suggestive" and therefore produced the possibility of irreparable mistaken identification, it is unlikely that the "fruit of the poisonous tree" doctrine would preclude the in-court identification. In *Nix v. Williams*, 467 U.S. 431 (1984), the Court refused to apply the "fruit of the poisonous tree" doctrine to exclude witness testimony when there was an "independent source" for the witness. The Court stated that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." In this case, the police knew about the jewelry store owner's existence, and could have asked him to make the in-court identification whether or not it conducted a pre-trial identification.

CONCLUSION

None of Suspect's objections to the in-court identification are likely to succeed. As a result, the evidence should be admitted into evidence against Suspect.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2006 BAR EXAM
Regrade

ESSAY Q6

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	Recognition that Sixth Amendment or right to counsel may apply to identification procedures.	1. o
2.	Awareness that Sixth Amendment applies only after adversary proceedings are commenced.	2. o
3.	Awareness that no Sixth Amendment protection applies to photo arrays.	3. o
4.	Recognition that identification procedures are subject to Due Process standards.	4. o
5.	Awareness that in court identification may be tainted by suggestive prior identification procedure.	5. o
6.	Linchpin of DP analysis is reliability.	6. o
7.	Recognition of Fourth Amendment issue - adequacy of grounds for arrest.	7. o
8.	Taking D to police station likely amounted to arrest.	8. o
9.	Arrest requires probable cause.	9. o
10.	Detective's characterization of grounds as "suspicion of robbery" is insignificant; test is objective, not subjective.	10. o
11.	Recognition that identification here may be "fruit of poisonous tree" i.e., an illegal arrest.	11. o
12.	Even if grounds for arrest were inadequate, identification may be attenuated, or result of independent source.	12. o

QUESTION 4

Late one night, police Officer Johnson was on street patrol. He spotted William Dunn driving his car on Main Street. The car appeared to be in good order, all lights and other equipment on the car were working properly. Dunn was not violating any law and there was no evidence of intoxication. Nevertheless, because, in Officer Johnson's words, "one never knows what one will find," he decided to stop Dunn just to check his license and registration.

Dunn promptly stopped in response to Officer Johnson's lights and siren, and produced a valid license and registration. Officer Johnson checked the documents and found that everything was in order. Officer Johnson then asked Dunn why he was driving around so late at night. Dunn told Officer Johnson that he had recently gotten off work and that he had had a "rough day." He was just out driving around to "calm down."

Officer Johnson continued to question Dunn for fifteen or twenty minutes. He then asked Dunn's permission to search the trunk of the car. Before Officer Johnson began his search, he very politely informed Dunn that he had a constitutional right to refuse the request. Nevertheless, Dunn consented to the search. Unfortunately for Dunn, his 16 year-old son had hidden one pound of marijuana in the trunk of Dunn's car that morning. Officer Johnson found the marijuana and immediately arrested Dunn. In response to Officer Johnson finding the marijuana Dunn blurted out, "I'll be darned. My son must have hidden that dope."

Dunn was charged in state court with criminal possession of marijuana.

QUESTION:

Discuss the legal issues the defense is likely to raise, and how they should be resolved.

DISCUSSION FOR QUESTION 4

This case presents important questions regarding police investigatory power, particularly the power of police to "stop" and search citizens. Stated conversely, the question involves the rights of citizens to be free from "unreasonable searches and seizures."

Stop of Dunn's car

The initial issue is whether Dunn was legally "seized" when Office Johnson pulled him over. As a general rule, the police may not stop an individual without a "reasonable suspicion" that the individual is involved in criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). In other words, the police cannot pull citizens over to engage in a "fishing expedition," and cannot pull them over simply to check a driver's license and registration. In this case, Officer Johnson lacked either probable cause or a reasonable suspicion, and did in fact pull Dunn over simply to check his license and registration. Accordingly, the stop was illegal.

Miranda violation

The next issue is whether Officer Johnson violated Dunn's privilege against self-incrimination. The Fifth Amendment to the United States Constitution protects citizens against being "compelled" to incriminate themselves. In the United States Supreme Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court imposed a number of prophylactic requirements on police interrogations. Whenever an individual is subjected to "custodial interrogation," the police must inform the individual of the following: that he has the right to remain silent; that if he chooses to speak, anything he says can and will be used against him; that he has the right to a lawyer; and that if he cannot afford a lawyer, one will be provided for him at no expense.

Miranda only applies when an individual is in "custody" and subject to "interrogation." "Custody" exists when an individual is subject to "arrest" or the functional equivalent of an arrest. *Stansbury v. California*, 511 U.S. 318 (1994). "Interrogation" exists when an individual is subjected to direct questioning or the functional equivalent of questioning. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

In this case, Dunn was subjected to explicit questioning because the officer asked him direct questions, but up until the time that Dunn was arrested, there is doubt about whether he was in "custody." As a general rule, although roadside investigative stops can involve "seizures" within the meaning of the Fourth Amendment, they do not involve "custody." In other words, custody is a more severe form of intrusion. *Berkemer v. McCarty*, 468 U.S. 420 (1984). Assuming that Dunn was not taken into custody, then no *Miranda* warning was required.

Finally, Dunn blurted out upon the discovery of the marijuana and his being arrested, "I'll be darned. My son must have hidden that dope." At this point Dunn was clearly in police custody, but his statement was volunteered. Miranda will not preclude the prosecution's use of statements volunteered by the defendant.

Search of trunk

The next issue is whether Dunn consented to the search of his vehicle. The officer did not possess a warrant to search the vehicle. In addition, he did not have probable cause to believe that the vehicle contained the "fruits, instrumentalities or evidence" of crime, and therefore the officer could not invoke the automobile exception to the warrant requirement.

The officer might try to justify the search under the "consent" exception to the warrant requirement. A citizen can always consent to the search of his vehicle. The question is whether any consent that was given was valid. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that the validity of consent should be determined under a totality of the circumstances test. The ultimate question is whether the consent was voluntary or was coerced. *See Schneckloth.* Although an officer need not inform a suspect of the right to refuse consent, the lack of information is a factor to be considered in the totality. When a suspect has been seized, especially when the seizure is illegal, this is an important factor to be considered in the totality.

In this case, there are factors suggesting that the consent was valid (i.e., that it was "voluntary" rather than "coerced"). Officer Johnson asked nicely and did not appear to be using force. In addition, not only was his gun holstered, but he informed Dunn of his right to refuse consent. However, courts have been more willing to find coercion when a suspect is in custody, especially when the suspect has been illegally seized. Here, the fact that the Dunn had been illegally seized may vitiate the consent. *Miranda* warnings can vitiate the coercion, but no warnings were given in this case. So, there are significant doubts regarding the validity of the consent.

Suppression of Marijuana

The more difficult question is whether the marijuana should be excluded at Dunn's trial. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court extended the exclusionary evidence rule to state court proceedings. Since this is a state court proceeding, the rule could be applied.

In this case, Officer Johnson violated Dunn's rights by stopping his car based on insufficient grounds. Even if Dunn's consent to search was valid (something which is doubtful), the evidence was illegally obtained because of the "fruit of the poisonous tree" doctrine. *Brown v. Illinois*, 422 U.S. 590 (1975). The "fruit of the poisonous tree" doctrine (a/k/a the "derivative evidence" rule) requires exclusion of evidence that was "derivatively obtained" from a constitutional violation. *See Brown* In this case, Officer Johnson would never have discovered the marijuana absent his illegal stop of Dunn. Accordingly, the marijuana was derived from the illegal stop and should be excluded.

Of course, in applying the exclusionary rule, the United States Supreme Court weighs the "costs" of exclusion (the fact that the prosecution might not be able to obtain a conviction without the evidence, thereby allowing a guilty person to go free, and the fact that there will be substantial costs if the state is forced to retry Dunn without the evidence) against the "benefits" (the hope that exclusion of the evidence will "deter" police misconduct). In this case, Officer Johnson acted at least negligently (in not knowing what the Constitution allows him to do), but there was no evidence that he intentionally violated Dunn's rights. As a result, even if the trial court concludes that the officer acted illegally, one can argue that he did so in "good faith." But the Supreme Court has rarely applied the so-called "good faith exception" to warrantless searches. So, it is likely that if the trial court concludes that the evidence was illegally seized, it would be excluded at Dunn's trial.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2007 BAR EXAM
Regrade

ESSAY Q4

SEAT

ISSUE		POINTS AWARDED
1.	Recognition of 4th Amendment search and seizure issue regarding the stop of D.	1. ○
2.	Stop = seizure, for 4th Amendment purposes.	2. ○
3.	Stop must be based on reasonable, articulable grounds for suspicion.	3. ○
4.	Recognition of Miranda issue.	4. ○
5.	Miranda is triggered by custodial interrogation.	5. ○
6.	Traffic stops don't usually amount to custody for Miranda purposes.	6. ○
7.	Volunteered statements do not offend Miranda.	7. ○
8.	Recognition of 4th Amendment issue re search of trunk.	8. ○
9.	Search of trunk requires warrant and probable cause, or some exception.	9. ○
10.	Recognition of consent as an exception.	10. ○
11.	Consent to search depends on totality of circumstances.	11. ○
12.	Recognition that discovery of marijuana may have been the "fruit of the poisonous tree," i.e., the prior unlawful stop.	12. ○

QUESTION 7

One day, the local First Federal Bank was robbed. Less than one mile from the bank, the police lawfully stopped Dan Defendant for speeding. Thinking he might be fleeing the bank robbery, the police took Defendant into custody and questioned him. Based on reports provided by bank tellers, Defendant's proximity to the bank, and his speeding, Defendant was charged with bank robbery.

The trial court appointed Al Attorney to represent Defendant. Attorney met with Defendant at the arraignment. Defendant explained that he was home with his mother at the time of the robbery, and that he was speeding because he was late for work. Attorney took notes, but never contacted Defendant's mother or employer to attempt to verify Defendant's story.

Before trial, the prosecutor made a plea bargain offer to Attorney. Attorney rejected it outright, never communicating the offer to Defendant.

At trial, the prosecutor presented the bank tellers as witnesses and they identified Defendant as the robber. The prosecution introduced a bank security camera video that showed a person resembling Defendant committing the robbery. After a brief deliberation, the jury found Defendant guilty.

At the sentencing hearing, Defendant asserted that he was not guilty. He told the judge that he wanted to appeal. The judge appointed Carl Counselor to represent Defendant for purposes of the appeal. Counselor met with Defendant who explained that he wanted to appeal. Counselor told Defendant that he would take care of it. Counselor reviewed Attorney's notes from the trial and decided that there were not any meritorious issues he could raise on appeal. Counselor did not file a notice of appeal.

QUESTION:

Discuss whether Defendant's constitutional right to counsel was violated by the actions of his two attorneys.

DISCUSSION FOR QUESTION 7

The issues in this question involve a criminal defendant's right to effective assistance of counsel. The Supreme Court has held that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). In *Strickland v. Washington*, 466 U.S. 668, 691-696 (1984), the United States Supreme Court recognized that the Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. The test for ineffective assistance of counsel requires the defendant to show that counsel provided deficient performance and the deficient performance prejudiced the defendant.

Failure to investigate alibi

Al met with Defendant at the arraignment and Defendant explained that he had an alibi defense – that was home with his mother at the time of the robbery and that he was speeding because he was late for work. Al failed to contact Defendant's mother or employer to develop this defense.

In assessing the reasonableness of an attorney's investigation, a court would consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). While a cursory investigation may be sufficient, a reviewing court must consider the reasonableness of the investigation that supported that strategy. *Strickland*, 466 U.S. at 691.

Al knew of Defendant's alibi claim but Al failed completely to investigate this potential defense. Al's failure to investigate constituted deficient performance. In light of the other evidence of guilt (eyewitness identifications, security camera video), however, Defendant may not be able to establish prejudice. There is an argument to be made on either side.

Failure to communicate plea offer

The prosecutor made a plea bargain offer to Al. Al rejected the offer without communicating it to Defendant or seeking Defendant's input.

An attorney has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Strickland*, 466 U.S. at 688. There are decisions---regarding the exercise or waiver of basic trial rights---that are of such importance that counsel cannot make them on behalf of the defendant. *Nixon*, 543 U.S. at 187. The defendant has the ultimate authority to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). For these significant decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. *Nixon*, 543 U.S. at 187.

An attorney's failure to convey a plea offer to the client constitutes deficient performance. *See Arredondo v. United States*, 178 F.3d 778 (6th Cir.1999); *United States v. Blaylock*, 20 F.3d 1458 (9th Cir.1994); *United States v. Rodriguez*, 929 F.2d 747 (1st Cir.1991);

Johnson v. Duckworth, 793 F.2d 898 (7th Cir.1986); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir.1982); *see also ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 4-6.2(b) (3d ed. 1993)("Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.").

Al received a plea bargain offer from the prosecution. Al should have communicated that offer to Defendant. Whether to plead guilty is a decision of such importance that Al could not make it on behalf of Defendant. *Nixon*, 543 U.S. at 187. Defendant had the ultimate authority to determine whether to plead guilty. *Barnes*, 463 U.S. at 751. For this significant decision, Al should have both consulted with Defendant and obtained consent to the recommended course of action. *Nixon*, 543 U.S. at 187. Al's failure to communicate the plea offer to Defendant satisfies the deficient performance prong of the ineffective assistance of counsel test.

Failing to communicate a plea offer to a defendant constitutes prejudice if there is a reasonable probability that the defendant would have accepted the offer if it had been timely communicated. *See United States v. Blaylock*, 20 F.3d at 1466-67.

Defendant cannot establish prejudice. Defendant maintained his innocence from the time he was stopped until he asked for counsel for an appeal. In light of Defendant's conduct before, during, and after the trial, Defendant cannot establish prejudice from Al's deficient performance. Therefore, Defendant was not denied the right to effective assistance of counsel by Al's failure to communicate the plea bargain offer to him.

Failure to appeal

A criminal defendant has the right to the effective assistance of counsel in a direct appeal of his conviction. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

"[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Counsel's failure "cannot be considered a strategic decision." *Id.* Thus, an attorney's failure to file a notice of appeal after his client directs him to do so constitutes deficient performance.

In such a case, the appellant is not required to demonstrate that his appellate claims are meritorious, because the prejudice resulting from the failure to file a notice of appeal is not in the outcome of the proceeding, but in the forfeiture of the proceeding itself. *Flores-Ortega*, 528 U.S. at 483. Accordingly, the defendant need not show a likelihood of success on appeal to prevail on an ineffective assistance of counsel claim based on counsel's failure to perfect an appeal. *Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also United States v. Snitz*, 342 F.3d 1154 (10th Cir.2003).

Rather, to satisfy the prejudice prong of the ineffective assistance of counsel analysis in this context, the defendant need only establish that there is a reasonable probability that, but for counsel's deficient performance, he would have timely appealed. Evidence of nonfrivolous grounds for appeal or the defendant's prompt request for counsel to prosecute the appeal are highly relevant. *Flores-Ortega*, 528 U.S. at 486.

The facts indicate that Defendant told the judge at the sentencing hearing that he wanted to appeal. The court appointed Carl Counselor to represent Defendant on appeal, and Carl met with Defendant who directed Carl to file a notice of appeal on his behalf. However, after Carl reviewed Al's trial notes, he concluded there were no meritorious appellate issues, and did not file a notice of appeal.

Carl acted in a professionally unreasonable manner by failing to follow Defendant's express instructions to pursue an appeal. Defendant can thus satisfy the deficient performance prong of the ineffective assistance of counsel analysis. Defendant can also satisfy the prejudice prong, because he made a prompt request for appellate counsel by indicating at the sentencing hearing that he intended to appeal and directed Carl to file an appeal on his behalf. These facts demonstrate that, but for Carl's deficient performance, Defendant would have filed a timely appeal.

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2008 BAR EXAM
Regrade

ESSAY Q7

SEAT

ISSUE		POINTS AWARDED
1.	Recognition that the Sixth Amendment guarantees the right to effective assistance of counsel.	1. ○
2.	Violation of effective assistance of counsel requires defendant show his counsel's performance was deficient, and that resulted in prejudice.	2. ○
3.	Counsel's performance is judged by an objective standard of reasonableness.	3. ○
4.	Al's failure to investigate alibi amounts to deficient performance.	4. ○
5.	It's arguable whether Al's failure to investigate defendant's alibi prejudiced defendant.	5. ○
6.	Al's failure to communicate plea offer amounts to deficient performance.	6. ○
7.	It's unlikely that Al's failure to communicate the plea offer prejudiced defendant in view of defendant's consistent protestations of innocence.	7. ○
8.	Carl's failure to file notice of appeal amounts to deficient performance.	8. ○
9.	Carl's failure to file notice of appeal did prejudice defendant by denying him of right to appeal.	9. ○