**Essay Question No. 1**

**Answer question in booklet No. 1**

Throughout June and July there had been a series of 12 vehicle break-ins at the trailheads around Anchorage. Among other things, the thief had stolen several wallets and purses. Officer Smith suspected David of being the thief.

Officer Smith was driving in mid-August when he saw John walking down the street. Officer Smith had arrested John twice in the past for heroin possession, the first time three years ago and the second one year ago. On both occasions John had offered to provide information in exchange for leniency. His information was good after the first arrest but it proved inaccurate after the second. Officer Smith knew that John was a friend of David's. Officer Smith had seen John in the company of a known heroin dealer twice in the last week, so Officer Smith figured that John was still using and likely had heroin in his possession.

Officer Smith pulled up alongside John, rolled down his window, and said, "Hey John, I want to talk to you." John waved at him but kept walking. Officer Smith then pulled his car up onto the sidewalk blocking John's path. John could not go forward without stepping into traffic in the street. Officer Smith got out of the car, placed John up against the car, and then patted him down. Officer Smith felt something small and soft in John's pocket. He reached in and pulled out a small bag of powdered heroin. Officer Smith then said, "I'll let you go if you tell me who's been doing the break-ins at the trailheads." John told Officer Smith that David had committed the break-ins and still had all of the licenses and credit cards from the victims stashed in a shoe box in his garage. John gave Officer Smith David's address. Officer Smith asked John, "When did you see the licenses and credit cards last?" John said, "Two weeks ago." Officer Smith then let John go.

Officer Smith returned to the station and confirmed that John had given him the correct address. Officer Smith also confirmed that no one had tried to use the stolen credit cards in the last two weeks. Officer Smith then prepared a search warrant application. His affidavit was based on John's statements and consisted of a single paragraph:

> I spoke with John today and he told me that David had committed the break-ins at the trailheads during June and July. John further said that David still had the licenses and credit cards and kept them stashed in a shoe box in his garage.

Officer Smith obtained the warrant and executed the search of the garage, discovering the licenses and credit cards in a shoe box on a shelf. He then arrested David and charged him with theft.

1. What arguments can David make for suppression of the licenses and credit cards based on the detention and search of John?

2. What arguments can David make for the suppression of the licenses and credit cards based on the search warrant application?

**Essay Question No. 1**
*****GRADERS' GUIDE*****
**Criminal Law**

## I. The Investigatory Stop and Search of John – 50%

### A. Introduction

David should argue that Officer Smith violated the Alaska constitution when he stopped and searched John without reasonable suspicion to believe that John had committed any crime or that he was armed. David should then argue that Officer Smith deliberately violated John's constitutional rights and that Officer Smith's conduct was gross and shocking. Finally, David should argue that the credit cards should be suppressed because they were the fruits of the illegal stop and frisk.[1]

### B. Officer Smith's Seizure of John – 20%

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.[2] A police officer may engage in a generalized request for information by putting questions to a citizen.[3] The citizen is under no obligation to answer the questions and may leave.[4] But a seizure occurs when the officer restrains the liberty of the citizen through physical force or a show of authority.[5] 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.[6] The conduct must be of a type that a reasonable person would view as threatening or offensive if coming from a private citizen.[7] A seizure may be either an investigatory stop or an arrest.[8]

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1 *David should not argue that Officer Smith violated Miranda or coerced an involuntary confession because Officer Smith did not ask John any questions that elicited self-incriminating information.*

2 *Waring v. State*, 670 P.2d 357, 363 (Alaska 1983).

3 *Howard v. State*, 664 P.2d 603, 608 (Alaska App. 1983).

4 *Id.*

5 *Waring*, 670 P.2d at 363-64.

6 *Id.*; *Majaev v. State*, 223 P.3d 629, 632 (Alaska 2010).

7 *Waring*, 670 P.2d at 363.

8 *Howard*, 664 P.2d at 608.

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.[9] 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.[10] Relevant factors to consider are (1) the seriousness of the crime that has either occurred or is about to occur, (2) the imminence or recency of the crime, (3) the strength of the officer's suspicion, (4) the opportunity for further investigation, (5) the intrusiveness of the stop, and (6) any flight or furtive action by the person at the approach of the officer.[11] "The fundamental question is whether 'a prompt investigation [was] required as a matter of practical necessity.' "[12] Once the officer has 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.[13]

David should argue that Officer Smith's encounter with John was an investigatory stop and not a simple matter of on-the-scene questioning. Officer Smith first pulled alongside John as John was walking down the street and told him that he wanted to talk to him. But John merely waved at him and kept walking, indicating that he did not want to talk. Officer Smith's reaction was to pull his car up onto the sidewalk blocking John's line of travel. At this point, a reasonable person would not feel free to leave. John could only avoid the encounter by walking out into the lane of traffic or turning around and going back the way he came. A reasonable person would interpret Officer Smith's actions as a show of force requiring them to stay and talk to him. Officer Smith then used physical force to detain John, by placing him up against the car. A reasonable person would certainly consider all of these actions threatening or offensive if coming from another citizen.

Officer Smith's detention of John would only be constitutional if he had a reasonable suspicion that imminent public danger exists or that serious harm to person or property has recently occurred. David should argue that the totality of the circumstances does not support a finding of reasonable suspicion.

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9 *Waring*, 670 p.2d at 365.

10 *Zemljich v. State*, 151 P.3d 471, 4734-75 (Alaska App. 2006).

11 *Id.*

12 *Id. quoting G.B. v. State*, 769 P.2d 452, 456 (Alaska App. 1989).

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

Only one factor – the seriousness of the crime – definitely supports a finding of reasonable suspicion. Officer Smith suspected John of possessing heroin, a dangerous drug that the legislature treats more seriously than many other drugs.

David should argue that the strength of Officer Smith's suspicion was pretty weak. He knew that he had arrested John twice, once three years ago and once one year ago, for possession of heroin. He also knew that John had been in the company of a known heroin dealer twice in the last week. But neither of these facts creates a strong inference that John was carrying heroin on his person at the time that he was stopped.

For the same reason, David should argue that the facts do not support a finding that the suspected crime – possession of heroin – was recent. Officer Smith hoped that John was currently committing the crime, but the facts do not really support a finding that John was currently in possession. Officer Smith's information supported an inference that John may have possessed heroin a week earlier when he was seen in the company of a heroin dealer. But there is nothing to indicate that he still had heroin in his possession a week later.

David should also argue that there was plenty of opportunity for further investigation. Officer Smith was not facing a crime in progress. Rather, he suspected that John was still using heroin and that he, therefore, probably had heroin in his possession. There wasn't an immediate need to stop and search John right then. Officer Smith could have put John under observation. If John contacted the heroin dealer again and the facts supported an inference that a transaction occurred, then Officer Smith would have a much stronger basis for conducting an investigatory stop.

David should also argue that stop was relatively intrusive because Officer Smith used a show of force to stop John's movement and then actually used force to conduct the frisk or pat down.

Finally, David should argue that John did not flee or resist Officer Smith. When Officer Smith initially called out to John, he waved and continued walking. But this cannot support a finding of reasonable suspicion because John had a constitutional right to decline Officer Smith's invitation and to continue walking.

### C. The Frisk or Pat-Down – 15%

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.[14] To conduct a frisk, the officer must

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

have a reasonable belief that the person may be armed and dangerous.[15] The officer's reasonable belief must be based on "specific and articulable facts … taken together with rational inferences from those facts…."[16] A frisk is "a limited, external probing of the clothing or articles for signs of possible weapons."[17] An officer may remove an object from the clothing if he has a reasonable belief that the object could be used as a weapon.[18] In *State v. Wagar*, the Alaska 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.[19]

David 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, Officer Smith can point to no facts supporting an inference that John was armed and dangerous. Moreover, Officer Smith exceeded the scope of a permissible frisk when he pulled the heroin out of John's pocket. Officer Smith only felt something small and soft, but he was only allowed to remove something from the pocket if it felt like something that could be used as a weapon. In this case, the item was small and soft and Officer Smith had no basis for concluding that it was a weapon. Thus, the frisk was not supported by reasonable suspicion.

**D. Vicarious Standing – 10%**

Ordinarily, a defendant does not have standing to assert the exclusionary rule for the violation of someone else's rights.[20] But in *Waring v. State*[21], the Supreme Court held that the Alaska constitution required two exceptions to the standing rule. A defendant may assert the exclusionary rule for the

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15 *Id.*

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

17 *Gray v. State*, 798 P.2d 346, 350 (Alaska App. 1990).

18 *Wagar*, 79 P.3d at 648.

19 *Id.* at 649.

20 *Waring v. State*, 670 P.2d 357, 360-63 (Alaska 1983).

21 670 P.2d 357 (Alaska 1983).

violation of someone else's rights when a police officer deliberately violates that person's rights or when the officer engages in gross or shocking misconduct.[22]

David should argue that he has standing to assert the exclusionary rule for the unconstitutional detention and search of John. John may assert the exclusionary rule if Officer Smith's conduct was deliberate. In this case, the facts support the conclusion that Officer Smith's conduct was deliberate. Officer Smith knew that John had volunteered information in the past in order to mitigate his sentence and that John was a friend of David's. Officer Smith's conduct ultimately targeted David. Officer Smith detained and frisked John in order to put pressure on him to provide information about David.

Although David may argue that Officer Smith's conduct was gross and shocking, he probably will not prevail on that ground. Although Officer Smith violated John's rights, the violation was at the low end of the spectrum. The detention was brief and the search relatively unintrusive. A court could, and probably would, conclude that there were many worse ways to violate John's rights. For instance, Officer Smith could have taken John into custody and held him isolated for a prolonged period, or he could have used more violent or coercive tactics. This violation appears to be no more egregious than a rather run of the mill bad stop.

**E. Fruit of the Poisonous Tree – 5%**

David should argue that the exclusionary rule bars admission of the credit cards and licenses because the search of the garage was a fruit of the illegal detention and frisk of John. The exclusionary rule prohibits the use of both "primary and derivative" evidence discovered as the result of an illegal stop and frisk.[23] Derivative evidence is evidence which was acquired by exploitation of the original illegality.[24] The evidence is inadmissible unless it was acquired by means sufficiently distinguishable to have purged the taint of the illegal conduct.[25]

David should argue that the credit cards and licenses are derivative evidence because Officer Smith only acquired them as a result of his illegal stop and frisk of John. Moreover, because the affidavit was based solely on

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22 *Id.* At 362-63.

23 *Cruse v. State*, 584 P.2d 1141, 1145 (Alaska 1978).

24 *Id.*

25 *Id.*

John's information, there are no facts supporting a conclusion that the taint was purged.

## II. The Search of David's Garage – 50%

### *A.* Introduction

David should argue that the search of the garage was illegal because the affidavit in support of the warrant was defective. First, he should argue that the affidavit does not satisfy the *Aguilar-Spinelli* standard because it contained unreliable hearsay. And second, he should argue that the affidavit violated the *Malkin* standard because Officer Smith omitted critical information from the affidavit.

### *B.* Warrant Requirement and Probable Cause – 10%

Officer Smith seized the licenses and credit cards while conducting a search pursuant to the warrant. The facts do not provide any basis for suppressing that evidence 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 a crime has been or was being committed.[26]

Taken at face value, the affidavit provides sufficient detail to warrant a reasonably prudent person in believing that David kept the licenses and credit cards in the shoe box in his garage. According to the affidavit, John stated that David had committed the break-ins in June and July, that he still had the licenses and credit cards, and that he kept them in a shoe box in his garage.

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

### *C. Aguilar-Spinelli* – 25%

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.[27] Under the *Aguilar-Spinelli* standard, when a

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

27 *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).

search warrant application rests on hearsay information provided by an informant, the state must establish both the basis of knowledge and veracity for each of the hearsay informants.[28] 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.[29] If the affidavit lacks an affirmative assertion that the information was based on personal knowledge, then the facts supplied must be so detailed that they support an inference of personal knowledge.[30] 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.[31]

"Generally, cases distinguish between two kinds of informants: 'citizen informants' and 'police informants.'"[32] *Aguilar-Spinelli's* credibility prong applies in full force to police informants because their motivation for providing the information is suspect.[33] In contrast, a more relaxed rule applies when the informant is a cooperative citizen or someone not from the criminal milieu. *Lloyd*, 914 P.2d at 1286. Less corroboration is necessary for a "citizen informant" than for a "police informant." *Id.*

David should argue that Officer Smith's affidavit does not survive an attack based on *Aguilar-Spinelli* because all of the information supporting probable cause comes from the hearsay statements of John and the affidavit fails to establish John's basis for knowledge or the reliability of his information.

Officer Smith could infer that John's basis of knowledge was John's personal observation of the licenses and credit cards in David's possession. John said that David had committed the thefts and that he had seen the licenses and credit cards two weeks ago. But Officer Smith failed to put an affirmative declaration of John's personal knowledge in the affidavit. Officer Smith merely said that John stated that David had committed the break-ins,

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

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

30 *Id.*

31 *Id.* at 324-25.

32 *Lloyd v. State*, 914 P.2d 1282, 1286 (Alaska App. 1996) *quoting Effenbeck v. State*, 700 P.2d 811, 813 (Alaska App. 1985).

33 *Id.*

that David still had the licenses, and that David kept them in a shoe box in his garage. Without the affirmative declaration of personal knowledge the information must be so detailed that it supports an inference of personal knowledge. In this case, the information is not particularly detailed. The fact that David committed the break-ins and that he still had the licenses and credit cards could easily be the subject of rumor and innuendo. The fact that David kept the licenses and credit cards in a shoe box is a little more detailed, but it's likely not enough to support an inference that John had personal knowledge of the thefts and the location of the evidence.

The affidavit contains no information about John's veracity. John only provided the information to Officer Smith in order to escape punishment for his own crime. He is, therefore, an informant from the criminal milieu rather than a citizen informant. The affidavit needed information that showed that John had provided accurate information in the past, that his statements were against his own penal interest, or that Officer Smith had corroborated sufficient detail. In this case, John's statements were not against his own penal interest. He said nothing that incriminated him in the break-ins. And the affidavit contains no information regarding the provision of accurate information in the past or corroboration by Officer Smith. The fact that Officer Smith corroborated that John gave him the correct address for David is not relevant because it is not in the affidavit. Similarly, the fact that John had given Officer Smith accurate information in the past was not relevant because it was not in the affidavit.

### *D. Malkin* - 15%

In *State v. Malkin*[34], 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.[35] If the statement was recklessly made, then the statement is excised from the affidavit and the remainder is tested for probable cause.[36] If the statement was intentionally made to deceive the magistrate, the warrant is invalidated. This analysis also applies to omissions. A reckless or intentional

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34 722 P.2d 943, 946 (Alaska 1986).

35 *Id.*

36 *Lewis v. State*, 9 P.3d 1028, 1032-33 (Alaska App. 2000).

omission will vitiate a warrant if the omission was material in that its inclusion would have precluded a finding of probable cause.[37]

Officer Smith did not make any misstatements in his affidavit, but he made numerous omissions that would have affected the magistrate's finding of probable cause. First, he neglected to put in the affidavit that John was a criminal informant and that he only provided the information to escape liability for his own crime. This could mislead the magistrate because citizen informants are treated quite differently from criminal informants. Second, he failed to mention that John had provided information twice before but was only accurate on the first occasion three years ago. And third, Officer Smith failed to say that John admitted that the last time that he had seen the licenses and credit cards was two weeks ago. John's information was stale. All of the omitted information casts doubt on John's credibility. Had the information been included, the magistrate would have likely demanded more information indicating that John's statements were accurate.

Similar to misstatements, intentional omissions will vitiate a warrant while reckless omissions will only vitiate the warrant if the omitted information would have precluded a finding of probable cause. Ordinarily, this would require an analysis of Officer Smith's omissions to determine whether they were reckless or intentional. But on these facts, that analysis is unnecessary because in either instance the omitted information would likely have precluded a finding of probable cause.

37 *Id.* at 1033.