ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

N-64, a confidential informant, told Anchorage Police Detective Jones that Dane was selling heroin. N-64 told Detective Jones that Dane lived in Apartment No. 7 at the Oceanview Apartments and that he had gone over to Dane's Apartment seven times in the last six months with a friend who bought heroin from Dane. N-64 said that he observed the sales, the most recent of which occurred earlier that day. N-64 further said that Dane had plenty of heroin left. Detective Jones then drove to the Oceanview Apartments, where he spoke with the apartment manager and asked him how long Dane had lived there. The manager told him that Dane had rented Apartment No. 7 three months earlier. On the way back to the station, Detective Jones spotted William, whom he had arrested several times for heroin possession. Detective Jones asked William, "Dane's selling heroin, isn't he?" William answered, "Yeah."

Detective Jones applied for a search warrant with an affidavit containing the following paragraphs:

1. N-64 is a confidential informant known to your affiant;
2. N-64 was present at Dane's apartment seven times over the last six months and saw Dane sell heroin to a friend of his. The most recent sale occurred earlier today;
3. Your affiant contacted William, a known heroin user, who confirmed that Dane was selling heroin;
4. Dane resides at Apartment No. 7 of the Oceanview Apartments.

The magistrate granted the warrant and Detective Jones and several other officers executed the warrant. The officers found heroin in a hidden cubbyhole at the back of a closet.

Detective Jones asked Dane politely if Dane would talk to him because he needed to get Dane's side of the story. Detective Jones said, "Let's go out to my car where we can have some privacy." Dane agreed and walked out with Detective Jones, who opened up the back door of the car so that Dane could get in. The inside door handles had been removed and Dane knew that he could not get out on his own.

Once inside the car, Detective Jones told Dane that he was not under arrest and asked Dane where he got the heroin. Dane repeatedly denied knowing anything at all about the heroin. Detective Jones began using a more aggressive tone until Dane blurted out, "I'm done answering questions." Detective Jones responded by saying, "Listen, we've got all the evidence we need. If you don't cooperate now, I'm going to have to tell the prosecutor and

the judge and you're going to go to jail for a lot longer." Dane then confessed to dealing heroin. Detective Jones got Dane out of the car, put handcuffs on him, and told him that he was under arrest.

Dane's case is set for trial. Discuss the arguments under the Alaska Constitution that Dane could use in a motion to suppress to exclude the heroin and his confession.

GRADERS GUIDE

***** QUESTION NO. 2 *****

SUBJECT: CRIMINAL LAW

1. Suppression of the Heroin (50 points)

a. Warrant Requirement and Probable Cause (10 points)

The police seized the heroin while conducting a search pursuant to the warrant obtained by Detective Jones. The facts do not provide any basis for suppressing the heroin other than an attack on the warrant.

Article 1, Section 14 of the Alaska Constitution creates a general rule that prohibits the state from searching a residence without first obtaining a warrant based on probable cause. Probable cause exists when reliable information is set forth in sufficient detail to warrant a reasonably prudent person in believing that crime has been or was being committed.[1]

Taken at face value, the affidavit provides sufficient detail to warrant a reasonably prudent person in believing that Dane was selling heroin from Apartment No. 7 of the Oceanview Apartments. N-64 said that he had seen him sell heroin from the apartment on seven occasions in the last six months. William also "confirmed" that Dane was selling heroin. Moreover, there was reason to believe that there was still heroin in the apartment because N-64 said that the most recent sale had occurred earlier that day and that Dane had plenty of heroin left.

But the affidavit suffers from two problems that affect the reliability of the information. It violates both the *Aguilar-Spinelli* and the *Malkin* standards.

b. Aguilar-Spinelli (25 points)

Citing Article 1, Sections 14 and 22 of the Alaska Constitution, the Alaska Supreme Court adopted the federal *Aguilar-Spinelli* standard as a matter of state constitutional law.[2] Under the *Aguilar-Spinelli* standard, when a search warrant application rests on hearsay information, the state must establish both the basis of knowledge and veracity for each of the hearsay informants.[3] An affidavit may establish the informant's basis of knowledge by showing that the information is based on the informant's personal knowledge rather than suspicion or belief.[4] If the affidavit lacks an affirmative assertion

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1 *State v. Smith*, 182 P.3d 651, 653 (Alaska App. 2008)

2 *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985). The United States Supreme Court abandoned the *Aguilar-Spinelli* standard in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

3 *Wilson v. State*, 82 P.3d 783, 783 (Alaska App. 2003).

4 *Jones*, 706 P.2d at 324.

that the information was based on personal knowledge, then the facts supplied must be so detailed that they support an inference of personal knowledge.[5] The state can establish the informant's reliability by demonstrating the informant's past reliability, by police corroboration of detailed facts in the informant's story, or by showing that the statement was against the informant's penal interest.[6]

Detective Jones's affidavit contains the hearsay statements from two informants: N-64 and William. The affidavit fails to meet the *Aguilar-Spinelli* standard for either of the informants.

The affidavit meets the basis of knowledge prong for N-64. The affidavit demonstrates that N-64 had personal knowledge because it states that he saw the sales take place. But the affidavit does not contain sufficient information about N-64's credibility. It does not establish that he has provided accurate information in the past. Rather, it merely states that N-64 is a confidential informant known to Detective Jones.

Similarly, Detective Jones did not corroborate enough of N-64's story to confirm its reliability. The only fact that Detective Jones's confirmed himself was that Dane currently resided at Apartment No. 7 of the Oceanview Apartments. But merely confirming that the suspect lives in the apartment indicated by the informant does not qualify as independent corroboration.[7] N-64's statements were probably not against his penal interest because he did not admit to any wrongdoing. His statement indicates only that he was present during the heroin sales. Nothing he said indicates that he was involved in any of the purchases as either a principal or as an accomplice.

The affidavit meets neither prong of the *Aguilar-Spinelli* standard for William. There is nothing to indicate that he has any personal knowledge of any heroin sales. He could have based his response on mere suspicion or belief. Moreover, William was responding to a leading question from Detective Jones, increasing the likelihood that he was simply giving Detective Jones the answer that Detective Jones wanted regardless of its accuracy. Similarly there is no information in the affidavit regarding William's veracity.

Cross-corroboration of information from several informants is an accepted method of demonstrating the validity of the information provided.[8] However, the informants must provide detailed first-hand accounts that are in substantial agreement.[9] The repetition of conclusory statements is

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5 *Id*.
6 *Id*. at 324-25.
7 *Id*. at 325.
8 *Wilson*, 82 P.3d at 787.
9 *Id*.

insufficient.[10] William's statement is conclusory; it provided no detail at all. Thus, his statement does nothing to corroborate N-64's.

c. Malkin (15 points)

In *State v. Malkin*[11], the Alaska Supreme Court held that Article 1, Section 14 of the Alaska Constitution required the excision of reckless and intentional misstatements from the affidavit. Once the defendant proves that statements in the affidavit are false, the state bears the burden of showing by a preponderance of the evidence that the statements were not made intentionally or recklessly.[12] If the statement was recklessly made, then the statement is excised from the affidavit and the remainder is tested for probable cause.[13] If the statement was intentionally made to deceive the magistrate, the warrant is invalidated. This analysis also applies to omissions. A reckless or intentional omission will vitiate a warrant if the omission was material in that its inclusion would have precluded a finding of probable cause.[14]

Arguably, Detective Jones's affidavit contains a material omission. He neglected to tell the magistrate that the apartment manager of the Oceanview Apartments stated that Dane only moved into Apartment No. 7 three months ago. This belies N-64's claim that he had seen Dane at that apartment for the past six months. Dane will want to argue that the inclusion of the apartment manager's information would have precluded a finding of probable cause because there would have been no reason to believe any other part of N-64's story. Dane will also want to argue that the omission must have been either reckless or intentional because Detective Jones specifically asked the apartment manager for the information. Ultimately, an evidentiary hearing will be necessary to determine the materiality of the manager's statement and Detective Jones's culpable mental state.

2. Suppression of the Confession (50 points)

Dane confessed to Detective Jones that he was dealing drugs, but the confession has two problems. It violates both *Miranda* and *Beavers*. The confession was also arguably the result of an illegal search and would be excluded as the fruit of the poisonous tree.

a. Miranda (25 points)

The Alaska Supreme Court requires *Miranda* warnings be given as a matter of state constitutional law.[15] The failure to provide proper warnings or

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10 *Id*.
11 722 P.2d 943, 946 (Alaska 1986).
12 *Id*.
13 *Lewis v. State*, 9 P.3d 1028, 1032-33 (Alaska App. 2000).
14 *Id*. at 1033.
15 *Munson v. State*, 123 P.3d 1042, 1047-1049 & n. 48 (Alaska 2005).

to obtain a waiver of the rights described in the warnings will generally result in the exclusion of the statement.[16]

An officer must give a person the *Miranda* warnings if the officer questions the person while the person is in custody.[17] A person is in custody if a reasonable person in the same circumstances would not feel free to break off the interrogation and leave. [18] A court will look at three groups of facts to determine whether a person is in custody:

> The first are those facts intrinsic to the interrogation: 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, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, 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. Finally, what happened after the interrogation whether the defendant left freely, was detained or arrested may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.[19]

A person may invoke his right to remain silent and end the interrogation in any manner and at any time during questioning.[20] The invocation does not require any ritualistic formula or talismanic phrase.[21] All that is necessary is a statement sufficiently clear that a reasonable police officer in the circumstances would understand it as an invocation of the suspect's rights.[22]

Dane should argue that there were two separate *Miranda* violations. First, Detective Jones began the interrogation without giving Dane *Miranda* warnings. Detective Jones was required to give the warnings if he was going to interrogate Dane while Dane was in custody. On these facts, there is no question that Detective Jones interrogated Dane. He told Dane that he wanted to talk to him to get his side of the story and repeatedly asked Dane where he got the heroin.

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16 *Id*. at 1047.
17 *Id*.
18 *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979).
19 *Id*.
20 *Munson*, 123 P.3d at 1048.
21 *Id*.
22 *Id*.

There is more of an issue about whether Dane was in custody. A lot of the facts suggest that Dane was not in custody. The officer asked Dane politely if he would talk to him and suggested that they talk in Detective Jones's car for privacy reasons. He also told Dane that he was not under arrest. But Dane was being questioned as a suspect rather than a witness and he was in the back of the Detective Jones's car when he was questioned.

The fact that he could not physically leave the car makes it much more likely that a reasonable person in Dane's place would not feel free to leave. In *State v. Smith*[23], the Supreme Court of Alaska held that under the circumstances of that case conducting the interrogation in the police car slightly favored a finding of custody. The police officer asked the suspect to sit in the front seat of a patrol car while they talked about the case for privacy reasons.[24] The day was hot and the car's air conditioner was on.[25] Furthermore, the front door was unlocked.[26] But, the officer could have conducted the interrogation in the suspect's apartment.[27] The circumstances surrounding Dane's interrogation are more coercive than in *Smith* because Danes was in the back seat and knew that he could not get out on his own.

The fact that Detective Jones immediately arrested, handcuffed, and placed Dane back into the car is a further indication that Dane was in custody.

Second, Detective Jones committed a *Miranda* violation when he refused to honor Dane's invocation of his right to remain silent. Dane told Detective Jones that he was done answering questions. In *Munson v. State*, the Alaska Supreme Court held that the statement, "Well, I'm done talkin' then" was a clear, unequivocal invocation of Munson's right to remain silent.[28] The officer in *Munson* violated Munson's rights by continuing to interrogate Munson despite the invocation. Dane's statement that "he was done answering questions" is very similar to Munson's and should also constitute a clear, unequivocal invocation of the right to remain silent.

b. Beavers (15 points)

A confession is not admissible unless it is voluntary.[29] The court must evaluate the totality of the circumstances to determine whether a particular confession is the product of free will or of a mind overborne by coercion.[30] A

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23 38 P.3d 1149, 1156 (Alaska 2002).
24 *Id*.
25 *Id*.
26 *Id*. at 1152.
27 *Id*. at 1156.
28 *Munson*, 123 P.3d at 1050-51.
29 *Beavers v. State*, 998 P.2d 1040, 1044 (Alaska 2000).
30 *Id*.

non-exhaustive list of the circumstances relevant to the court's determination includes "the age, mentality, and prior experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."[31]

The right to remain silent includes the right to terminate an interrogation at any time.[32] A police officer's threat of harsher treatment conveys that the suspect will be punished for remaining silent or refusing to answer any other questions.[33] Threats of harsher treatment are, therefore, presumptively coercive, and the court will consider the confession involuntary unless the state can affirmatively show that the confession was voluntarily made.[34]

The voluntariness of Dane's confession hinges upon one fact: Detective Jones's response when Dane invoked his right to remain silent. Detective Jones told him that he was going to tell the prosecutor and the judge if Dane didn't cooperate and Dane was going to get a longer jail sentence. This is precisely the kind of threat of harsher treatment that is presumptively coercive according to the Alaska Supreme Court's decision in *Beavers*. Nothing in the facts indicates that Dane's statement was voluntary despite the coercion. Rather the course of the interrogation indicates that Dane was coerced. He made no incriminating statements and denied knowing anything about the heroin until after Detective Jones ignored his invocation of his right to remain silent and threatened him with a longer jail sentence.

c. Fruit of the Poisonous Tree (10 points)

In *Lindsay v. State*[35], the Alaska Court of Appeals held that a statement obtained after an illegal detention and search was excludable as the fruit of the poisonous tree. The police wanted to talk with Lindsay about a theft, and contacted him at the home of some of his friends at 2:30 in the morning.[36] The police took Lindsay back to the station where they interrogated him for 40 minutes.[37] Lindsay ultimately signed a "consent to search" form and made an incriminating statement.[38] According to the court, the consent to search and the statement were the fruits of Lindsay's illegal detention and should have been suppressed.[39] The court further concluded that the taint of the illegal detention was not attenuated "[b]ecause no insulating factor, such as passage

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31 *Id*.
32 *Id*. at 1045-46.
33 *Id*. at 1046.
34 *Id*.
35 698 P.2d 659, 662 (Alaska App. 1985).
36 *Id*. at 660.
37 *Id*.
38 *Id*.
39 *Id*. at 662.

of time without questioning or illegal custody, change of conditions, change of location, or change of parties involved."[40]

Dane's statement would likely be considered the fruit of the search of Dane's apartment. Detective Jones did not talk with Dane until after he executed the warrant and discovered the heroin in the cubbyhole. He then asked Dane if Dane would talk because he needed to get Dane's side of the story. If Dane's attack on the warrant is successful, the court should suppress the statement as well as the heroin. Detective Jones exploited the illegal search by using the discovery of the heroin to confront Dane. He said that he needed to get Dane's side of the story. Furthermore, there is a strong argument that the taint of the illegal search did not dissipate because there was no insulating factor.

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[40] *Id.*