

**FEBRUARY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Criminal Law

QUESTION

A Picasso sketch was taken from Town museum by a burglar. The sketch was recovered three weeks later when an art dealer in Switzerland read about the theft. The dealer recognized the sketch described in the article as the sketch he had purchased from a young woman with an American accent.

Police had been unable to identify the burglar or match fingerprints found at the scene of the theft. Sally is a petty thief with convictions for burglary. Tec, a Town police investigator, believed Sally had knowledge of the theft. He decided to trick Sally into providing information. Tec went to Sally's home, told her he was arresting her for the museum burglary and theft and handcuffed her. After Tec advised Sally of her *Miranda* rights. Sally immediately replied: "Hey, come on. I didn't do the museum job. Donna did. She told me she broke in and took a drawing. She said she sold it in Switzerland."

Based on Sally's information, the grand jury issued a subpoena ordering Donna to appear, submit to fingerprinting, and produce her passport. After the court denied Donna's motion to quash the subpoena and ordered her to comply, she submitted to fingerprinting and turned over her passport. Her fingerprints were found to match those in the museum. Her passport bore a date stamp showing that the holder had entered Switzerland two days after the museum burglary.

Sally has left Town and cannot be located. Donna has been charged with burglary and theft.

Donna moved to exclude the following evidence:

- (1) Sally's statement to Tec, which Donna claims: (a) is hearsay, the admission of which would violate her rights under the Sixth Amendment, and (b) was obtained in violation of Sally's rights under the Fourth Amendment;
- (2) The fingerprints she provided, which Donna claims were obtained in violation of her rights under the Fifth Amendment and are the "fruits" of an unlawful search and seizure; and
- (3) Donna's passport, which she claims was obtained in violation of her rights under the Fifth Amendment.

What should the prosecutor argue in opposition to Donna's motions, and how should the court rule on each? Discuss.

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ANSWER A

MOTION TO EXCLUDE SALLY'S STATEMENT TO TEC

Was Sally's statement to Tec hearsay, whose admission would violate Donna's rights under the Sixth Amendment?

The Sixth Amendment gives to criminal defendants the right "to be confronted with the witnesses against them." Admission of hearsay against a defendant violates the confrontation clause unless it is within one of the well-recognized common law exceptions to the hearsay rule.

Hearsay is an out-of-court statement offered to establish the truth of the statement. Sally's statement to Tec was made out of court. It is being offered to prove that Donna did steal the painting, as Sally said. Therefore, Sally's statement is hearsay. Since it repeats a statement of Donna, who told Sally she broke in, to show the truth of that statement, it is hearsay within hearsay. For the statement to be admissible, both levels of hearsay must be within an exception.

The prosecutor can show that Donna's statement to Sally was an admission by her. An admission by a party opponent is a well-established exception to the hearsay rule. Since Donna's statement to Sally was not coerced in any way, it would be admissible against her in court. Therefore, Donna's statement to Sally was within the 'admission of a party opponent' exception to the hearsay rule.

The prosecutor would argue in defense that Sally's statement was a declaration against interest. As required by the rule, Sally is unavailable for trial. However, it is not clear that Sally's statement is against her interest. Donna could argue that Sally was trying to exonerate herself, not admit to wrongdoing. The prosecutor could argue that the statement shows her to have knowledge of the theft which she has refused to report, giving rise to the possibility that she was an accessory after the fact to the crime. However, that was clearly not Sally's intent when she said it, and if Sally did not understand the statement to be against her interest, it would not be within this exception to the hearsay rule.

Under the Federal Rules of Evidence, a hearsay statement may be admitted under the "catch-all exception" if it is more probative than any other evidence which the party could produce, evidence is present of its reliability, and the other party is given sufficient notice. However, this is not a well established common law exception to the hearsay rule and should probably not be used as a basis for admitting a statement against a criminal defendant. Further, the prosecution's access to the fingerprints, the passport, and the possible testimony of the dealer seems much more probative. Therefore, Sally's statement should not be admitted under the catchall exception.

Should the statement of Sally be excluded because of violation of Sally's Fourth Amendment rights?

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The Fourth Amendment protects individuals from unreasonable searches and seizures. This generally requires a warrant based on probable cause. Tec's visit to Sally's home and arrest of her was not based on the probable cause ordinarily required for such an action, and he had no warrant. Sally's statement to Tec was the result of Tec's unreasonable search. Therefore, it was obtained in violation of Sally's Fourth Amendment rights.

The exclusionary rule prohibits the prosecutor from using evidence gathered in violation of a criminal defendant's Fourth Amendment rights against the criminal defendant. To have standing to assert exclusionary rule, however, one must have a privacy interest that was invaded. The prosecutor should argue that Donna has no privacy interest in Sally's house, or in Sally. Therefore, Donna has no standing to assert the exclusionary rule on Sally's behalf.

Conclusion

Although Donna cannot assert the exclusionary rule against Sally's statement, the statement by Sally is hearsay not within any exception. Therefore, the court should exclude the out-of-court statement of Sally.

MOTION TO EXCLUDE DONNA'S FINGERPRINTS

Fifth Amendment

The Fifth Amendment provides that no criminal defendant can be compelled to be a witness against himself. The privilege against self-incrimination applies only to testimonial evidence. The prosecutor can show that Donna's fingerprints are physical evidence, rather than testimonial evidence. Donna was not compelled to be a witness against herself. Therefore, the fingerprints do not violate the Fifth Amendment.

Fourth Amendment

If Donna's argument that the fingerprints were obtained as the "fruits" of an unlawful search and seizure, she again could not rely on the invasion of Sally's rights because she would not have standing.

Donna could argue that since the case against her was based on the unlawful arrest of Sally, the subpoena of her was itself an unlawful search, since it was not based on probable cause. However, the prosecutor can argue that, even though the arrest of Sally was not unlawful, Sally's actual statement was made under appropriate warnings and was not coerced. When corroborated by the final whereabouts of the picture and the memory of the art dealer, sufficient cause probably did exist to subpoena Donna. Appropriate procedural requirements for a grand jury were complied with. Therefore, the "search" of Donna compelling her to produce fingerprints was lawful.

Conclusion

The court should find that Donna's Fifth Amendment rights were not violated by compelling fingerprinting, and that they did not result from an unlawful search and seizure. Therefore Donna's fingerprints should be admitted.

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MOTION TO EXCLUDE DONNA'S PASSPORT

Fifth Amendment

Donna apparently argues that compelling her to turn over her passport, like compelling her to submit to fingerprinting, violates her Fifth Amendment protection from self-incrimination. However, the prosecutor should argue that, like the fingerprints, Donna's passport is not testimonial in nature. Even though the passport involves written words, they do not represent Donna's responses to questions about her activities, but documents prepared for another purpose. Therefore, the admission of Donna's passport does not violate the self-incrimination clause.

Donna could conceivably argue that the taking of her passport for her prosecution violates the Fifth Amendment takings clause, which provides that private property shall not be taken for public use without just compensation. Her passport was her private property and the government did take it for its public purpose of crime prosecution. The prosecutor should argue that this clause was not intended to apply to ordinary discovery methods in a criminal case, and that at most it entitles her to recompense for the taking of the property, not to having the passport excluded. Therefore, the admission of Donna's passport does not violate the takings clause.

Conclusion

The court should find that the admission of Donna's passport did not violate the self-incrimination clause or the takings clause of the Fifth Amendment. Therefore, Donna's passport should be admitted.

ANSWER B

1. Sally's statement to Tec

Donna is asserting two grounds for suppression of the evidence: Hearsay, which would violate her right to confront a witness, and violation of Sally's Fourth Amendment rights.

Hearsay issue

Sixth Amendment

The Sixth Amendment guarantees the right of a criminal accused to confront the witnesses against her. In this case, Donna is arguing that she will not be able to confront Sally.

Ordinarily, the right to confront is not violated by the admission of hearsay, provided the evidence complies with the provisions of the hearsay rule. The prosecutor should argue that the evidence does in fact comply with the provisions and exceptions of the hearsay rule, and that therefore, the evidence should be admitted since it does not violate Donna's Sixth Amendment rights.

Donna will likely argue that Sally has left town and cannot be located. Thus, Donna will be unable to confront her. However, the prosecution should argue that it was in no way to blame for Sally's disappearance, and that the evidence will be reliable since it complies with the hearsay rule.

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Hearsay rule

Generally, hearsay is not admitted. However, there are many exceptions to the rule.

Double hearsay

In this case, the hearsay is double, that is, there are two separate hearsay issues in the one statement.

The statement by Donna to Sally, "I broke in and stole a drawing." is one level of hearsay. The second is the statement by Sally to Tec.

The statement of Donna to Sally

Admission of a party opponent

Admissions of a party opponent are not considered to be hearsay under the federal rules. Under state law, admissions are hearsay, but fall under an exception.

Here, Donna admitted to Sally that she had committed the crime. Donna is now a party (defendant). Thus, this statement will be considered to be an admission of a party opponent, and will be admissible notwithstanding the hearsay rule.

The statement of Sally to Tec

The prosecution should argue that Sally's statement to Tec fell under the exceptions of statement against interest, and excited utterance.

Statement against interest

The statement of a person not a party, that is against her penal or pecuniary interest is admissible, provided the person is unavailable.

Here, Sally made a statement that may have indicated that she knew of Donna's crime, and failed to report it, and may even have aided in the cover up. The prosecution should argue that the statement that Sally made could have subjected her to prosecution, and therefore was against her penal interest. Sally is unavailable because she cannot be located.

However, the court is likely to rule that the statement was self serving since it was intended to keep Sally from being prosecuted for theft, a more serious offence, and was therefore not against her interest.

Excited utterance

A statement made after an exciting event, while still excited will be an exception to the hearsay rule.

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Here, Sally had just been arrested for a crime probably committed by Donna. She had been handcuffed, and read her rights. She was thus, likely excited as a result. The statement was directly related to the arrest. Thus, the prosecution would probably succeed in arguing that the statement was an excited utterance.

Violation of Sally's Fourth Amendment rights

Donna is claiming that the police violated Sally's Fourth Amendment rights.

Unreasonable search and seizure

There is little doubt that Tec was improper in his arrest of Sally. He had no probable cause to believe that she committed the crime, and he had no warrant to arrest her at her home.

Standing to assert Fourth Amendment violation

The prosecution should argue that, notwithstanding the violation of Sally's Fourth Amendment rights, Donna has no standing to exclude the evidence on that basis.

Only the person whose rights were violated may move to exclude the evidence. Here, Donna's rights were not violated. Only Sally's were. Thus, only Sally may seek exclusion of the evidence. Thus, the court will likely rule in favor of the admission of the statement by Sally.

2. The fingerprints

Donna has asserted that the fingerprints were obtained in violation of her Fifth Amendment privilege against self-incrimination, and that the fingerprints were obtained as a result of an unlawful search and seizure.

Self-Incrimination

Fingerprints are not considered to be a form of self-incrimination. The prosecution should argue that fingerprints are not a statement, and are merely part of a person's appearance. Only self-incriminating statements are protected by the Fifth Amendment. Thus, the prosecution will likely prevail on this issue.

Illegal search of Sally

As discussed above, the prosecution could successfully assert that Donna may not exclude evidence based on the illegal search of Sally.

Search (subpoena) of Donna

A search will only be unlawful if it exceeds the reasonable expectation of privacy. The prosecution should argue that there is no expectation of privacy in a person's fingerprints. Rather, the fingerprints are part of a person's public appearance, and will thus be subject to a search. This argument is likely to succeed.

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Second, the subpoena was a result of the grand jury investigation. The prosecution should argue that there was probable cause to arrest Donna, based on the statements by Sally, and that therefore, the police had a right to search Donna incident to the arrest.

This argument will likely succeed as well.

The grand jury was proper in considering the illegally obtained evidence from Sally, since Sally is not seeking to exclude it, and also because a grand jury may consider otherwise inadmissible evidence.

Thus, the prosecution will likely prevail, and the court will admit the fingerprints.

3. Passport

Donna has asserted that the passport was obtained in violation of her Fifth Amendment privilege against self-incrimination.

Self-Incrimination

The prosecution should argue that the passport should be admitted because it is not a statement, but rather real evidence. Donna should not be able to withhold legitimate evidence from the court merely because it incriminates her.

Donna will probably argue that this case is like the case where a person was allowed to omit his name from a tax return to avoid incriminating himself.

However, the prosecution could argue in rebuttal that this is not a case of the name itself being incriminating. Rather, the passport shows where Donna has been, and only shows that she had an opportunity to commit the crime.

Most likely, the prosecution will prevail, and the court will admit the passport into evidence.

Summary

The court will likely admit each item of evidence.