GRADER'S GUIDE

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

SUBJECT: CRIMINAL LAW

Question I: (35 points)

Alaska's first degree burglary statute, A.S. 11.46.300, defines that crime as requiring that the person commit burglary in the second degree as well as a further element that raises the offense to burglary in the first degree. Second degree burglary has the following elements: (1) a person enters or remains unlawfully in a building (2) with the intent to commit a crime in the building. A.S. 11.46.310. Alaska does not require that force be used during the unlawful entry. *See* A.S. 11.46.300 and .310.

For both levels of burglary, Alaska requires that the intent to commit the further crime exist at the time that the unlawful entry or remaining occurred; it cannot be formed after the unlawful entry into or remaining in the building. *Pushruk v. State*, 780 P.2d 1044, 1046 (Alaska App. 1986); *Arabie v. State*, 699 P.2d 890, 893-94 (Alaska App. 1985). The concept of "remaining" unlawfully only applies where the person's initial entry into a building was lawful, but the person's legal right to be in the building is terminated and the person continues to remain in the building. *Id.* Thus, where a person forms the intent to commit a crime after his unlawful entry into a building, the person has not committed a burglary. *Shetters v. State,* 751 P.2d 31, 36 n. 2 (Alaska App. 1988)(a trespasser who, inside the building, forms the intent to commit a crime does not thereby commit a burglary nor does the intent to commit a crime convert a lawful presence into an unlawful remaining).

Alaska currently requires that the intended ("ulterior" or further) crime be identified by the state in the indictment; the prosecution cannot simply charge that a person intended to commit "some crime." *Adkins* v. State, 389 P.2d 915, 916 (Alaska 1964); *Semancik v. State*, 57 P.3d 682 (Alaska App. 2002)(however, the state's petition for hearing was granted in the *Semancik* case by the Alaska Supreme Court where the state is asking the court to overrule its holding in *Adkins*). It is not necessary, however, that the further intended crime actually be committed—only that the person had the intent to commit this further identified crime when he unlawfully entered the dwelling. A.S. 11.46.300 and .310.

As to how to elevate burglary from second-degree burglary to first-degree, one theory as to the further element necessary for first-degree burglary requires that the building involved be a dwelling. A.S. 11.46.300(a)(1). A dwelling is defined as "a building that is designed for use or is used as a person's

permanent or temporary home or place of lodging. A.S. 11.81.900(b)(21). Another theory as to the further element requires that, in effecting entry or while in the building or immediate flight from the building, the person causes or attempts to cause physical injury to a person. A.S. 11.46.300(a)(2)(B). "Physical injury" is defined as "a physical pain or an impairment of a physical condition." A.S. 11.81.900(b)(45).

Applying these legal concepts to the evidence presented to the grand jury, the following should be discussed.

As to the crime of burglary generally, the evidence reasonably establishes that the initial entry into Carl's residence was unlawful. Carl never authorized the person to enter his home in the middle of the night. He was startled to see someone in his house at that time of night. Since Alaska does not require forcible entry in order to establish burglary, the fact that the door was left unlocked and there was apparently no force used to gain entry is irrelevant. *Smith v. State*, 362 P.2d 1071 (Alaska 1961).

As to the additional elements required for first-degree burglary under the two theories, there is no question that a building was entered and that it was a dwelling. This element can be established by the fact that it was Carl's house and that he saw someone in his house. Similarly, there is no question that the person caused or attempted to cause physical injury to Carl while in the dwelling. The person hit Carl with a book, reasonably causing pain. Thus, the additional element that first-degree burglary requires under either of the two theories is present under the facts presented to the grand jury.

The unresolved issues have to do with the elements required of all burglaries: (1) whether the evidence establishes that the person entering Carl's house intended to commit a further crime at the time he entered the house, and (2) whether the evidence establishes what this further crime was. A reasonable inference from the facts that the person was rummaging around Carl's dresser and that he apparently had taken Carl's wallet from the dresser, only to drop it during his flight from the house, could establish that the person intended to commit the further crime of theft in the house at the time he unlawfully entered the house. No other reasonable explanation is presented by the facts as to why the person entered the house or to explain his actions in the house.

The person's striking Carl is unlikely to satisfy the element of intending to commit a further crime at the time of entry (which is a separately-required element from that which elevates second degree burglary to first degree burglary). The facts suggest that the assault on Carl was spur of the moment, after unlawful entry had already been gained, and resulted from being surprised by Carl. Therefore, the facts do not support a conclusion that the person had the intent to assault Carl at the time of the unlawful entry, but formed that intent later.

Thus, the facts as presented to the grand jury could establish all the elements of first degree burglary under either theory: that the person unlawfully entered a building with the intent to commit the crime of theft in the building, and (1) that the building was a dwelling, or (2) that the person caused or attempted to cause physical injury to a person while in the building.

Question II: (10 points)

Under Alaska law, the prosecutor has an obligation when presenting evidence to a grand jury to present exculpatory evidence as well as evidence that establishes the charged crime. *Frink v. State*, 597 P.2d 154, 165 (Alaska 1979). Exculpatory evidence is defined as "evidence that would tend to negate guilt as to the charged offense." *Id.* But a prosecutor does not have an obligation to develop all evidence favorable to the defendant. *Id.* at 166.

Here it would be reasonable for Doug to argue that the prosecutor failed to fulfill this obligation by not having the trooper testify about Doug's entire statement. Doug's entire statement establishes an alibi for Doug, i.e., it could be considered evidence that negates his guilt to the charged crime.

Doug could also try to argue that the prosecutor failed to fulfill this obligation by not presenting information about Carl's initial statement (not being able to clearly see the person in the house, the tentative nature of the identification of the person in the house as someone who looked like the new teacher, and not knowing the teacher's name). But this evidence, although it is quite favorable to Doug and could be brought out at trial, does not rise to the level of evidence that actually negates Doug's guilt as to the charged offense. Even though evidence is favorable to the defendant and is inconsistent with Carl's testimony to the grand jury, such evidence does not meet the definition of "exculpatory evidence" as defined by the *Frink* court. To adopt such a broad definition of "exculpatory evidence" would turn grand jury proceedings into mini-trials, which was not the intent of the *Frink* court. *Cathey v. State*, 60 P.3d 192, 195 (Alaska App. 2002).

Thus, Doug has a strong argument that the indictment should be dismissed because of the failure to present exculpatory evidence about his alibi, but his argument that the prosecutor should have presented Carl's earlier statements (inconsistent with his grand jury testimony) would fail.

Question III: (55 points total)

Doug could raise a Fifth amendment/*Miranda* argument, a Fourth amendment argument, and a *Stephan* violation argument and seek suppression of his statements.

Fifth Amendment/*Miranda*

One argument to be made in support of suppressing Doug's entire statement to the trooper is that the statement was obtained in violation of Doug's *Miranda* rights. If a person is in a custodial setting and is not given *Miranda* warnings prior to being questioned, then the statement obtained is suppressed. The term "custody" for *Miranda* purposes focuses on whether the person has been taken into custody or has been deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 P.2d U.S. 436, 444 (1966).

In Alaska the test for evaluating whether a person is in "custody" is an objective one—whether a reasonable person would feel that he was not free to leave and break off police questioning. *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979). Under the test established in *Hunter*, the court must consider the events before the questioning and the facts surrounding the questioning itself and determine whether a reasonable person in those circumstances would have felt that he was not free to leave and break off police questioning. *Id.* The determination of *Miranda* custody depends on the totality of the circumstances. *Id.*

Three groups of facts are relevant to this determination: the facts surrounding the questioning, the facts pertaining to the events leading up to the questioning, and the facts pertaining to what happened after the questioning. *Id.*

Among the factors that a court should consider are (1) what the individual was told by the police about his ability to leave, (2) whether he was allowed complete freedom of movement during the questioning, (3) who initiated the contact, (4), whether individual was being contacted as a suspect, (5) whether deceptive stratagems were used, (6) whether the atmosphere was police-dominated, and (7) whether the suspect was placed under arrest at the end of the questioning.

Taking these factors and applying them to Doug's situation, the following should be discussed.

It could be argued that Doug went with the officer because he wanted to cooperate with the officer's investigation as the officer never needed to use any force in having Doug accompany the officer to the police office. However, Doug

was not specifically told by the trooper that he did not have to answer the trooper's questions. Nor did the trooper ever tell Doug that he was free to leave. The terminology used by the trooper, his "need" to talk with Doug, although a colloquial term, could suggest to a reasonable person that the person did not have a choice about going with the officer to the police office to answer questions. Assurances by police that the person is free to leave generally indicate a lack of custody, *see Thompson v. State*, 768 P.2d 127, 131 (Alaska App. 1989), but no such assurances are presented by the facts in Doug's case.

The initial contact was mutual, but the contact was maintained by the trooper, not by Doug. Doug only appeared to have intended to say hello to the trooper and continue on to school. But the trooper interfered with Doug's planned activities. The trooper insisted that Doug come with him then, rather than allowing Doug the opportunity to go to school first. And the trooper escorted Doug to the office, rather than allowing Doug to stop by the office when it was convenient to Doug. *Contra Thompson*, 768 P.2d at 131(defendant came by the police station on his own after being called to come down and was told he was free to leave when he arrived; no custody found). Thus, this factor supports a conclusion of custody.

The contact was initiated because the trooper appeared to consider Doug a suspect, not simply a witness. But the trooper did not directly communicate this to Doug. Thus, without Doug knowing that he was being questioned as a witness, this factor is neutral. *See State v. Smith*, 38 P.3d 1149, 1159 (Alaska 2002).

Although no strong-arm tactics were used to have Doug accompany the trooper to answer questions, the officer did employ some deception in getting Doug to accompany him and answer his questions. The officer told Doug that the officer was questioning everyone in town about their whereabouts when, in fact, the officer appeared to have questioning Doug only and as a suspect, not because he might have witnessed something. Thus, this factor supports a finding of custody.

The interview took place at a police station, a factor that favors custody. *State v. Smith*, 38 P.3d 1149, 1156 (Alaska 2002). Doug was not placed inside the cell or formally restrained at the police station. However, two uniformed police officers were present for the questioning and one, the local police chief, stood between Doug and the door. Even though the police chief was not acting in any menacing fashion, nonetheless his presence and position in the room at the time of the questioning could have made a reasonable person in that situation feel like he was not free to leave until he answered the trooper's questions. Moreover, the number of police officers—two—favors a finding of custody. *Id.* at 1157.

The questioning was not lengthy nor was it particularly intense or accusatory. This factor cuts against a finding of custody.

Doug was allowed to leave at the end of the questioning, a factor that cuts against a finding of custody. However, that the officer arrested him so quickly after he had left the police station and without apparently obtaining any further information suggests that the officer might have done so only to avoid having to advise Doug of his *Miranda* rights.

Thus, Doug has a persuasive argument that, when considering the totality of the circumstances, Doug was in custody such that *Miranda* warnings should have been given to him by the trooper and that his statement should therefore be suppressed.

Doug could also argue that, even if his initial statements were not a product of a *Miranda* violation, the last portion of his statement was. Alaska courts have held that questioning that is non-custodial at its inception may become custodial as it progresses. *Motta v. State*, 911 P.2d 34 (Alaska App. 1996). Even if the entire statement is not suppressed as a violation of *Miranda* rights, Doug could argue that the portion of his statement about drinking beer could be suppressed because he was in custody at that point. In *Motta*, the appellate court explained that even where a contact between police and a defendant begins as a noncustodial interview, the contact can become custodial if the police do or say anything that would suggest to a reasonable person that the person is no longer free to leave. In *Motta*, at the point that the police would not allow the defendant to leave the room to get a cigarette, the appellate court found that the contact had become custodial.

In Doug's case, even if the court concluded that Doug was not in custody up to the point that he asked to leave to go to school, Doug could argue that the officer's response to this question, "Not quite yet—just a couple more questions," a response that suggested that Doug was not free to leave at that point, made the remainder of the contact custodial. Thus, Doug has a strong argument that his final portion of his statement to the trooper should be suppressed.

<u>Fourth Amendment argument</u>

Doug may also argue that his statements were the "fruits" of an unlawful seizure/arrest, i.e., an arrest based on less than probable cause. Where contact between a police officer and a citizen goes beyond an on-the-scene questioning and particularly where it involves the individual traveling to a police station, the contact does not involve any *Terry* or *Coleman* investigatory stop analysis as it is not considered a limited investigatory stop. *Lindsay v.*

State, 698 p.2d 659, 661 (Alaska App. 1985)(an investigatory stop requires that the detention be of brief duration and that it not require the person stopped to travel an appreciable distance). Instead such contact must be analyzed as a full-blown seizure. *Id.* Such a seizure is justified where the police have probable cause to arrest the individual, even if no formal arrest has occurred. *Id*. However, no seizure occurs if the individual voluntarily accompanies the police to the police station. *Id*.

Doug would argue that he was seized/arrested at the point that the trooper did not permit Doug to drop his books off at school, but instead told Doug that he "needed" to talk to him right away. Probable cause to arrest without a warrant requires that the police have probable cause to believe that a felony has been committed and a reasonable belief that the person to be arrested is the one who committed it. *Schmid v. State*, 615 P.2d 565, 574 (Alaska 1980). In Doug's case, there is no question but that the trooper had probable cause to believe that a felony had been committed (burglary). But the stronger argument for Doug is that there was insufficient basis to reasonably believe that Doug had been the one who had committed the crime. All the trooper knew that connected Doug to the crime was Carl's statement that the person in his house looked somewhat like the new teacher in town and that Doug was the new teacher in town. It is unlikely that this limited information could be sufficient to establish a reasonable belief that Doug was the person who had committed the crime.

Thus, Doug could likely successfully argue that the trooper lacked probable cause to seize/arrest Doug and bring him to the police station. If this is the case, then Doug would ask that his statements made after he had been seized be suppressed as fruits of the unlawful seizure. *See Linday*, 698 P.2d at 662, citing to *Wong Sun v. United States*, 371 U.S. 471 (1963). Because no insulating factor, such as the passage of time without questioning or illegal custody, change of location or conditions or change of parties involved or the giving of *Miranda* warnings, points to an attenuation of the taint of the illegal custody, Doug's statements would likely be suppressed. *Lindsay*, 698 at 662; *see also Brown v. Illinois*, 422 U.S. 590 (1975).

But the state would likely argue that there had been no seizure/arrest because Doug had accompanied the trooper to the police station voluntarily, i.e., that Doug had consented to go with and talk to the trooper at the station. Whether Doug consented to accompany the trooper is a question of fact determined by the totality of the circumstances. *Lowry v. State*, 707 P.2d 280, 283-284 (Alaska App. 1985). Among the factors that a trial court is to consider when determining whether Doug voluntarily went to the police station are similar to the factors considered in determining whether Doug was in custody for *Miranda* purposes, but focus primarily on the initial interaction between Doug and the trooper that resulted in them getting to the station. *Id*. Factors that

courts have considered include whether the initial contact involved a show of some force by the police (e.g., a pat-down search for weapons or having guns drawn), whether the individual was advised that he was free to disregard the police request or that he was expressly told that he was not under arrest, whether the individual was restrained in any manner (e.g., handcuffs, placed in the back of a police vehicle), or whether the individual himself expressed an interest in talking with the police. *Id.* at 284. Additional factors include whether the individual was told that he was free not to accompany the officer, whether the matter was put to the individual in terms of a request versus a command, whether the individual had any control of the time and place of questioning, whether the individual was treated as a suspect or as a witness, or whether the police used intimidating language or actions in order to have the individual accompany the police. See generally, W. LaFave, *Search and Seizure:A Treatise on the Fourth Amendment*, §5.1(a)(3rd ed. 1996), Vol. 3 pp. 4-9.

In Doug's case, the question of whether he went voluntarily with the trooper is a close call. Doug should argue that he was never told that he did not have to talk to the trooper, he was told more than once that the trooper "needed" to talk to him, and the trooper was insistent that Doug accompany the trooper immediately, rather than allowing Doug the opportunity to drop his books off at school. Additionally, during the questioning, Doug asked for permission to leave, suggesting that he did not believe that he was there voluntarily to answer questions. On the other hand, the initial contact between the trooper and Doug appeared to be low-key and friendly, the trooper never engaged in any show of force such as patting down Doug or displaying any weapons, and the trooper told Doug that he was trying to talk to everyone in town, rather than singling Doug out as a suspect. Nor was any actual restraint placed on Doug while he accompanied the trooper to the station. Thus, the argument that Doug had voluntarily accompanied the trooper could go either way.

Compare *Lindsay*, 698 P.2d at 661-662 (where defendant was contacted at 2:30 a.m. by police and told in a commanding tone to get into the police car rather than allowed to take his own car and was transported to the police station, where he was not told either that he was under arrest or free to leave, and where a friend was prevented from talking to him at the police station, the court concluded that the defendant did not accompany the police voluntarily) with *Lowry*, 707 P.2d at 283-284 (where police in two squad cars pulled up behind defendant's car and police ordered him out of the car, where a police officer pointed a shotgun at him and a second officer frisked him, but where the police then told the defendant that he was not under arrest and asked if he was willing to accompany them to the police station, where the defendant remained with the police while even more police arrived at the scene, and was then transported in a police car to the station, although not handcuffed or otherwise physically restrained in the police car, the court concluded that,

although it was a close question, the defendant had not been in custody but had accompanied the police to the station voluntarily).

Stephan violation

Under Alaska law, Doug could also seek suppression of the statement because the officer failed to tape-record the statement as required under *Stephan v. State*, 711 P.2d 1156 (Alaska 1985). The Alaska Supreme Court held in that case that where the police conduct a custodial interrogation in a place of detention such as a police station, the police must tape-record the entire interview. Where the police fail to do so, the statement obtained will be suppressed where the defendant claims that the police version of the statement is inaccurate. *Id.* at 1163.

Here since, as previously discussed, there is a good argument that the questioning was custodial in nature and since it took place in a police station, Doug could seek suppression of the officer's version of his statement as being in violation of the *Stephan* requirement that the statement should have been recorded. The facts indicate that the trooper did not tape-record the interview.

Doug must also disagree with the statement being attributed to him by law enforcement and argue that the statement is inaccurate. To the extent that the officer is claiming, consistent with his grand jury testimony, that Doug's statement was limited to that information provided to the grand jury, then Doug does disagree with the officer's version of what Doug said to him.

Unanticipated problems that occur during the tape-recording such as the tape unexpectedly malfunctioning or stopping are considered exceptions to the *Stephan* requirement. *Id.* at 1165. But there is nothing in the facts that suggests that this occurred. It appears that the trooper simply did not tape-record the conversation. There is nothing in the facts to suggest that the trooper could not have tape-recorded the questioning. A reasonable assumption, given the *Stephan* requirement generally, is that the local police chief would have a working tape-recording at the police station. Thus, Doug has a good argument that his statement should be suppressed under the court's holding in *Stephan*.