ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Officer Smith of the Anchorage Police Department saw Dave walking along a road while he was on patrol. Dave threw some firecrackers into the street. There weren't any cars nearby. Setting off fireworks in Anchorage is an infraction punishable by a fine. Officer Smith decided that he would give Dave a warning rather than a citation. Officer Smith put on his overhead lights and pulled over behind Dave. He got out of the patrol car and said, "Come here a minute." Dave walked over, and Officer Smith told him not to light any more fireworks in the city and not to ever throw them into the road.

Sergeant Jones of the Anchorage Police Department drove up as Officer Smith was about to let Dave go. Officer Smith advised Sergeant Jones about what happened, and Sergeant Jones told Dave that he needed to see his identification. Dave gave him his driver's license. Sergeant Jones gave the license to Officer Smith and told him to check for any outstanding warrants. Sergeant Jones then told Dave to turn around, put his hands on the patrol car, and spread his legs. Sergeant Jones then conducted a pat down of Dave's clothing. He felt a hard cylindrical object about two inches in length and about a half inch in diameter in Dave's chest pocket. He also felt something that felt like a plastic bag. Sergeant Jones had manipulated many plastic bags while conducting pat-downs over the years. Sergeant Jones manipulated both objects through the cloth of Dave's shirt. He could not identify the cylindrical object, nor could he tell if the plastic bag contained anything.

Officer Smith came back with Dave's driver's license and said that there were no warrants outstanding. Sergeant Jones told him to wait a minute because he wasn't done. Sergeant Jones then reached into Dave's pocket and grabbed the hard cylindrical object. Sergeant Jones tipped the object at an angle as he pulled it out of the pocket. The plastic bag was snagged on the object and came out of the pocket at the same time. The cylindrical object turned out to be a lip balm, and the bag contained a small amount of white powder that Sergeant Jones recognized as cocaine. Sergeant Jones then arrested Dave for possession of cocaine.

Discuss both of the police officers' conduct and whether the cocaine should be suppressed.

GRADER'S GUIDE

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

SUBJECT: CRIMINAL

I. The Investigatory Stop – 35 points

Article I, section 14 of the Alaska Constitution prohibits unreasonable searches and seizures. Not all contacts between a citizen and the police result in a seizure of the citizen.[1] A police officer may engage in a generalized request for information by putting questions to a citizen.[2] The citizen is under no obligation to answer the questions and may leave.[3] But a seizure occurs when the officer restrains the liberty of the citizen through physical force or a show of authority.[4] A show of authority exists when an officer engages in conduct that would cause a reasonable person to believe that he was not free to leave.[5] The conduct must be of a type that a reasonable person would view as threatening or offensive if coming from a private citizen.[6] A seizure may be either an investigatory stop or an arrest.[7]

In Alaska, an investigatory stop must be supported by reasonable suspicion that imminent public danger exists or serious harm to person or property has recently occurred.[8] A reasonable suspicion is one that has a factual basis in the totality of the circumstances known by the officer in light of that officer's experience and training.[9] Relevant factors to consider are seriousness of the crime that has either occurred or is about to occur, the imminence or recency of the crime, the strength of the officer's suspicion, the opportunity for further investigation, the intrusiveness of the stop, and any flight or furtive action by the person at the approach of the officer.[10] "The fundamental question is whether 'a prompt investigation [was] required as a matter of practical necessity.'"[11] Once the officer has

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1 *Waring v. State*, 670 P.2d 357, 363 (Alaska 1983).
2 *Howard v. State*, 664 P.2d 603, 608 (Alaska App. 1983).
3 *Id*.
4 *Waring*, 670 P.2d at 363-64.
5 *Id*.; *Majaev v. State*, 223 P.3d 629, 632 (Alaska 2010).
6 *Waring*, 670 P.2d at 363.
7 *Howard*, 664 P.2d at 608.
8 *Waring*, 670 p.2d at 365.
9 *Zemljich v. State*, 151 P.3d 471, 4734-75 (Alaska App. 2006).
10 *Id*.
11 *Id*. *quoting G.B. v. State*, 769 P.2d 452, 456 (Alaska App. 1989).

accomplished the purpose of the seizure, the stop may go no further unless the officer has reasonable suspicion that person is engaged in some other criminal activity or the initial seizure has become a consensual encounter.[12]

This question involves an analysis of the scope of an investigatory stop. Officer Smith conducted an investigatory stop when he detained Dave to talk to him about throwing firecrackers. Sergeant Jones then extended the scope of the investigatory stop continuing Dave's detention so that he could check for outstanding warrants and frisk Dave.

Officer Smith's Initial Detention of Dave

Officer Smith detained Dave through a show of authority, for he activated his overhead lights and told Dave to "Come here a minute." A reasonable person arguably would not feel free to leave in this situation. In *Coffey v. State*, the Court of Appeals held that an officer's activation of the patrol car's overhead lights, combined with the statement to a pedestrian, "come over here . . . I need to talk to you" constituted an investigatory stop, which required reasonable suspicion.[13]

To justify the seizure, Officer Smith had to have reasonable suspicion that Dave's conduct posed an imminent public danger or that Dave had recently caused serious harm to person or property. On the face of the facts, an argument could be made either way. On one hand, Officer Smith saw Dave throw some firecrackers into the street. Potentially, throwing firecrackers into a street could pose a risk of harm because the firecrackers could distract a driver as they went off, causing the driver to have an accident. Also, fireworks always pose at least some small risk of starting a fire. On the other hand, Dave could argue that throwing the firecrackers into the street did not pose an imminent public danger because there were no cars nearby and he wasn't likely to start a fire by throwing them into the street. There was no evidence that Dave caused any harm at all.

There is some support in the case law for upholding the stop. The court of appeals stated in a memorandum opinion and judgment in *Cousins v. State* that throwing firecrackers into the street justified a stop, but the court made that statement without analyzing whether

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12 *Cousins v. State*, 2006 WL 1897112 at *2 (Alaska App.)

13 *Coffey v. State*, 216 P.3d 564, 567 (Alaska App. 2009)

throwing the firecrackers posed an imminent public danger. The opinion provides no indication that the parties argued the issue.

Sergeant Jones's Continued Detention of Dave

Sergeant Jones likely extended the scope of Dave's detention when he arrived. He took Dave's driver's license from him and then had him assume the pat-down position against the patrol car. This conduct arguably amounted to a show of authority because it would have been threatening or offensive coming from a private citizen. However, some applicants may note that a police officer's request for identification does not automatically turn an encounter into an investigatory stop "so long as the officer does not convey the message that compliance is required and so long as the officer does not retain the identification for an unnecessarily long time."[14]

Once the purposes of a seizure are accomplished, the police must let the citizen go unless the police have developed further information justifying continuing the detention. In this case, Officer Smith detained Dave briefly so that he could warn him not to use fireworks in the city and not to throw firecrackers into the road. Officer Smith had accomplished this purpose when Sergeant Jones arrived. Sergeant Jones continued the detention, but he did not have any additional information indicating that Dave was involved in any other criminal activity. He wanted to check for outstanding warrants, but he had no indication that there might be any. He also wanted to frisk Dave, but he had no information that Dave had any weapons or contraband on him. Sergeant Jones's continued detention of Dave was an impermissible fishing expedition.

II. The Frisk – 30 points

The fact that an officer has reasonable suspicion to detain someone for an investigatory stop does not mean that the officer has a basis for performing a frisk, or pat-down search of the person.[15] To conduct a frisk, the officer must have a reasonable belief that the person may be armed and dangerous.[16] The officer's reasonable belief must be based on "specific and articulable facts … taken together with rational inferences from those facts…."[17] A frisk is "a limited, external probing

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[14] *Horner v. State*, 2008 WL 314164 *4 (Alaska App. 2008) (unpublished, quoting and citing *Wright v. State*, 795 P.2d 812, 815 (Alaska App. 1990) and *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

[15] *Albers v. State*, 38 P.3d 540, 542 (Alaska App. 2001)

[16] *Id*.

[17] *State v. Wagar*, 79 P.3d 644, 648 (Alaska App. 2003).

of the clothing or articles for signs of possible weapons."[18] An officer may remove an object from the clothing if he has a reasonable belief that the object could be used as a weapon.[19] In *State v. Wagar*, the supreme court quoted with approval a commentator who stated that a soft object would not justify a further search, but a hard object would if its size and density indicated that it might be a weapon.[20]

Dave should argue that the frisk was impermissible. Alaska law only permits a frisk if an officer has a reasonable suspicion that the suspect might be armed and dangerous. The suspicion must be based on specific and articulable facts. In this case, Sergeant Jones can point to no facts supporting an inference that Dave was armed and dangerous. Thus, the frisk was not supported by reasonable suspicion.

Dave should also argue that Sergeant Jones exceeded the scope of a permissible frisk when he stuck his hand into Dave's pocket. A frisk or pat-down only involves a limited, external probing of the clothes. An officer may remove an object from a pocket only if the officer has a reasonable belief that the item could be used as a weapon. Sergeant Jones felt a hard, cylindrical object about two inches long and a half inch in diameter. A court would uphold Sergeant Jones's removal of the object from Dave's pocket if he could articulate specific reasons for why he suspected that the object could be used as a weapon. But there is nothing in the facts to indicate that he thought it might be a weapon. In *State v. Wagar*, the court upheld an officer's removal of an object that was hard, about three inches long, and pointed. *Wagar* is distinguishable because the object was longer and pointed. It was easier to conceive of it as a weapon. In contrast, the object in Dave's pocket was more consistent with common innocuous items like lip balm or a tube of Dramamine.

Similarly, there is nothing in the facts to indicate that the bag could used as a weapon, so Sergeant Jones had no basis for removing the bag on purpose.

III. Plain View Exception to the Warrant Requirement – 10 points

A search without a warrant is per se unreasonable unless it falls within one of the narrowly defined exceptions to the warrant

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18 *Gray v. State*, 798 P.2d 346, 350 (Alaska App. 1990).
19 *Wagar*, 79 P.3d at 648.
20 *Id*. at 649.

requirement.[21] There is no search or warrant requirement for objects which are in "plain view".[22] A seizure under the "plain view" doctrine is valid if (1) the initial intrusion which afforded the view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent.[23] Before opening a closed, opaque container, an officer must have more than probable cause to believe that it is contraband; the information available to the officer must rise "to a state of certitude rather than mere prediction."[24]

Although the doctrine is referred to as the "plain view" doctrine, the investigating officer's observations may be based on any of the five senses.[25] The pivotal question is "whether observation of the unopened container amounts to a virtual, if not literal, observation of its contents – an 'equivalent to the plain view of the [contraband] itself."[26]

Dave should argue that the bag of cocaine should be suppressed because it was seized without a warrant and because the "plain view" exception to the warrant requirement does not apply. The bag of cocaine came out of Dave's pocket at the same time as the lip balm. Although Sergeant Jones recognized the powder as cocaine, his discovery of the cocaine does not satisfy all of the requirements of the "plain view" doctrine. The initial intrusion which afforded the view of the cocaine must have been lawful. In this case, the initial intrusion was arguably not lawful because Sergeant Jones did not have a reasonable suspicion that Dave was armed and dangerous or that the hard, cylindrical object in Dave's pocket could be used as a weapon. The discovery of the evidence must also be inadvertent. In this case, Sergeant Jones's discovery of the cocaine was arguably not inadvertent. Sergeant Jones recognized that there was a plastic bag in Dave's pocket, but he could not tell if the bag contained anything. When Sergeant Jones removed the cylindrical object from the pocket he tilted it and it snagged on the bag. Dave should argue that Sergeant Jones was fishing for the bag. The facts suggest that Sergeant Jones was fishing but do not require that conclusion.

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21 *Erickson v. State*, 507 P.2d 508, 514 (Alaska 1973).
22 *Id*.
23 *Newhall v. State*, 843 P.2d 1254, 1257 (Alaska App. 1992).
24 *Id*. at 1259 *quoting United States v. Williams*, 822 F.2d 1174, 1184-85 (D.C.Cir. 1987)
25 *Newhall*, 843 P.2d at 1261, J. Bryner concurring.
26 *Id*., *quoting Texas v. Brown*, 460 U.S. 730, 751 (1983).

IV. Exclusionary Rule – 25 Points

In *Lindsay v. State*,[27] 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.[28] The police took Lindsay back to the station where they interrogated him for 40 minutes.[29] Lindsay ultimately signed a "consent to search" form and made an incriminating statement.[30] According to the court, the consent to search and the incriminating statement were the fruit's of Lindsay's illegal detention and should have been suppressed.[31] The court further concluded that the taint of the illegal detention was not attenuated "[b]ecause no insulating factor, such as passage of time without questioning or illegal custody, change of conditions, change of location, or change of parties involved."[32]

The bag of cocaine would likely be considered the fruit of an illegal detention and search. As noted above Sergeant Jones illegally detained Dave when he continued Officer Smith's investigatory stop to run the warrants search and to frisk Dave. Sergeant Jones also conducted an illegal frisk because he did not have a reasonable suspicion to believe that Dave was armed and dangerous and because he exceeded the scope of a permissible frisk by putting his hand in Dave's pocket. Moreover, there are no circumstances attenuating the taint of the illegal detention and search. There was no break in time between the illegal acts and the discovery of the cocaine. Dave remained detained the whole time. Similarly, the conditions and location of Dave's detention remained the same. Furthermore, Sergeant Jones committed the initial illegality and made the resultant discovery.

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27 698 P.2d 659, 662 (Alaska App. 1985).
28 *Id*. at 660.
29 *Id*.
30 *Id*.
31 *Id*. at 662.
32 *Id*.