GRADER'S GUIDE

***** QUESTION NO. 3 *****

SUBJECT: CRIMINAL LAW

1. Search/seizure motions - before the police officer was told of Debra King's arrest (40 points total)

The stop of the vehicle (15 points)

An investigatory stop is a recognized exception to the general constitutional prohibition against warrantless searches and seizures. *Terry v. Ohio*, 392 U.S. 1 (1968). Under federal law this exception permits police to conduct a brief stop of a suspicious individual to obtain identification or to maintain the status quo while obtaining more information when such action is reasonable in light of the facts known to the officer. *Adams v. Williams*, 407 U.S. 143, 146 (1972).

Alaska has adopted a more stringent standard than the federal standard as to investigatory stops. In *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976), the Alaska Supreme Court held that before a police officer may conduct an investigatory stop, the officer must have reasonable suspicion that imminent public danger existed or that serious harm to persons or property has recently occurred. Alaska courts have also adopted a flexible approach in evaluating the reasonableness of a police officer's conduct, which requires balancing the seriousness and recency of the suspected crime and the strength of the officer's suspicions against the intrusiveness of the stop. *State v. G.B.*, 769 P.2d 452, 456 (Alaska 1989)

Here the police actually used a show of force (lights and siren) to stop Dan's vehicle. Thus, the stop was a police seizure and is legal only if it is a valid investigatory stop. *Smith v. State*, 756 P.2d 913 (Alaska 1988). The question is then the balance of the intrusiveness of the stop with the reasonableness of the police officer's suspicion. Here the facts would likely support the police officer's stop of Dan's vehicle based on a reasonable suspicion that the vehicle had been involved in the Marty's Club incident.

At the time the police officer stopped Dan's vehicle he had information that an offense had just occurred. Thus, the crime was recently committed. As to the seriousness of the crime, although the officer may not have known exactly how serious the offense at Marty's Club was, he could not rule out the possibility that a serious property offense had occurred. For example, in *G.B.*, the investigatory stop was upheld even though the crime being investigated might have been a shoplifting or a misdemeanor theft, since the officer knew

that the crime had recently occurred and could not rule out that a more serious crime had been committed. 769 P.2d at 456-57.

In Dan's case, the officer had information that the person suspected of committing the crime had left the scene in a certain kind of vehicle and was heading in a certain direction. Even though there was some concern that the color of the vehicle may or may not be that described by the witnesses, the police do not need absolute certainty or even probable cause before conducting an investigatory stop; all that is needed is a reasonable suspicion. *State v. Moran*, 667 P.2d 734, 735-76 (Alaska App. 1983). Given that the make of vehicle was the same, that the color arguably matched, that the vehicle was on the road where the suspect vehicle had been likely traveling, and that the police officer had observed no other vehicles generally matching the description of the vehicle on the road, the combination of these facts establish the necessary reasonable suspicion that this car was involved in the incident.

Thus, a motion to suppress based on the stop of the vehicle would most likely be denied.

Continued detention/pat-down of Dan (25 points)

Once the vehicle had been stopped, the police officer could see that Dan was not a woman and the suspect was a woman. But although the officer was looking for a female suspect, the information he had been given suggested that the driver of the Ford Explorer might have information about the incident or the whereabouts of the suspect.

Under Alaska law, police are justified in detaining an individual if the police have reasonable suspicion to believe that the person might be a witness to a potentially serious offense and might have knowledge of material aid in the police investigation. *Beauvois v. State,* 837 P.2d 1118, 1121 (Alaska App. 1992). Thus, the continued detention of Dan even after the officer sees that he is not a woman was likely justified for the following reasons.

The information known to the officer was as follows: a potentially serious offense was committed just moments before, the suspect got into a vehicle similar to the one driven by Dan, the suspect got in the passenger side, the officer could not tell what (or who) was in the back of Dan's vehicle, Dan's vehicle was on the same road as that traveled by the vehicle containing the suspect, and the officer saw no other vehicle matching the description on the road. Thus, the officer could reasonably believe that the suspect may still be inside the vehicle or that Dan has information concerning the suspect and her whereabouts.

Thus, a motion based on the continued detention at this point would likely be denied.

The question is then whether the officer could legally order Dan out of the vehicle to conduct a pat-down search for weapons. An officer can order a driver out of a vehicle during a traffic stop for officer safety reasons. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Anchorage v. Cook*, 598 P.2d 939 (Alaska 1979). But the authority to briefly detain an individual during either a traffic stop or an investigatory stop does not necessarily give the officer automatic authority to conduct a pat-down search of the individual. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Terry v. Ohio*, 392 U.S. 1 (1968); *Albers v. State*, 38 P.3d 540, 542 (Alaska App. 2002).

A pat-down search is legal only when the officer is aware of facts that support a reasonable suspicion that the person being detained is armed or is dangerous. *Id.* Alaska courts have recognized that when an officer has reasonable suspicion that a person detained is armed or dangerous and the person is inside a vehicle, the officer can lawfully order the person out of the vehicle and conduct a pat-down for weapons. *Gutierres v. State*, 793 P.2d 1078, 1081 (Alaska App. 1990).

In *Gutierres* the police officer making an investigatory stop of a vehicle containing two men suspected of being involved in a burglary ordered both the driver and passenger out of the vehicle in order to conduct a pat-down search. Even though the officer did not observe either man to be armed and neither man engaged in any threatening behavior, the *Gutierre*s court upheld the pat-down search in light of the following factors: the officer could reasonably believe that the two individuals were involved in a serious theft offense, the officer could fear that someone involved in such a crime could resort to violence, and the officer could be concerned for his safety because he was alone at the time of the stop. *Id.* at 1081.

The facts in Dan's case present a close call. Dan was not being detained as the suspect in the Marty's Club incident. Dan had committed no act in the officer's presence to give the officer reason to believe that Dan himself is armed or dangerous. Dan had identified himself and was validly licensed. At the point that the officer had decided to conduct the pat-down search, Dan had not yet been asked for consent to search the vehicle. Dan appeared to be alone in his vehicle.

On the other hand, although the officer had no information that a weapon had been used in the Marty's Club incident, the officer did have reliable information that a crime involving force had recently been committed, that the suspect had struggled with and fled from a private security guard, that the vehicle stopped was the same type of vehicle as that used by the suspect to

flee the scene, that it was unknown whether the suspect was or was not in the vehicle, and that the suspect was still at large. Given that there was only one officer and possibly two persons in the vehicle, including a suspect in a serious offense, and that the suspect had recently used force to remove herself from the security guard's presence, a judge could conclude that the officer would be reasonable in being concerned for his own safety and in ordering the driver out of the vehicle in order to conduct a pat-down search. This conclusion would be consistent with the court's holding in *Gutierres*.

Even though it is a close call, a motion to suppress based on the officer's ordering Dan out of the vehicle in order to conduct a pat-down search when the suspect was still at large could be denied in light of *Gutierres*.

2. Search/seizure motions - <u>after</u> the police officer was told of Debra King's arrest (40 points total)

<u>Dan's continued detention</u> (15 points)

"[A]n investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Here once the police learned that Dan and his vehicle were not involved in the Marty's Club incident, the justification for the investigatory stop ended. At that point, unless the police have some other legitimate basis for an investigatory stop and can meet the Alaska standard under *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976), the police can no longer detain Dan.

The information known to the officer is as follows. Dan had committed no traffic offenses. He was validly licensed. He was not involved in the incident at Marty's Club.

That Dan refused to allow the police to search his vehicle cannot be used as a basis to justify a continued detention. Dan has a constitutional right to refuse to consent to a warrantless search by a police officer. *Clark v. State*, 704 P.2d 799, 806 (Alaska App. 1985). Generally the state cannot rely on an individual's exercise of a constitutional right to establish guilt. *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *cf. Brown v. Texas*, 443 U.S. 47 (1979)(an individual's refusal to identify himself can not be used to establish reasonable suspicion that the person is involved in criminal activity). Nor can the police base an investigatory stop on generalized suspicion. *Metzker v. State*, 658 P.2d 147, 150 (Alaska App. 1983).

Even though the police officer did not have the right to continue to detain Dan at this point, he could have asked Dan if Dan would be willing to talk with him further to answer some questions. No illegal restraint is involved where a police officer approaches an individual and asks the individual if he is willing to

answer questions. *Waring v. State*, 670 P.2d 357 (Alaska 1983). But rather than asking Dan to remain voluntarily and talk with the officer, the police officer subjected Dan to a pat-down search. Dan would have reasonably believed that he was not free to leave at this point in light of the officer's show of authority. *Castle v. State*, 999 P.2d 169, 171 (Alaska App. 2000). At this point, the continued detention of Dan is likely illegal. The exclusionary rule renders inadmissible any evidence obtained directly or indirectly as a result of an unlawful search or seizure. *Wong Sun v. United States*, 371 U.S. 471 (1963). Therefore the cocaine found because of this seizure which was the basis for the charge against Dan would be inadmissible against him.

Pat-down search and its scope (25 points)

Even if the police officer could have legally detained Dan briefly in order to ask him some questions, the officer could not first conduct a pat-down search under Alaska law. Under Alaska law a pat-down search is legal only when the officer is aware of facts that support a reasonable suspicion that the person being detained is armed or dangerous. *Albers v. State*, 38 P.3d 540, 542 (Alaska App. 2002). Although a pat-down search could have been considered reasonable (and therefore legal) before the police officer learned of Ms. King's arrest, once the officer learned of the suspect's arrest, the justification for the pat-down search of Dan no longer existed. At that point the officer had no information that Dan was armed or dangerous. Dan had done nothing threatening during the contact to suggest otherwise.

Thus, a motion to suppress based on the officer's conducting a pat-down search would likely be granted. Therefore the cocaine found during this search which was the basis for the charge against Dan would be inadmissible against him. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

If the judge were to hold that the pat-down search itself was justified, a police officer conducting a pat-down search for weapons is only permitted to engage in a limited external patting of the outer clothing of the person detained. *Terry v. Ohio*, 392 U.S. 1 (1968); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Ozenna v. State*, 619 P.2d 477, 479 (Alaska 1980). Here the facts suggest that the police officer apparently believed that he could reach inside pockets as part of the pat-down search procedure. But the police may not search pockets or closed areas during a pat-down search for weapons unless the police officer can identify articulable facts that support a reasonable suspicion that a weapon is contained inside. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Jackson v. State*, 791 P.2d 1023, 1028 (Alaska App. 1990).

There are no facts suggesting that the officer had some particularized reason to search Dan's pocket before doing so. Nothing suggests that the

officer felt something, and particularly something that the officer could believe was a weapon, during the external pat-down search of the pocket before reaching into the pocket and taking out the baggie. Thus, the exception allowing seizure of a weapon from a pocket during a pat-down search does not apply. Similarly, the exception that allows seizure of an atypical weapon upon a showing that the officer reasonably believed that the pocket contained an atypical weapon as allowed by *Jackson v. State*, 791 P.2d 1023, 1028 (Alaska App. 1990) does not apply. There are no facts indicating that the officer had any reason to think that Dan would possess weapons at all, much less atypical weapons.

Similarly, nothing suggests that the officer could tell from the external pat-down of the pocket that the pocket contained contraband. Thus the federal plain feel exception adopted in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), does not apply. Under this exception, if an officer has probable cause to believe that what was felt inside clothing during a pat-down search was contraband, the item can be seized. Alaska has not yet adopted a plain feel exception. In a concurring opinion in a pre-*Dickerson* case, the Alaska appellate court discussed in *dicta* the plain feel exception in the context of virtual certainty as to the item's nature as opposed to probable cause. *Newhall v. State*, 843 P.2d 1254, 1261 (Alaska App. 1992)(Bryner, C.J., concurring). But the facts in Dan's case do not suggest that the police officer had any idea what was in Dan's pocket before reaching in and taking out what was inside. Therefore, the plain feel exception also does not apply under the facts.

Thus, a motion to suppress based on the scope of the pat-down search would likely be granted. The cocaine would be suppressed as evidence obtained from an illegal search. *Wong Sun v. United States*, 371 U.S. 471 (1963).

3. Discuss the following charges (20 points total)

Robbery (5 points)

Robbery in the second degree is committed when a person, if in the course of taking or attempting to take property from the immediate presence and control of another, the person uses or threatens the immediate use of force upon any person with intent to prevent or overcome resistance to the taking of the property or the retention of the property after taking. A.S. 11.41.510(a)(1). Even without Ms. King's action in kicking the security guard in the shin, she could likely be charged with second degree robbery. In *Butts v. State*, 53 P.3d 609 (Alaska App. 2002), the Alaska appellate court held that the statutory definition of the word "force" found in A.S. 11.81.900(b)26) included the term "bodily impact" which the court interpreted as including indirect contact with property that a person is holding. Given that Ms. King did more than struggle

with the security guard over the DVDs and that she actually kicked him, she could be charged with second degree robbery.

Felony Theft (10 points)

Before determining what level of theft a person can be charged with, Alaska statutes require that basic elements of theft be met first. A person commits theft if the person, with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another. A.S. 11.46.100(1). The facts support charging Ms. King with some level of theft. A reasonable inference is that she intended to deprive the business of property, the DVDs, and actually obtained the property of the business.

Whether the theft offense could be charged as a felony is determined by several factors. These factors include the value of the property taken, the nature of the property taken, the manner in which the property is taken, or the prior criminal history of the person charged with the offense. A.S. 11.46.120-150. Since the property taken (DVDs) does not fall within any of the special categories of items such as a firearm or explosive, see A.S. 11.46.130(a)(2), or vessel or aircraft safety or survival gear, see A.S. 11.46.130(a)(4), the nature of the property taken does not support a felony charge. Since there is no indication in the facts that Ms. King had any prior theft convictions as is required under A.S. 11.46.130(a)(6), she cannot be charged under this theory of felony theft. Although it is theoretically possible, but highly unlikely, that the three DVDs had a value of $500 or more as is required by A.S. 11.46.130(a)(1), it is not recommended that Ms. King be charged under this theory of felony theft.

The remaining felony theft charge, A.S. 11.46.130(a)(3), requires that the property was taken from "the person of another." Alaska appellate courts have suggested in the context of discussing a related issue that this theory of felony theft would be satisfied if the person takes property that is being held by another. *See De Nardo v. State,* 819 P.2d 903, 906 (Alaska App. 1991). Ms. King initially took the DVDs from the store and not from the person of another and therefore her initial taking was not a felony offense. But her continued attempts to take the DVDs, which ultimately involved taking the DVDs from the hands of the security guard could support a felony theft charge under A.S. 11.46.130(a)(3).

Assault (5 points)

Misdemeanor assault requires that a person recklessly causes physical injury to another. A.S. 11.41.230(a)(1). "Physical injury" is defined by Alaska law as "a physical pain or impairment of physical condition." A.S.

11.81.900(b)(45). “Recklessly” is defined as being aware of and consciously disregarding a substantial and unjustifiable risk that the result will occur where the risk is of such a nature and degree that the disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A.S. 11.81.900(a)(3). Since it is reasonable to conclude that a kick in the shins would cause physical pain and that Ms. King would have be aware of the risk that a kick to the shins would cause physical pain, Ms. King could be charged with this offense.