GRADER'S GUIDE

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

SUBJECT: CRIMINAL LAW

1. Motion to suppress Joe's confession based on a claim that the confession was involuntary 65 %

A confession is not admissible unless it is voluntary. *Sovalik v. State*, 612 P.2d 1003, 1006 (Alaska 1980). A suspect's statement is involuntary when the police use methods that are such that they overbear the suspect's will to resist. *Thompson v. State*, 768 P.2d 127, 131 (Alaska App. 1989). Whether a statement is voluntary depends on the effect of the police officer's conduct on the suspect's will. *Id*. The state bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. *Sprague v. State*, 590 P.2d 410, 412-14 (Alaska 1979). A trial court determines whether a confession was involuntary by considering the totality of the circumstances surrounding the confession. *Id*.

Some factors to consider as to the totality of the circumstances include (1) the person's age, mentality, and prior contacts with police or the criminal justice system, (2) the nature of the contact (custodial or not), (3) the length, intensity and frequency of the interrogation, (4) the existence of any deprivation or physical mistreatment, and (5) the existence of promises of leniency or inducements. *Id*. Alaska treats the issue of any threats made under a different analysis from the totality of the circumstance analysis applied to the other factors. *Beavers v. State,* 998 P.2d 1040 (Alaska 2000). Alaska has determined that the use of threats, as opposed to promises of leniency, is considered to be presumptively coercive such that a statement obtained as a result of a threat is presumed involuntary. *Id*.

Considering these factors as they apply to Joe's situation, the following should be discussed. Although Joe has had at least one prior contact with the criminal justice system (resulting in his felony conviction), there is no evidence that the earlier incident involved questioning by the police. Thus, this factor does not provide significant weight either for or against an involuntary statement. Second, there is no evidence to suggest that Joe was vulnerable to police coercion because he is quite young, nor is there any evidence to suggest that Joe's mental state or educational background is other than that of the ordinary person. Thus, this factor does not support a finding of involuntariness.

On the other hand, the nature of the contact is arguably at least quasi-custodial. Even though the trial judge has already denied the *Miranda* motion, whether the contact was close to custodial is considered by a court when evaluating whether the statement was involuntary. *Smith v. State*, 787 P.2d 1038 (Alaska App. 1990). Although Joe was not in a custodial location like a police station or a police car, the trooper separated Joe from his co-workers by directing him to the tent, by telling the foreman to stay out, and by closing the flap of the tent. Also, Joe was told that the officer "needed" to know what happened. The officer never informed Joe that Joe was free to leave without talking to the officer. Thus, these facts would support a conclusion that the contact was at least quasi-custodial, a factor that supports a finding of involuntariness.

There is no evidence that Joe was either physically mistreated or deprived of anything of significance. The questioning was neither lengthy nor of particular intensity or frequency. These factors cut against a finding of involuntariness.

Additional factors to be discussed include that Joe was reluctant to talk with the officer until the officer told Joe three things: that it would be "no big deal" to tell the officer what happened, that making a statement was just a formality since the trooper had write up some kind of report about what happened, and that trooper would guess that things could go badly for Joe with the District Attorney's Office if Joe refused to make a statement. The first two statements are close to promises of leniency. *See Miller v. State*, 18 P.3d 696 (Alaska App. 2001)(defendant's statement, not made until he was told that if he would tell the police that he started a fire by accident, it was not that big of a thing and would be "an over and done deal," was involuntary); *accord Smith v. State*, 787 P.2d 1038 (Alaska App. 1990). Even though Joe was told that the trooper was writing a report for the District Attorney's Office, Joe was expressly told that making a statement was no big deal, but was only to be included in a report described as a "formality." Thus, a good argument could be made that Joe's statement was involuntary after factoring in this information, given the nature of the statements by the trooper and the fact that Joe gave his statement only after they were made to him.

The third statement, although somewhat ambiguous, might be considered an indirect threat of harsher treatment by the state if Joe continued to refuse to make a statement. If so, then Joe's statement would be presumptively involuntary without consideration of any other factor. Alaska has rejected an argument that police threats should be considered in the same manner as police promises (i.e., as one of the factors to consider in the totality of the circumstances). *Beavers v. State*, 998 P.2d 1040, 1044-48 (Alaska 2000). In *Beavers*, the threat made was that if the defendant did not talk to the police, if he was hiding something from them, he was "really going to get

hammered." The *Beavers* court concluded that this statement constituted a threat of harsher treatment if the defendant would not make a statement and held that such a threat rendered the resulting statement presumptively involuntary absent evidence affirmatively establishing that the suspect's will not was overborne by the threat. *Id.* at 1048.

Joe may argue that the statement made to Joe rose to the level of a threat of harsher treatment if he exercised his right to remain silent. The reference by the trooper that the report was being sent to the District Attorney's Office could have reasonably been interpreted by Joe to mean that the trooper considered the matter a criminal investigation and that a decision by Joe to exercise his right to remain silent would be punished. *Beavers*, 998 P.2d at 1046. On the other hand, the comment is not the direct threat that was made in the *Beavers* case. Additionally, the statement was made before there was any reason for the trooper to believe that any crime had been committed. On balance, it is not clear that this statement would be considered an actual threat to Joe of punishment for remaining silent such that the *Beavers* analysis would apply (presumptively involuntary).

Even if the statement is not a clear threat, Joe's attorney could reasonably argue that the statement, in combination with the other factors, should result in Joe's statement being suppressed as involuntary.

2. Necessity defense 35 %

Alaska has not adopted a specifically-defined statutory necessity defense (as contrasted with other statutory justification defenses such as self-defense, see A.S. 11.18.300 and .330-335), but has recognized the common-law defense of necessity in A.S. 11.81.320. This statute does not define the elements of a necessity defense. Instead the statute generally states that "conduct that would otherwise be an offense is justified by reason of necessity to the extent permitted by common law." A.S. 11.81.320. Thus, a necessity defense is generally recognized in Alaska as an affirmative defense in all criminal prosecutions.

The term "common law" as used in this statute refers to the evolution of the law through court decisions. *Lacy v. State*, 54 P.3d 304, 307 (Alaska App. 2002). By not having a rigid definition of a necessity defense, the legislature intended that the courts have the power to define the specifics of the defense in Alaska. *Id.* Generally speaking, a necessity defense is premised on the concept that it is sometimes necessary to break the law in order to prevent a worse evil. *Id.*

Alaska courts have held that, before a defendant is entitled to successfully rely on the defense of necessity, the defendant must prove by a preponderance of the evidence the following. First the action taken must have been done to prevent a significant evil; second, there must have been no adequate alternative; and third, the harm caused must not have been disproportionate to the harm avoided. *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981). In other words, the defense is available if the defendant acted in the reasonable belief that an emergency existed and that there were no alternatives available even if that belief was mistaken. The person's actions are weighed against the harm reasonably foreseeable at the time, rather than the harm that actually occurs. *Id.*

In Joe's case, he believed that an emergency existed. He was being chased by a charging grizzly and knew that the handgun was there as protection from the bear. On the other hand, Joe had in some ways created the emergency. He had had other options such as waking his tentmate before leaving his tent, trying to wake up someone else first to deal with the bear before waving his shirt at it, not waving his shirt at the bear, or seeking help from someone in camp rather than running straight to the boat to get the handgun. But Joe was not required to have eliminated all other options nor was he precluded from raising the defense if he had initially contributed to the situation that then became an emergency. But he must have been reasonable in the belief that an emergency existed at the time he committed the crime even if this belief is mistaken. *Seibold v. State*, 759 P.2d 780, 783 (Alaska App. 1998).

The only harm that occurred was that Joe committed a status offense at whose root is the prohibition against presumptively dangerous individuals (convicted felons) from possessing concealable weapons, see *McCracken v. State*, 743 P.2d 382 (Alaska App. 1987); no other harm occurred. When this harm is balanced against the harm avoided (Joe or others in camp being mauled or killed by the bear), the harm incurred does not outweigh the harm avoided.

Joe would be entitled to have his jury instructed on the necessity defense as Alaska courts have held that juries should be instructed on a necessity defense whenever the defendant presents "some evidence" in support of the defense's three elements, see *Seibold v. State*, 959 P.2d 780 (Alaska App. 1998), and he can do so. Given the facts in his case, it is possible that the defense will be successful. The jurors would have to consider and conclude that Joe had proved by a preponderance of the evidence that he had acted in the reasonable belief that an emergency existed that required that he possess a handgun and that there were no alternatives available to him at the time he possessed the handgun even if that belief was mistaken.