

## Question 6

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.
2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.
3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

## Answer A to Question 6

### 1. Motion to suppress the cocaine

#### Standing:

Dave has standing to bring this motion because he is being charged with possession of cocaine that was found in his car. He, unlike Ted, has a reasonable expectation of privacy in compartments within his car that are not visible in plain view, and can therefore assert a violation of the 4<sup>th</sup> Amendment if they are unlawfully searched, and assert the exclusionary rule to suppress evidence found that way.

#### Traffic stop

A police officer has the right to stop and detain a car that is violating any provision of the vehicle code. Here, the car was speeding and weaving in violation of the code, so Polly had the right to cause the car to pull over. Upon such a stop, both the driver and passenger are considered detained according to the Terry v Ohio doctrine. The request for Dave's driver's license and registration were lawful, as was her intended search for arrest warrants.

#### Search

However, instead of going to her patrol car, Polly saw Ted "slip something under the seat." This must have been a very minimal viewing, and somewhat lacks credibility, because Ted was in the passenger seat, and Polly was walking away from the driver's side back to her own vehicle. Anyway, assuming that she actually did [see] what she says she saw, her actions were still unlawful. Polly opened Ted's car door, looked under his seat, and opened a bag found there. This action qualifies as a search, because a person has a reasonable expectation of privacy in the compartments of his car which are not visible in plain view. The contents of a paper bag under a car seat are certainly not in plain view. Therefore, to search it, Polly needed a warrant, or a warrant exception.

### Auto Exception:

The auto exception the warrant requirement allows an officer to search any compartment within a car in which the officer has probable cause to believe that she will find evidence of a crime. Here, Polly saw Ted “slip something under his seat.” Under these circumstances, that sight is not enough to generate probable cause. If asked, she could not articulate with particularity what it is she suspected she saw. There were no other facts to cause Polly to suspect that something under Ted’s seat would contain evidence of a crime. The mere fact that Ted appeared to be concealing whatever-it-was is not enough. A Supreme Court case involving a student on school grounds, who held a black pouch behind his back when approached by the principal, provides precedent that the mere inarticulate hunch or suspicion created when a suspect appears to be hiding something is not enough to create reasonable suspicion, much less the higher standard of probable cause.

### Search incident to arrest:

Before a Supreme Court decision [in] March of 2009, an officer would be allowed to search the passenger compartment of a car during or after the arrest of a car’s occupant, based on a search incident to arrest. However, this rule has been changed, and does not allow a search if the passenger has been removed and is no longer in arm’s reach of the contents of the car. Additionally, Polly had not chosen to arrest Ted and Dave at the time she made the search. Although she had the right to arrest Dave for a vehicle code infraction, she had not made the decision to do so, and therefore, even under the old rule, she would not have been able to use this exception to search under Ted’s seat.

### Terry frisk

As stated earlier, the traffic stop was a detention. When an officer detains a suspect because of a reasonable suspicion that a crime has occurred (here, the vehicle code infractions), she has the right to frisk the suspect for weapons to protect herself. This allows a visual scan, as well as a brief physical inspection of the outer garments by running her hands along them. To do this, the officer must have at least a reasonable

suspicion that the person might be carrying a weapon. Here, Polly went far beyond what was allowed. She wasn't looking for weapons; she was simply indulging her suspicious curiosity when she checked to see what Ted put under the seat. As mentioned above, she had no reason to believe Ted would be concealing a weapon. Now, if perhaps she had run her check for warrants, and found a warrant out for Ted or Dave for a violent offense, that might have generated the necessary suspicion for some kind of frisk. But even then, the frisk would have required her to command Dave and Ted out of the car and she could frisk their clothing - not permitted her to look under their seats and inside bags.

#### Conclusion:

Since no warrant exception permitted Polly to make the search, and she did so in violation of Dave's reasonable expectation of privacy without a warrant, the search was unlawful, the cocaine that was found is "Fruit of the poisonous tree" and should be excluded.

#### 2. Motion to suppress Ted's statement or for a separate trial

##### Confrontation Clause

A statement by a coconspirator is not admissible against a defendant as an admission of a party opponent. Therefore it must be admissible under some other hearsay exception if it is hearsay. Even if it is admissible under evidence law, the constitution sometimes allows for suppression.

The confrontation clause of the constitution requires that for any testimonial evidence offered against a defendant, the defendant must have the opportunity to confront and cross-examine the declarant. Here, Dave and Ted are being tried jointly, and Ted's statement is offered substantially against both of them. Ted's statement is not admissible against Dave unless Ted can be cross-examined. And because it is Ted's trial too, Ted has the right not to take the stand because of his Fifth Amendment right against self-incrimination. If Ted exercises this right, then Ted cannot be cross-examined, and Dave's right of confrontation is violated. The remedy is, as Dave requested, to either exclude the statement, or try Ted and Dave separately.

The prosecution, if it wishes to avoid both these remedies, can argue that the statement is not offered “against” Dave. The statement really doesn’t incriminate Dave in any way; in fact, it is more exculpatory than anything for both defendants. More facts would be needed to be sure of this, because if Dave’s defense is that Ted owned the cocaine, then the statement, while good for Ted, weakens Dave’s defense. Or if Ted has changed his story, this prior inconsistent statement may hurt Ted’s credibility, which may hurt Dave’s defense by association with Ted. So the prosecution’s attempt to include the statement and maintain a joint trial will probably fail, but will succeed if Ted’s statement is not harmful to Dave’s defense.

If the statement is helpful to [the] prosecution of Ted, the prosecution will not wish it to be excluded. Rather than exclude it, the prosecution will prefer to try Dave separately, and this remedy will be granted upon the prosecution’s agreement.

### Miranda

Even if Ted’s statement was obtained in violation of Miranda rights or 14<sup>th</sup> Amendment voluntariness rights, Dave cannot assert those rights as a reason to exclude the statement from use against him. A defendant can only assert his own constitutional rights in seeking to exclude evidence, not those of another person.

### **3 . Motion to discharge Dave’s attorney and substitute a new attorney in his place**

A criminal defendant has an absolute right to counsel at trial, as long as incarceration is a possible punishment. The issue is whether Dave has a right to discharge and replace his attorney a week before trial. Dave has retained an attorney, not used a publicly provided one, and this is helpful to his case, because no public financial hardship is involved. However, because [the] trial is so soon, the court has discretion to grant Dave’s motion only if it finds that the case will not be unduly delayed. The court will not permit Dave to delay the case so much that he will have a defense of a speedy trial violation; however, it may allow Dave the delay if he waives that defense. And, if the substitution will cause delay that will make a necessary witness unavailable, the court will be disinclined to grant it.

The court will balance Dave's interests as well. If he has differences with his attorney that make it impossible for his attorney to provide him with competent representation, then the court will be strongly inclined to grant the substitution, because otherwise Dave may have a case for Ineffective Assistance of Counsel that could undo the court's and prosecution's time and efforts. If the only consequence of the substitution will be delay, the court will consider its calendar, and it will also consider the right to a speedy trial. But weighing all these considerations, the court will likely permit the substitution because no facts show that any undue burden on the court will occur.

## Answer B to Question 6

### Question 1: The Motion to Suppress the Cocaine

Fourth Amendment / Fourteenth Amendment Applicability: Any action by the state (a government official) that invades a person's reasonable expectation of privacy (REOP) will trigger the applicability of the Fourth Amendment protections against unreasonable searches and seizures.

Here, assuming that Polly was a state police officer, the Fourth Amendment will apply to her actions through selective incorporation via the Fourteenth Amendment.

Fourth Amendment -- State Action: Private actors are not bound to constitutional norms. As mentioned above, any Fourth Amendment challenge to a search or seizure must involve "state action" in the searching and seizing. Here, there is no question that Polly, a police officer, is an agent of whatever state or local government she works for. Since her actions revealed the cocaine, the state action requirement is satisfied.

Fourth Amendment -- Reasonable Expectation of Privacy: To have standing to bring a Fourth Amendment claim to suppress seized evidence, the person asserting the claim must have standing.

To have standing under the Fourth Amendment, Dave must prove that he had a reasonable expectation of privacy in the contents of his passenger compartment. Under existing case law, because Dave is the owner of the vehicle that was stopped by Polly, Dave has a reasonable expectation of privacy in the contents of the passenger compartment of the vehicle, as well as the trunk and any other places that items could be stored.

Note also that the state cannot argue that Dave lacked a REOP due to the item being in plain view from the exterior of the car (placing an item in plain view in the passenger

compartment may indicate that the owner had no reasonable expectation of privacy), the item in question--the bag--was under a passenger seat, and not visible from the exterior of the car.

Therefore, Dave has standing (a REOP in the item seized) to move for its suppression.

The Traffic Stop -- Lawful Stop: A police officer may conduct a routine traffic stop if the police officer has reasonable suspicion that a law has, is, or will be violated by the occupants of the car, or if the police officer has probable cause that the car contains contraband, or the driver has violated the law.

Here, Polly personally observed Dave's car "speeding" and "weaving in and out of traffic" in violation of the Vehicle Code. Therefore, Polly was justified under the Fourth Amendment in stopping the car, because she had at least reasonable suspicion, if not probable cause, that a law had been violated.

The Traffic Stop -- Lawful Seizure: The Supreme Court has made clear that a traffic stop seizes not only the driver, but any passengers, under the Fourth Amendment. However, because the stop was justified (as discussed above), this seizure is lawful under the Fourth Amendment.

### The Search of the Passenger Compartment -- Improper Search

#### *Warrant Requirement*

The general rule, subject to a number of exceptions, is that any search by a state actor of any area that a person has a REOP in cannot be conducted without (1) probable cause, (2) supported by a validly executed warrant.

Here, it is clear that Polly did not have a validly executed warrant to search Dave's car. Therefore, we must look to see whether any exceptions will apply to this general rule.



### Automobile Exception Does Not Apply Because NO PROBABLE CAUSE

The automobile exception, which exists because items in an automobile may be quickly transported and disappear before a warrant can be applied for and issued, is only a replacement for the general warrant requirement. However, it does not absolve the state actor from having probable cause to search.

Probable cause to search means that the person has probable cause to believe that the place to be searched will contain specific items of contraband. It is determined based upon a totality of the circumstances, and must be based upon more than just mere suspicion, but reliable sources and articulate observations.

Here, Polly merely saw Ted slipping “something” under his seat as she was walking away. Polly had no other facts to support a belief that the item was contraband or a weapon, nor could she be sure that Ted was actually performing that act (she was walking when she observed it). Therefore, Polly did not have probable cause to perform the search of Dave’s car. Moreover, the basis for the stop itself was a routine traffic violation, and not something (perhaps intoxicated driving) that would provide probable cause to search the automobile compartment (perhaps for open liquor bottles).

Because Polly did not have probable cause to search Ted’s car, the automobile exception cannot apply.

*An Exception to Probable Cause -- A Terry Search of the Car:* An officer may conduct a “Terry Frisk” of a person if the officer has reasonable and articulable suspicions that the person may be armed. This is to ensure that officers are safe while conducting their duties.

Here, the state may argue that Polly’s observation created an articulable and reasonable suspicion that the occupants of the car were stowing weapons or other materials that might put her in danger. Therefore, pursuant to her lawful seizure of Ted

and Dave, she was within her rights to conduct a “Terry Search” of the automobile (only for weapons) to ensure her safety.

However, a Terry search is limited solely to a search of weaponry, and the paper lunch bag was likely clearly not a weapon (even if Polly conducted a plain feel of it, which she didn't). Polly was not authorized to open the bag under a Terry search theory, because she did not first ascertain that it was contraband based upon a “plain feel.”

Therefore, this exception will also not apply.

*Plain View Does Not Apply:* As mentioned earlier, because the paper bag was beneath the passenger seat, the item was not in plain view of the officer from a lawful vantage point (outside the car), nor was the paper bag immediately incriminating on its face. Therefore, the discovery of the paper lunch bag does not meet either of the requirements for this exception.

*Evanescence Exception Does Not Apply:* The evanescent exception often applies to contraband that can be easily disposed of, or will easily disappear, thereby excepting officers from obtaining a valid warrant. However, it requires that the officer have probable cause to search the area in which the contraband is discovered. Because no probable cause existed, this exception does not apply.

*No Consent:* The seizure of a passenger vehicle in a routine traffic stop does not provide consent to the officer to search the passenger compartment, nor did Dave or Ted give such consent to Polly. Therefore, this exception will also not apply.

*No Exception to the Warrant Requirement or Probable Cause Applies [To] The Cocaine:* Because no exception to the warrant requirement or probable cause applies to the circumstances here, the search of the car and the discovery of the cocaine must be suppressed. Thus, Dave will likely succeed on this motion.

## **Question 2: Motion to Suppress Ted's Statement or for a Separate Trial**

State Action: Again, private actors are not bound to constitutional norms. Thus, the statement must have been obtained by a "state actor" for the suppression motion to be valid. Here, the statements by Ted were obtained by questioning by Polly, who as discussed above is a state actor. Therefore, this requirement is met.

Suppression of Statement After Unlawful Arrest -- No Standing to Bring: As discussed in Question 1, the arrest of Ted and Dave was the result of an improper search of Dave's vehicle, because the probable cause to arrest Ted and Dave was based entirely upon the improperly seized cocaine. If probable cause to arrest is based solely on unconstitutionally obtained evidence, then the subsequent arrest is invalid and unlawful.

Any statements made by a suspect in custody following an unlawful arrest must be suppressed unless the state can show that the "taint" of the unlawful arrest has been purged. Case law is unclear whether Mirandizing a suspect unlawfully arrested is sufficient to "purge the taint" of the prior arrest, even if the suspect waives his Miranda rights following a properly administered warning. What is clear is that releasing the suspect would purge the taint (but that didn't happen here).

However, regardless of the merits of this valid issue, Dave has no standing to bring a claim that Ted's statement was improperly obtained as evidence of an unlawful arrest. This is because only the person who made such a statement can bring such a challenge. Thus, Dave would be wise to encourage Ted to bring this argument forward.

Co-Defendant Confession, Confrontation, and Self-Incrimination Rights -- Redact or Suppress: Because this is a criminal trial with co-defendants, special constitutional concerns arise when one defendant's confession is being admitted against the other defendant. This is because of the intersection between the right of a defendant against self-incrimination (and the right to not take the stand) and the right of an accused to

“confront” the witnesses against him, meaning being able to put the witness under oath, cross-examine him, assess his demeanor, and physically be present for the process.

The Confrontation Clause only applies to “testimonial statements,” which case law clearly includes confessions to police officers within the definition. Here, Ted’s statement falls within this category, because his statement was made to Polly after waiving his Miranda rights. Therefore, the admission of the statement falls within the “testimonial” category of testimony.

Moreover, the testimony clearly implies that Dave is responsible for the contents of the bag, as Ted makes it clear that he--the only other passenger in the car--had nothing to do with the paper bag. This testimony will likely be used against Dave to show that he had true possession of the bag.

Under these facts, because Ted cannot be forced to take the stand and be confronted (because he can assert his Fifth Amendment right to not take the stand), the confession must be redacted as to not cast any negative light onto Dave, or be suppressed.

Conclusion on Suppression: Because it is unlikely that the statement can be redacted to not cast an accusatory light upon Dave, the court will likely grant its suppression.

Conclusion on Alternative -- Separate Trials: The Court may alternatively grant separate trials for Dave and Ted, and should do so in the interests of justice, since it appears under the facts that Dave and Ted will be asserting inconsistent defenses, and will likely attempt to implicate each other in the process.

This has the potential of prejudicing each defendant’s right to a fair trial, and confuse the issues to the jury, because the jury may be tempted to conclude that one defendant is “correct” and the other defendant is “wrong” in accusing the other of fault. This may violate the Fourteenth Amendment requirement that the state bear the burden of

proving the element of every crime charged, and, therefore, separate trials may be the only way to ensure that the state still bears this burden.

Under these circumstances, the court, in the interests of justice should grant the request for separate trial.

### **Question 3: Motion to Discharge Attorney**

The Sixth Amendment Right to Counsel of Choice: The “root meaning” of the Sixth Amendment, per Supreme Court case law, is that the Sixth Amendment right to counsel also includes a Constitutional right to the counsel of one’s choice. This right, of course, does not apply to appointed counsel (which the Supreme Court has clarified), but only to retained counsel. Moreover, this right is not absolute. A criminal defendant cannot improperly delay criminal proceedings by abusing this right, constantly requesting permission to substitute counsel for no good reason.

Here, it is clear from the facts that Dave has retained counsel, and was not appointed counsel by the court. Therefore, Dave does have a Constitutional right to the counsel of his choice. However, it is also clear that the time frame in which Dave has requested a new lawyer is one week before trial.

Under these facts, the court must consider whether granting the request for substitution of counsel would be unfairly prejudicial to the other parties (both the co-defendant and the state), because it would likely have to grant time for the new counsel to become familiar with the details of the case.

Thus, under these facts, it is unlikely that the court would agree--at the eve of trial--to allow the defendant to exercise his Constitutional right to the counsel of his choice.

The Sixth Amendment Right to Go Pro Se: Note that the Sixth Amendment also guarantees the right of a defendant to represent himself (subject to competency

requirements and a knowing and intelligent waiver of the right to an attorney). Here, the Court could grant the discharge of the present attorney (but deny the substitution of a new attorney) if Dave would rather represent himself. However, the facts do not show such a desire, and therefore, the Court will likely not propose such an alternative.

The Sixth Amendment Right to Effective Counsel: The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. The deficiency of counsel in representation, if it causes actual prejudice (a reasonable probability of a different outcome due to the deficiency), is a structural Constitutional error that is grounds for reversal of a conviction and retrial.

Here, the facts show that Dave was merely dissatisfied with his attorney's performance. If Dave had alleged an actual conflict of interest (which would exist if the same attorney represented both Dave and Ted), and the court agreed with this claim of actual conflict, the court should allow Dave to discharge his present attorney and substitute a new attorney, or risk any conviction being reversed under the Sixth Amendment.