ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Roommates Vinnie and David decided to go out for beers one Friday night. Over the course of the evening, David drank fairly continuously. He became increasingly angry with Vinnie, and Vinnie suggested he should stop drinking. David challenged Vinnie to fight him. Vinnie left the bar, hoping that David's temper would mellow before returning home.

While Vinnie was sleeping at home, he heard David screaming that he was going to get Vinnie. Vinnie jumped up and locked his bedroom door. While David pounded on the door, Vinnie grabbed his phone and called 911. The 911 dispatcher asked Vinnie what was going on. In a rush, Vinnie exclaimed, "Get here quick! My roommate is beating down my door! I think he wants to kill me!" Soon after that, the line went dead.

When police responded several minutes later, they found Vinnie attempting to clean up pieces of his broken door. The right side of Vinnie's face was badly swollen and he was bleeding from his nose. An officer asked Vinnie if he was okay, and Vinnie, obviously upset and frightened, responded that he'd be okay. Vinnie explained excitedly in the course of a short one-minute interview that David had broken down the door and beaten him up and had run out of the house as police approached.

Minutes later, two police officers located David down the street. The two officers approached David and asked him what had occurred. David shook his head and muttered that he had done it and the police should just arrest him now. The officers arrested David and charged him with the assault on Vinnie.

By the time of trial, Vinnie had moved away from Alaska and could not be found. The prosecution sought to introduce Vinnie's statements to the 911 dispatcher and to the responding police officers. The court overruled David's hearsay objection, holding that both the statements to the 911 dispatcher and the statements to the responding officers constituted excited utterances.

1. David makes a second objection to use at trial of Vinnie's statements to the 911 dispatcher and to the responding police officers, arguing that their use would violate his constitutional right to confront witnesses against him. Analyze and discuss whether each set of statements is admissible in light of David's constitutional right to confront witnesses.

2. David also seeks to suppress his own statement to the police officers, arguing that he was subjected to custodial interrogation without the benefit of *Miranda* advisements. Analyze and discuss this claim.

GRADER'S GUIDE

***** QUESTION NO. 5 *****

SUBJECT: CRIMINAL LAW

I. David makes a second objection to use at trial of Vinnie's statements to the 911 dispatcher and to the responding police officers, arguing that their use would violate his constitutional right to confront witnesses against him. Analyze and discuss whether each set of statements is admissible in light of David's constitutional right to confront witnesses. (60% of points)

A. Right to Confrontation Under the United States and Alaska Constitutions – 20%

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is also present in Article I, section 11 of the Alaska Constitution. *See also Pease v. State*, 54 P.3d 316, 326 (Alaska App. 2002); *Taylor v. State*, 977 P.2d 123, 125-26 (Alaska App. 1999). Within the last few years, the United States Supreme Court has rendered decisions that address the contours of this right of the criminal defendant under the Confrontation Clause; and state courts, including the appellate courts of Alaska, have endeavored to interpret and apply the principles set forth by the U.S. Supreme Court.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the trial court admitted a taped statement by the defendant's wife to the police in which she described events leading up to and including the defendant's stabbing of the victim. The statement was made hours after the event. The Court held that because the statement at issue was testimonial in nature, its use, without any opportunity for the defendant to cross-examine the witness, violated the Sixth Amendment's Confrontation Clause.

The Court subsequently clarified that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington,* 126 S.Ct. 2271, 2273-74 (2006).

Alaska courts have also addressed the issue. *See, e.g.*, *Porterfield v. State*, 145 P.3d 613 (Alaska App. 2006) (witness's statements made to friend without realizing this friend was a police informant were not testimonial under *Crawford*); *Anderson v. State*, 111 P.3d 350 (Alaska App. 2005) (injured assault victim's response to police officer's question "What happened?" at scene was not testimonial in nature), *petition for hearing denied by Alaska Supreme Court*, *remanded by United States Supreme Court in light of Davis v. Washington*.

B. Vinnie's Statements to the 911 Dispatcher – 20%

Vinnie's statements to the 911 dispatcher: "Get here quick! My roommate is beating down my door! I think he wants to kill me!" were made as Vinnie's roommate, David, was beating on Vinnie's door, after David had screamed that he was going to come and get Vinnie. Vinnie's statements to the 911 dispatcher were also in response to the dispatcher's preliminary questions about what was going on. There is a good argument that these statements are not testimonial because the emergency was ongoing. See *Davis* 126 S.Ct. 2271. (holding that statements made to 911 dispatcher during and immediately after the assault were not testimonial).

Vinnie's statements with regard to what was happening were made without the time or ability to reflect upon the criminal consequences of what he was saying. Viewed objectively, the questions and answers during the 911 call here demonstrated that the dispatcher was attempting to help address and resolve an emergency. The conversation between the 911 dispatcher and Vinnie was markedly less formal than the interrogation at issue in *Crawford*. Here, the "interrogation" was much quicker and more basic, designed to give police information necessary for them to provide emergency aid. The court will likely determine that Vinnie's statements made to the 911 dispatcher were not testimonial, would not implicate the defendant's rights under the Confrontation Clause, and thus should be admitted at trial.

C. Vinnie's Statements to the Responding Police Officer – 20%

According to the criteria discussed above, some factors point toward a finding that the statements are testimonial. First, when Vinnie stated that his roommate beat him up he was describing past events. When the officer asked about what happened, Vinnie was no longer facing the emergency of the assault being perpetrated against him. At least to some extent, the officer was asking about past events, and Vinnie was describing past events. The court thus could find that Vinnie's statements were not made for the purpose of resolving an existing emergency situation but to investigate a crime. See *Davis*, 126 S. Ct. 2271; *Crawford* 541 U.S. 36 (2004) (statement made hours after the event).

To the contrary, one might argue that the emergency facing Vinnie was ongoing. He had just been assaulted and might have needed medical attention.

However, while Vinnie's face was very swollen, and while there was blood coming from his nose, he was up and walking around. One might make an argument that this description of Vinnie's injuries indicates some potential ongoing medical emergency, but there is little in the facts supporting an interpretation that the injuries to Vinnie were life-threatening or particularly in need of immediate treatment. Indeed, the officer asked Vinnie if he was okay, and Vinnie responded that he would be okay.

Another argument that the emergency is ongoing is that the assault suspect was not yet contained. The emergency to which the police responded was not resolved. The person could be lying in wait or pose a further danger to the public. *Compare Davis* 126 S. Ct. 2266 (2006) (finding no ongoing emergency when suspect was contained).

The police needed to ascertain the basics of what happened to Vinnie in order to completely resolve the emergency. The responding police officer asked his questions, not in the context of a formal interview, but in a quick, instinctive manner – as part of very preliminary questioning. The police arrived and questioned Vinnie shortly after David had just assaulted him. Vinnie answered the officers' preliminary questions without time for reflection or calculation. When viewed objectively, Vinnie's statements were made without thought as to their impact on future criminal proceedings. In this way, the statements appear distinctly nontestimonial.

Depending upon the weight given to these various factors in determining the nature of Vinnie's statements to the responding police officer, the statements may or may not be deemed testimonial and thus may or may not implicate David's right to confront witnesses. Either conclusion as to admissibility is plausible. The analysis is more important.

II. David also seeks to suppress his own statement to the police officers, arguing that he was subjected to custodial interrogation without the benefit of *Miranda* advisements. Analyze and discuss this claim. (40% of points)

David's suppression claim turns on whether his statements were the product of "custodial interrogation." *See generally Miranda v. Arizona*, 384 U.S. 436 (1966); *see also Beagel v. State*, 813 P.2d 699, 705 (Alaska App. 1991). Custodial interrogation means "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*, 384 U.S. at 444. "Only a restraint of a 'degree associated with formal arrest' will constitute *Miranda* custody, however." *Motta v. State*, 911 P.2d 34, 38 (Alaska App. 1996) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

Courts assess whether a person is in custody for purposes of *Miranda* using an objective, reasonable person test. *Hunter v. State*, 590 P.2d 888, 895 (Alaska App. 1979). When determining issues of custody, courts focus upon two essential inquiries: "(1) the circumstances surrounding the interrogation; and (2) given the totality of those circumstances, whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *State v. Smith*, 38 P.3d 1149, 1154 (Alaska 2002). Relevant pre-interrogation facts include how the defendant got to the place of questioning – whether he got there of his own accord, in response to a police request, or by police escort. *Id.* Relevant circumstances of the interrogation itself include when and where the interrogation occurred, how long it lasted, how many police officers 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, and whether the defendant was being questioned as a suspect or as a witness. *Id.* Post-interrogation inquiry focuses upon what happened after the interrogation – whether the defendant left freely, was detained, or was arrested. *Id.* "The post-interview events factor is of limited weight," however, and "cannot by itself be the determinative test for custody." *Id.* at 1159.

In determining whether the police officers engaged in "interrogation" of David, the court would examine whether the officers here engaged in "express questioning or its functional equivalent." *Beagel*, 813 P.2d at 705 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980)). The functional equivalent of questioning refers to:

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. *Id.* (quoting *Innis*, 446 U.S. at 300-01).

Depending on the factors emphasized in the analysis, different examinees may come up with different answers in terms of the strength of David's claim to suppress his own statements.

One might argue that the single question posed by the two officers in approaching David was not "custodial interrogation," but rather constituted "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." *State v. Salit*, 613 P.2d 245, 257 (Alaska 1980); *see also McCracken v. State*, 914 P.2d 893, 896 (Alaska App. 1996) (early police questioning of suspect while suspect's movements about the crime scene were being limited was upheld as noncustodial and also appeared to have constituted the kind of general on-the-scene questioning that does not qualify as "interrogation"); *Beagel*, 813 P.2d at 705 (distinguishing general on-the-scene questioning from interrogation, and

ultimately finding that defendant's statements were not the product of interrogation). In conjunction with addressing the nature of the very preliminary question that the police officers posed, one might discuss factors suggesting that this situation was not custodial. For instance, the police did not bring David to the place of questioning; rather, they approached him where he already stood. This initial question was very brief, and there is no indication that the officers made any show of force in terms of displaying weapons or making any commands. Nor had the officers done anything, other than approach David, that actually physically restrained him.

One should also recognize factors that potentially support a finding of custodial interrogation. For example, in approaching David, the police knew who he was and that he was not just a suspect, but the suspect, in this case. The argument would follow that the police knew their questioning about what had happened would likely elicit an incriminating response from David. Other factors may include the fact that David was outnumbered, as he was approached by two police officers, the fact that David did not initiate the contact, and the fact that David was arrested immediately after making his statements in response to the officers' question.