ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

David shipped a crate labeled "tools" from Anchorage to Dillingham by a private barge company. The shipping contract provided that the barge company reserved the right to search all items shipped. When the barge arrived at the municipal port in Dillingham, Smith, an employee of the barge company, unloaded the barge and stored the freight, including David's crate, in the barge company's warehouse.

Smith routinely searched freight, looking for drugs and other contraband. When he found contraband, he reported his find to the port management and to the Alaska State Troopers. If the Troopers arrested someone for smuggling drugs, he received a $500 cash reward. Smith received two or three such rewards per month. Smith had also received a special citation for being the most productive citizen informant in the state.

Smith opened David's crate and saw three large tool chests and opened them. The first two contained only tools but the third contained several opaque plastic bags as wells as tools. Smith called the port manager, a municipal employee, who supervised all facets of the port's operations. The port manager picked up one of the bags and cut it open. Smith and the port manager recognized the bag's contents from its appearance and smell as hashish and called the State Troopers. Trooper Jones responded, and Smith and the port manager told him what they had done.

Trooper Jones applied for a warrant to seize and search the contents of the crate. His affidavit in support of the warrant stated only that "Smith, an employee of the barge company, had opened the crate and found what he recognized as hashish" and that Trooper Jones had confirmed that there were three crates labeled "tools". The court issued the warrant and Trooper Jones found hashish in all of the opaque bags. The state charged David with possession of hashish.

What arguments should David make under the Alaska Constitution in support of a motion to suppress the hashish?

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CRIMINAL LAW

The facts present three separate searches susceptible to attack under the Alaska Constitution. First, Smith opened David's crates, discovering opaque plastic bags. Second, the port manager took one of the bags from the crate, manipulated it and cut it open, revealing the hashish. And third, Trooper Jones executed the warrant, opened the bags, and discovered hashish in all of them. David should argue that all three searches violate the Alaska Constitution.

1. Smith's Search of the Crates – 33%

As a preliminary matter, David will need to argue that he had a reasonable expectation of privacy in the crates. A search is unconstitutional if it violates a person's subjective expectation of privacy and the expectation is one that society is prepared to recognize as reasonable. *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001). The facts do not expressly state whether David had a subjective expectation of privacy. But it is reasonable to assume that a person who ships freight by common carrier maintains some expectation that the contents of his crates will not be exposed to the public. The question of whether David's expectation of privacy was reasonable involves a value judgment as to whether the police conduct is consistent with the aims of a free and open society. *Id.* at 1171. David should argue that allowing police to search all freight shipped on a common carrier is not consistent with Alaska's free and open society as protected by the Article I, sections 14 and 22 of the Alaska Constitution.

The shipping contract gave the barge company the right to search David's crates. But this did not give the barge company the right to permit the state to search the crates. In *Corngold v. United States*, 367 F.2d 1, 7 (9th Cir. 1966), the court of appeals held that an airline could not consent to the federal government's search of shipped freight despite the fact that the shipping contract gave the airline the right to search the package. The shipper did not expressly authorize the airline to consent to the search, nor did he give up his right to privacy in the contents of the package. *Id.* Corngold is consistent with Alaska view of consent. To be voluntary, "consent must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred." *Erickson v. State*, 507 P.2d 508, 515 (Alaska 1973). In *Erickson*, the supreme court held that a third party could not consent to a search of a suitcase unless the person had express or implied authorization from the owner of the suitcase. *Id.* at 516.

David should argue that Smith acted as a state agent in searching the crates and that his warrantless search violated Article I, Section 14 of the Alaska Constitution.

In *Bell v. State*, 519 P.2d 804 (Alaska 1974), an airline employee searched a box that had been shipped. The employee opened the box because he had dropped it, but he admitted that he would probably have opened it anyway because he suspected the recipient might be involved with drugs. The box contained several items wrapped in green garbage bags. One of the bags was torn and the employee observed that it contained vegetable matter. The employee then called airport security. The Alaska Supreme Court held that the employees' search did not violate the state constitution because the employee did not act in conjunction or at the direction of the police. *Bell*, 519 P.2d at 807. In reaching this decision, the court emphasized that the employee had not cooperated with the police in the past, had not been instructed by the police, and had not had any prior contact regarding drug detection. *Id.* The court also stressed that the airline tariff approved by the Civil Aeronautics Board gave the airline permission to search all shipments. *Id.*

The supreme court reiterated this position in *State v. Stump*, 547 P.2d 305 (Alaska 1976). In Stump, an airline employee became suspicious of a package and opened it, discovering plastic bags of a white powdery substance. *Id.* at 306. In reaching its decision, the court emphasized that "there was no evidence that [the employee] had cooperated with the police in the past or had any previous contact with them pertaining to drug detection." *Id.* at 307.

The court of appeals recently applied the *Bell* standard in *Yeltatzie v. State*, 2011 WL 5247887, in which the troopers suspected an employee of a small regional airline of smuggling drugs. A trooper conveyed this information to the owner of the airline. Ultimately, in the presence of the trooper, the owner opened a package shipped to the employee. The package contained drugs. The owner received a reward of several hundred dollars. The court of appeals upheld the search as a private search because it was neither instigated nor joined in by the state. *Yeltatzie*, 2011 WL 5247887 at *2. In reaching its decision, the court stressed that an airline may have a legitimate business reason to search freight. In this case, the court concluded that the owner's interest in ensuring that his airline was not involved in shipping drugs was a legitimate reason to open the box. *Id.* The court of appeals also upheld the trial court's factual finding that the reward was not a significant motivation in the airline owner's decision to open the package.

Similar to the tariff in *Bell*, the shipping contract in the fact pattern gave the barge company the right to search all items shipped. But the facts in the question differ from *Bell*, *Stump*, and *Yeltatzie* in that there is a stronger claim that Smith, the barge company employee, searched David's crate at the

instigation of the Troopers. Smith routinely searched freight looking for drugs and other contraband. The fact that Smith received between $1,000 and $1,500 per month indicates that his motive was personal rather than related to the barge company's interest. This is further supported by the fact that he searches for drugs and other contraband. His searches appear to have a law enforcement goal rather than a business motive. The fact that Smith received a special citation for being the most productive citizen informant also supports the conclusion that the Troopers instigated the search. By recognizing and rewarding Smith's activities, the Troopers arguably instigated his searches.

2. The Port Manager's Search of the Opaque Bag – 34%

David should also argue that the port manager conducted an unconstitutional search when he cut open the bag. Although the port manager was not a law enforcement officer, he was a "state agent" because he was a municipal employee acting within the scope of his duties. As a result, Article I, Section 14 of the Alaska Constitution prohibited him from searching the bag without a warrant.

The Alaska Supreme Court held in 1974 that an airport security officer was a state agent because he carried out law enforcement functions at the airport. *Bell v. State*, 519 P.2d 804, 807-08 (Alaska 1974). The supreme court followed this reasoning a year later in *J.M.A. v. State*, 542 P.2d 170, 174-76 (Alaska 1975), and held that a foster parent was not a state agent. The court of appeals applied the same reasoning in *D.R.C. v. State*, 646 P.2d 252, 258 (Alaska App. 1982), to hold that school teachers and officials did not have law enforcement functions. But in *Lowry v. State*, 707 P.2d 280, 285-86 (Alaska App. 1985), the court of appeals recognized that the United States Supreme Court raised the bar when it made it clear that the Fourth Amendment of the United States Constitution applied to both civil and criminal authorities. In *Lowry*, the court concluded that the actions of a security guard hired by the coroner's office to guard a house were governed by the "warrant clauses of the United States and Alaska Constitutions." *Lowry*, 707 p.2d at 286.

The facts indicate that the port manager supervised all facets of operations at the port. Conceivably, this would involve any law enforcement activities at the port. But even if the port manager did not engage in law enforcement functions regularly, he was certainly a civil authority. He was a municipal employee engaged in supervising the port, and he responded when Smith called him about the opaque bags. A warrantless search is per se unreasonable unless it falls with one of the narrowly defined exceptions to the warrant requirement. *Erickson v. State*, 507 P.2d 508, 514 (Alaska 1973). The port manager's act of cutting the bag open without first obtaining a warrant violated the state constitution.

3. Trooper Jones's Search of the Opaque Bags – 33%

As noted above, 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. *State v. Smith*, 182 P.3d 651, 653 (Alaska App. 2008). Trooper Jones's affidavit stated that "Smith, an employee of the barge company, had opened the crate and found what he recognized as hashish." This statement would support a finding of probable cause because it would warrant a reasonably prudent person in believing that the crate contained hashish. But Trooper Jones's affidavit presents two problems. First, it contains a hearsay statement, and second, it contains misstatements and omissions.

In *State v. Jones*, 706 P.2d 317 (Alaska 1985), the supreme court reaffirmed its use of the *Aguilar-Spinelli* test and held that, "[w]hen a search warrant is based on the hearsay statement of a confidential informant, the affiant must establish the informant's basis of knowledge and veracity." *Id.* at 324. There are two kinds of informants: "police informants" and "citizen informants." Establishing the veracity of a police informant requires a showing that the informant has provided reliable information in the past, has provided a statement against his own penal interest, or corroboration of a great many of the details of the informant's story. *Lloyd v. State*, 914 P.2d 1282, 1286 (Alaska App. 1986). In contrast, to meet the veracity prong for a citizen informant, the police need only verify some of the details of the information. *Id.* Determination of which corroboration standard to apply requires a realistic assessment of the informant's motives as they appear from the information properly before the court. Id. at 1286-87. The court requires greater corroboration when the informant's primary motive is to obtain an official concession or reap some personal benefit. *Id.* at 1286 quoting *Gustafson v. State*, 854 p.2d 751, 756-57 (Alaska App. 1993). In *State v. Bianchi*, the court of appeals used the *Aguilar-Spinelli* test to evaluate an affidavit that contained the hearsay statements of a named person.

In the question, Trooper Jones submitted an affidavit that contained a hearsay statement: "Smith, an employee of the barge company, had opened the crate and found what he recognized as hashish." The affidavit establishes the basis of knowledge prong of the *Aguilar-Spinelli* test because it states that Smith opened the crate and discovered the hashish. But the facts raise an issue with the veracity prong because Trooper Jones did very little to confirm Smith's story. He merely confirmed the existence of the three crates and that they were labeled "tools". If Smith were considered a "police informant", then the warrant would likely fail because the affidavit does not contain the necessary corroboration. Trooper Jones could have provided sufficient information because he could have detailed all the reliable information that

Smith had provided in the past. On the other hand, if Smith were considered a "citizen informant", then there may be sufficient corroboration. The crux of the issue is where to place Smith because he has characteristics of both. The facts do not make Smith's motivation explicit. On one hand, he looks like a "citizen informant" in that he does not appear to be involved with the criminal milieu. He could be searching the freight for drugs and contraband in the interest of public safety. On the other hand, he gets paid an award if he finds drugs and gets two or three awards a month. This makes it look as if his motivation is one of personal gain which would make him more like a "police informant."

The lack of corroborating information in the affidavit highlights the second problem: the misstatements and omissions. In *State v. Malkin*, 722 P.2d 943, 946 (Alaska 1986), the Alaska Supreme Court held that Article 1, Section 14 of the Alaska Constitution requires the excision of reckless and intentional misstatements from the affidavit. Once the defendant shows 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. *Id.* If the statement was recklessly made, then the statement is excised from the affidavit and the remainder is tested for probable cause. *Lewis v. State*, 9 P.3d 1028, 1032-33 (Alaska App. 2000). If the statement was intentionally made to deceive the magistrate, the warrant is invalidated. *Id.* This analysis also applies to omissions. *Id.* A reckless or intentional omission will vitiate a warrant if the omission was material in that inclusion of the omitted information would have precluded a finding of probable cause. *Id.*

Trooper Jones's affidavit contains both misstatements and omissions. Trooper Jones's affidavit contained a misstatement because he stated that Smith found the hashish in the crate and recognized it. But Smith only found the bags in the crate. He did not recognize the contents of the bags as hashish until after the port manager cut one of them open. Arguably, the trooper's misstatement was intentional because he had been told by Smith and the port manager what they had done. The fact that the misstatement covers up the probable constitutional infirmities of the searches conducted by Smith and the port manager suggests that the misstatement was intentional. But the misstatements need only be found reckless to defeat this particular warrant. Once the statement is excised, there is no information left on which to find probable cause. It is possible that a judge could conclude that Trooper Jones's misstatements were not reckless; that they were only negligent. Given the simplicity of the facts and the investigation, though, that conclusion is less probable.

In any event, the trooper's affidavit also contained omissions for it omitted any mention of the port manager's role and any mention of the money that Smith had made as a result of his prior searches or the citation that the troopers gave him for his work. These omissions are material because the

information would likely have prevented the magistrate from granting a warrant. The state cannot rely on illegally seized evidence to support a warrant. *State v. Lewis*, 809 P.2d 925 (Alaska App. 1991).