GRADER'S GUIDE

***** QUESTION NO. 4 *****

SUBJECT: CRIMINAL LAW

1) Does Bernie have an entrapment defense? Why or why not? (5 points)

No. Entrapment requires government action. Absent any evidence that Sammy was acting as an agent of the government, Bernie has no entrapment defense (regardless of how instrumental Sammy was in getting Bernie to commit the crime).

2) Police catch up with Sammy and charge him (a) with attempted vehicle theft and (b) as an accomplice to the vehicle theft. Discuss whether the facts support either charge. (30 points)

The facts support charging Sammy with attempted vehicle theft. A person commits the crime of vehicle theft in the first degree if, having no right to do so (or any reasonable ground to believe the person has such a right), the person drives, tows away, or takes (1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another. AS 11.46.360. A person is guilty of attempt if, with intent to commit the crime, the person engages in conduct which constitutes a "substantial step" toward the commission of that crime. AS 11.31.100(a) Here, Sammy's acts of buying the bolt cutters, casing the BMW lot, driving Bernie to the crime scene, and acting as a lookout would most certainly constitute a "substantial step" toward driving or taking away a car of another when he has no right to do so.

Concerning accomplice liability, AS 11.16.110(2) declares that a defendant can be held criminally responsible for another person's conduct if the state proves two things. First, the state must prove the specified actus reus--that the defendant solicited the other person to commit the offense or aided or abetted the other person in planning or committing the offense. Second, the state must prove mens rea--that the defendant engaged in this conduct with the intent to promote or facilitate the commission of the offense.

In short, under AS 11.16.110(2), Sammy can be charged as Bernie's accomplice if, with intent to facilitate the car theft, he *asked or encouraged* Bernie to steal the car or *helped plan or commit* the theft. The facts support charging Sammy under either theory. He asked Bernie to commit the vehicle theft by suggesting that Bernie steal the car and

encouraged Bernie by his "incessant begging" and refusing "to take 'no' for an answer." Sammy also helped plan and commit the theft by buying the bolt cutters, casing the lot, bringing Bernie to the scene of the crime, and acting as a lookout.

3) Bernie's lawyer moves to suppress, on *Miranda* grounds, (a) Bernie's first statement to Officer Jones and (b) all of Bernie's statements that he made in the police car. Discuss what a court would consider in deciding whether to grant or deny the motion. (65 points)

In *Miranda v. Arizona*, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To determine whether a person was in custody, the trial court looks to the circumstances surrounding the interrogation and asks whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.

The Alaska Supreme Court in *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979), established the objective, reasonable person standard for determining custody. Under *Hunter*, facts pertaining to events before the interrogation, facts intrinsic to the interrogation, and facts about events after the interrogation are relevant and determine whether "a reasonable person would feel he was not free to leave and break off police questioning." *Hunter* at 895; *see also State v. Smith*, 38 P.3d 1149 (Alaska 2002).

Specific facts include:

1. Preinterrogation events, especially how the defendant got to the place of questioning--whether he came completely on his own, in response to a police request, or escorted by police officers;

2. The circumstances of the interrogation, including: when and where it occurred how long it lasted, how many police were present what the officers and the defendant said and did the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door whether the defendant was being questioned as a suspect or as a witness;

3. Postinterrogation events, especially what happened after the interrogation--whether the defendant left freely, was detained, or was arrested.

The trial court determines on a case-by-case basis whether the suspect was "in custody" and considers the totality of the circumstances in each case.

But the inquiry as to whether a statement should be suppressed on *Miranda* grounds is not limited only to whether a suspect was in custody. *Miranda* safeguards are activated only when a person is subjected to either (1) express questioning or (2) its functional equivalent – words "reasonably likely to elicit an incriminating response."

(a) Bernie's first statement to the officer will not be suppressed. Officer Jones' question – "Pretty cold night out, isn't it?" – did not appear designed to elicit an incriminating response and thus does not qualify as interrogation. Because Bernie's statements were more along the lines of a spontaneous utterance, they would not be suppressed on *Miranda* grounds. (Because Bernie's statements were not the product of police interrogation, it is irrelevant whether he was in custody or not. *See Beagel v. State*, 813 P.2d 699, 705 (Alaska App. 1991).)

(b) By contrast, Officer Jones' next question about wanting to hear Bernie's side of the story, as well as her follow-up questions in the police car, would likely be considered police interrogation. The facts indicate that Officer Jones knew "full well what was going on." Although the questions might seem fairly innocuous, they would be considered the equivalent of interrogation because Officer Jones' purpose was to get information on the crime that she had just witnessed, and she knew (or should have known) that her words were "reasonably likely to elicit an incriminating response." *Beage*l at 705.

The answer to whether or not Bernie's statements in the police car should be suppressed then rests upon whether Bernie was in custody. Under the *Hunter/Smith* criteria, the court would consider the following facts of Bernie's interrogation:

The fact that the interaction occurred in a police car does not determine the issue. The supreme court recently commented in *Smith* that, with "dozens of cases where a court was asked to determine whether a suspect was in *Miranda* custody when the facts included questioning in a police car," the most that could be determined from the cases was "that an interview in a police car is not determinative of *Miranda* custody." *Smith*, 38 P.3d at 1156. The court noted that while

"questioning in a police car is more custodial than in one's home, it is generally less custodial than questioning at the police station." *Id.* Another factor that a court will consider is that, on a "chilly winter evening," it was reasonable and convenient to use the heated police car rather than standing out in the cold. *See id.; see also Hintz v. State*, 627 P.2d 207, 209 (Alaska 1979) (reasonable to have suspect sit in front seat of the police car when temperature was –10 degrees).

Weighing in favor of a finding of custody would be the fact that the police officer initiated the contact, and it was at the officer's request that Bernie came to be sitting in the police car discussing the case with her. Also in favor of a finding of custody was that Bernie was clearly being questioned as a suspect and not a witness; he had just been caught in the act and had already admitted to the officer that he was trying to steal a car. Although the officer did not use any high-pressure interrogation techniques or accuse Bernie, she also never informed Bernie that he was free to leave or that he did not have to talk to her. She also never told Bernie that he would not be arrested. The fact that Officer Jones took Bernie in to custody at the end of interview rather then letting him go additionally favors a finding of custody.

Weighing against a finding of custody is the fact that Officer Jones did not order Bernie to get into the squad car but rather invited him to do so. Bernie appeared willing to talk and walked to and entered the patrol car voluntarily. *See Smith*, 38 P.3d at 1157. The interview was a short one, lasting approximately 15 minutes. *See id*; *see also State v. Murray*, 796 P.2d 849, 850 (Alaska App. 1990) (no *Miranda* custody where interview lasted only 25 minutes). Officer Jones did not restrain Bernie in any way; Bernie was uncuffed and sitting in the front seat of the police car. Also supporting a finding of non-custody is the fact that only one officer was present. See *Smith, supra* at 1157 (presence of only one officer favors conclusion of non-custody). Officer Jones demeanor was casual and calm; her questions "tell me your side of the story" and the follow-up questions were not high-pressure. The overall tone of the interview was low-key with Bernie apparently doing most of the talking and Officer Jones simply asking follow-up questions. *See Long v. State*, 837 P.2d 737, 740 (Alaska App. 1992) (finding of no *Miranda* custody based in part upon fact that tone of interview had been low-key and "not heavy-handed"); *see also Murray*, 796 P.2d at 850 (where suspect "began speaking immediately upon sitting down in the car," no *Miranda* custody). Nothing in the fact pattern indicates that Officer Jones ever promised anything to Bernie in exchange for his help or became accusatory during the interview.

Considering, under the totality of the circumstances, whether a reasonable person would have felt free to leave, this situation presents a very close case. A strict application of the factors articulated in *Hunter* and *Smith* might seem to favor a finding of non-custody. On the other hand, a court would be hard pressed to find that a reasonable person would have felt free to terminate the interview and leave under these circumstances: a police officer had just caught him trying to steal a car, he had confessed his crime, and he was already sitting in a police car. An examinee need not reach a finding on this issue.