**THE COMMITTEE OF BAR EXAMINERS**
**OF**
**THE STATE BAR OF CALIFORNIA**

# July 2001
# California Bar Examination
# Performance Test Questions
# and
# Selected Answers

# PERFORMANCE TESTS AND SELECTED ANSWERS

# JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2001 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

In re J.S.

**INSTRUCTIONS**

**FILE**

Memorandum from Ann Ruger to Applicant

Transcript of Interview with Dr. Sylvia Garwin

Communicable Diseases (1996), Harold Pearlman, M.D., Ph.D.

Chapter 12. Tuberculosis

Article in *The Columbia Times* (Jan. 7, 2001)

In re J.S.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. Grading of the three tasks will be weighted as follows:

Task A — 40%
Task B — 40%
Task C — 20%

# TUESDAY AFTERNOON
JULY 24, 2001

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

**Jackson County**
**Office of the General Counsel**
**1293 Jonesboro Road**
**Ana, Columbia**

July 24, 2001

**TO:** Applicant
**FROM:** Ann Ruger, General Counsel
**RE:** Jerome Sloane

We have been asked by Dr. Sylvia Garwin, Director, Jackson County Department of Health & Human Services, whether we can involuntarily commit a patient, Jerome Sloane, to the Jackson County Hospital. We have considerable experience with involuntary commitment of patients for psychiatric reasons. The problem here, however, is that the patient is refusing treatment for tuberculosis (TB). I've included the relevant Columbia statute dealing with contagious diseases. Keep in mind that it was passed in 1912 and I'm not sure of its continuing vitality.

I will be meeting with Dr. Garwin tomorrow to advise her what options are available for dealing with Mr. Sloane. Please draft a memorandum addressing the following:

Task A: Under the given factual circumstances, what persuasive arguments Dr. Garwin's department can make to lawfully commit Mr. Sloane to the County Hospital for treatment (1) until he completes his treatment program entirely or (2) at least until he is no longer contagious.

Task B: In connection with each of those options, what statutory and constitutional authority there is that would allow such a commitment and what standards and procedures Dr. Garwin's department would need to follow.

Task C: In the event the court does not commit Mr. Sloane for the period of time necessary to complete his treatment program entirely or even until he is no longer contagious, what other creative solutions the County might consider to protect the public and ensure that Mr. Sloane completes his treatment program entirely.

Remember, Dr. Garwin is an experienced public health official familiar with legal matters. She will want as much detail in your legal analysis as I would.

**Transcript of Interview With Dr. Sylvia Garwin**

Ann Ruger: Thanks for coming over, Dr. Garwin.

Dr. Garwin: No problem. I'm glad we were able to get together on such short notice. We have a serious problem over at County Hospital and we need to move quickly.

Ruger: Tell me about it.

Garwin: Jerome Sloane is a 40-year-old male suffering from TB and is HIV positive. He is seeking to leave the hospital against medical advice.

Ruger: When you say seeking to leave, what has he done precisely?

Garwin: Well, so far he has been found dressed in street clothes, sitting in the hospital lobby, and has made repeated demands to leave.

Ruger: Of course, you know from our previous discussions most patients have the right to refuse treatment even if it is medically unwise. How is this different?

Garwin: A sputum sample confirmed that Mr. Sloane has active TB.

Ruger: What is the significance of that?

Garwin: He's contagious and he needs treatment.

Ruger: I thought I heard there was a new outbreak of TB nationwide.

Garwin: I would hardly call the increased incidence of TB an outbreak. Even if it were widespread, most patients wouldn't even need hospitalization. This is different. Mr. Sloane is HIV positive and he's homeless. Being HIV positive and homeless makes it difficult to treat the TB and to avoid its spread.

Ruger: What do you mean?

Garwin: It's simple. Because active TB can be serious and can be contagious by repeated contact, there are few options for the homeless with active TB. Not that the hospital is risk-free. Once he wandered to the pediatrics ward.

Ruger: If he weren't homeless, would you be seeking to commit him?

Garwin: If he had a place to live, steps could be taken short of commitment. If he lived in a college dormitory with other roommates, for example, different quarters would have to be found for him. If he lived in a private home and could be given a private bedroom, or others in the household could be given prophylactic antibiotic therapy, confinement to his own home might be appropriate. But he's homeless, and a shelter where he would risk infecting others, including those with impaired immune systems, would probably be the worst place for him to stay. Even then, this all assumes he would actually submit to the treatment. The hospital's past experience is that he is noncompliant.

Ruger: What do you mean "noncompliant"?

Garwin: He has a prior history of disappearances and releases against medical advice, only to return via the emergency room when his health deteriorated.

Ruger: Do you have anything more specific?

Garwin: I was told he previously failed to follow proper infection control guidelines or take proper medication while in the hospital. He also failed to complete treatment regimens following his release.

Ruger: Has any attempt been made to find him a place to stay where he could be treated?

Garwin: In March he was discharged and deposited in a taxicab. The cab driver was given the address of a shelter to which he was to be driven. He never showed up at the shelter. He was given an appointment at a TB clinic a bus trip away from the shelter and never showed up there either.

Ruger: You obviously aren't treating him personally. Who is dealing with him at the hospital?

Garwin: There's his admitting physician, a pulmonary disease specialist, the hospital social worker, a floor nurse, an infectious control nurse, the hospital deputy director, and

the County Chief of Social Work. I just had a meeting with all of them and they think commitment is best for him. Look, the bottom line is he must remain isolated until he is no longer contagious. And his contagiousness cannot be assessed unless he gives additional sputum samples, which, by the way, he refuses to do. If he would just cooperate, he'd be okay.

Ruger: What's the problem with the sputum sample?

Garwin: Well, an involuntary sputum sample requires a bronchoscopy. It's not the most pleasant thing in the world, and involves sedation and significant risks.

Ruger: What about the medication?

Garwin: The medications are quite toxic, dangerous, and some require painful intramuscular administration. He is being asked to take many pills causing numerous side effects, including nausea and pain. The efficacy of the drugs will be unknown until we receive the sensitivity reports. But the fact remains if he doesn't do it he will not get better and may die. I recognize some noncompliant patients can be treated without confinement and that others cannot be treated even with confinement. There's no guarantee one way or the other. But we've got to do something. Look, I've got to get back to the hospital. I have brought along some reading material that may explain the medical aspects better. He just needs the treatment.

Ruger: Good. I'll get back to you tomorrow with an assessment of the problem and what we might be able to do.

Garwin: Thanks.

**Communicable Diseases (1996)**

Harold Pearlman, M.D., Ph.D.
Chair, Department of Pulmonary Medicine
Columbia State University School of Medicine

Chapter 12
*Tuberculosis*

Tuberculosis (TB) is a communicable disease caused by a bacteria or bacilli complex, mycobacterium (M.) tuberculosis. One of the oldest diseases known to affect humans, it was once known as consumption or the great "white plague" because it killed so many people. Human infection with M. tuberculosis was a leading cause of death until antituberculous drugs were introduced in the 1940s. While it can affect other parts of the body, such as lymph nodes, bones, joints, genital organs, kidneys, and skin, it most often attacks the lungs. It is transmitted by a person with what is called active TB by airborne droplets projected by coughing or sneezing. When the organism is inhaled into the lungs of another, TB infection can result. Usually this happens only after close and prolonged contact with a person with active TB. Most of those who become infected do not manifest any symptoms because the body mounts an appropriate immune response to bring the infection under control; however, those infected display a positive tuberculin skin test. The infection (sometimes called latent TB) can continue for a lifetime, and infected persons remain at risk for developing active TB if their immune systems become impaired.

Whether a person has active TB and is infectious can be determined by analyzing a smear of sputum (a substance expelled from the lungs) by staining the smear (for immediate analysis) or by culturing the bacilli (which can take longer but is more sensitive). Chest x-rays may reveal the presence of the disease but not whether it is contagious.

Typical symptoms of active TB include fatigue, loss of weight and appetite, weakness, chest pain, night sweats, fever, and persistent cough. Sputum is often streaked with blood; occasionally massive hemorrhages occur if TB destroys enough lung tissue. Fluid may collect in the pleural cavity. Gradual deterioration occurs. If active TB is not treated, death is common.

Only persons with active TB are contagious. The active state is usually easily treated through daily administration of drugs. Typically a short medication protocol will induce a remission and allow a return to daily activities with safety. A failure to continue with medication may lead to a relapse and the development of multiple drug resistant TB (MDR-TB), a condition in which the TB bacilli do not respond to at least two (isoniazid and rifampin) of the primary treatments, so that the active state is not easily cured and contagiousness continues for longer periods.

Death often results because it takes time to grow cultures and to determine the drugs to which the organism is sensitive. By the time that determination is made, it may be too late, particularly for a person whose immune system has been compromised by a co-morbidity such as human immunodeficiency virus (HIV). For that reason, a wide range of drugs is tried initially while the cultures are grown and sensitivities detected, particularly if MDR-TB is suspected. Once sensitivities are discovered, medication can be adjusted so that ineffective drugs are eliminated and at least two effective drugs are always used.

Active TB of the lungs is considered contagious, requires immediate medical treatment, and involves the administration of several drugs. Usually, after only a few days of treatment, infectiousness is reduced markedly. After two to four weeks of treatment, most people are no longer contagious and cannot transmit TB to others even if they cough or sneeze while living in close

quarters. The disease, however, remains active in the patient.

Exposure over a prolonged time is usually required, and less than thirty per cent of family members living closely with an infected person and unprotected by prophylactic drugs will become infected by the patient with active TB. On the other hand, transmission has been known to occur with as little as a single two-hour exposure to coughing, sneezing, etc., of a person with active TB. To cure TB, however, continued therapy for six to twelve months may be required. Failure to complete the entire course of therapy risks a relapse and the development of MDR-TB.

MDR-TB results when only some TB bacilli are destroyed and the surviving bacilli develop a resistance to standard drugs and thus become more difficult to destroy. This resistance may involve several drugs and directly results from a patient's failure to complete therapy.

TB is more serious in persons with impaired immune systems, which can result from poor health, chronic abuse of alcohol or drugs, old age, chemotherapy for cancer, or HIV infection. Such persons are more likely to develop active TB if they already harbor the TB bacilli. By way of example, ninety percent of persons with latent TB (i.e., persons who are neither symptomatic nor contagious) and with an intact immune system will never develop active TB. On the other hand, persons infected with HIV and with latent TB will develop active TB at the rate of eight per cent per year.

HIV is the cause of acquired immune deficiency syndrome (AIDS). HIV infection weakens the body's natural ability to fight disease. As the immune system deteriorates, those infected with HIV may become clinically ill with many serious illnesses. These are called opportunistic diseases and include pneumonia, some forms of cancer, fungal and parasitic diseases, certain viral diseases, direct damage to the nervous system, and TB. Persons infected with HIV are at much greater risk of developing active TB if they have latent TB. Once a person with HIV develops one of these opportunistic diseases, that person is classified as having AIDS.

*The Columbia Times*

Two Differing Approaches to Public Health

Sunday, January 7, 2001

Jackson County yesterday became the first jurisdiction in Columbia to require healthcare workers to report the name of anyone who tests positive for tuberculosis (TB) to the county Department of Health and Human Services. A county health official said the requirement would provide valuable information.

**Not serious - yet**

Tuberculosis infections are not increasing significantly in the county, but the program will help ensure the disease does not gain momentum, said Dianne Johnson, senior epidemiologist with the Jackson County Department of Health and Human Services. "No one has ever compiled this information," she said.

“The county is responsible,” said Johnson, “for protecting the public from communicable diseases, such as TB.” The first step, she said, in dealing with the increased incidence of TB is to gather this information. The county has not, she said, devoted specific resources to TB.

The county reported 43 active cases in 1999 and 37 in 2000. Statewide, 258 active cases were reported last year. Globally, tuberculosis is a serious problem, claiming the lives of 2 million people every year, said Dr. Chris Bryson, director of infectious disease programs for the state. More than half of the active cases recorded in Columbia appear in immigrants, he said, and the Jackson County program will help ensure that no one is missed. "Finding those individuals, getting them screened . . . and getting them offered treatment is really a strong measure for preventing the spread of TB in this country and keeping things going in the right direction," he said.

Jackson County previously had tracked only active tuberculosis cases. There are many more people in the county who may be latent carriers of the disease. That means they are infected with the bacterium that causes the disease and will test positive on a skin test, but they will not show symptoms or pass it on to others.

About 10 percent of latent carriers go on to develop an active form of the disease. Symptoms include a persistent cough, fever, fatigue and weight loss. With treatment, the disease almost always is curable.

The Health Department will work with health care workers to determine how each infected person was exposed and what treatment options are available.

"We have lots of lists," Johnson said. "We have lists of people with salmonella, shigella, you name it. This is nothing different."

**A different place**

More than 300 miles north of Jackson County, others in the state have responded to healthcare issues by doing more than recording names. Take Dr. Eric Whit and his patients. The doctor grew up in Woodview, one of Capital City’s poorest neighborhoods and a virtual public-health war zone. In Woodview, which has twice the population of Jackson County, amid the strung-out street junkies and the windowless building shells, the statistics are harrowing:

- Fourth worst tuberculosis infection

rate of the city's 77 neighborhoods.

- Seventh worst for HIV.
- Eleventh worst for full-blown AIDS.
- Thirteenth worst for gonorrhea.

"You look around and wonder where to start," said Dr. Whit, a jovial physician who always wears a stethoscope and jokes that the neighborhood he works in is turning his hair completely gray at age 34. "Finding that starting point is almost mind-boggling as you look around this neighborhood."

The hometown doctor who graduated from the University of Columbia and always planned to practice medicine in disadvantaged communities finally decided to start with the men of his neighborhood--men like him who had grown up poor and on the wrong side of the city. "I looked around, and, in the midst of all this need, I decided that they needed me here at home," he said.

So, in a nation where the overwhelming majority of social services focuses on impoverished women and children, Whit came up with a novel concept that he hopes will eventually become a public health model for both the city and the state: a free health clinic for men that aims not only to heal their street-worn bodies, but to minister to their broken spirits as well.

With funding from Capital City and the federal government, Whit opened a clinic he named Project Brotherhood. While working his day job as a doctor in one of the city's 30 regular health clinics, Whit initially lured poor men to the Project Brotherhood offices every Thursday night with free haircuts, hot pizza and no-appointment-necessary doctor's visits--often in that order.

Now, just a little more than a year later, Whit has more patients than anyone ever predicted, has recently opened a second Project Brotherhood center at Capital City Hospital, and is finding that the men he serves are increasingly turning to him for much more than just physicals and prescriptions. "We do what we can," says Whit. More than once, Whit has been known to pay for a hotel room or an apartment to help a patient through a rough time.

**A community within**

It's just after 4 p.m. on a recent Thursday when clusters of men start arriving at the squat, brick clinic at 6337 S. Woodland Ave. The sign is simple: "Project Brotherhood. Every Thursday. 4 to 7 p.m."

Before the night is over, the doctors and social workers here will have helped numerous men with stomach problems and job problems, kid problems and wife problems. Any symptom that could walk through the door--from mental illnesses to broken families to advanced diabetes--does.

There's Alex S., 24, who is worried about the weight he has gained since another doctor put him on antidepressants. And 32-year-old Albert W., who is worried that he isn't being the kind of father he should be. And David R., who thinks he has seen a lot in 56 years of life and suspects he has some wisdom to share with the other guys.

Some of the men head immediately back to the exam rooms with a doctor. Others gather in a big, open room around a table and start talking about their week. A barber cuts hair, pizza gets ordered, and men wander in and out.

"The structure here is unique," says Jerry Watson, a Project Brotherhood social worker. "That's deliberate. We let them determine the structure."

Watson helps the men with many of the problems they may face, from finding a place to live to checking up on their medication. “Dr. Whit and I,” he explained, “have been appointed guardians for some of the men who can’t take care of themselves.”

**Healing the spirit**

"Doc, I'm getting BIG," Whit's patient, Alex S., says, alarmed. When Whit realizes that Alex's upper arms are so massive that the blood-pressure cuff won't even fit around them, he playfully punches his patient in the arm. Alex clearly appreciates Whit's bedside manner.

While Whit spends most of his time in exam rooms with patients, Watson, the social worker, gathers the rest of the men around a table. "How was your week?" Watson says, drawing a quiet man in the corner into the conversation. Albert W. looks startled to be put on the spot, and he lowers his eyes. The room grows quiet. The men just look at one another until a man in a red sweatshirt leans forward and starts talking, taking Albert off the hook.

Capital City is heralding Project Brotherhood as a low-budget, innovative success story. The men who use Project Brotherhood are calling it their lifeline. Whit is simply calling his tiny clinic in Woodview a decent start.

# TUESDAY AFTERNOON
JULY 24, 2001

California
Bar
Examination

Performance Test A

**LIBRARY**

In re J.S.

**LIBRARY**

Columbia Welfare and Institutions Code

Chapter 4. Communicable Diseases

Columbia Code of Regulations, Department of Health

Chapter 8. Communicable Diseases

Selected Federal Statutory and Regulatory Provisions

In re. H. H. (Columbia Supreme Court 1983)

Idell S. v. Albert L. DiDario (United States Court of Appeals, 3d Cir., 1995)

COLUMBIA WELFARE AND INSTITUTIONS CODE
CHAPTER 4. COMMUNICABLE DISEASES
(ENACTED 1912)

§ 270. Rules and regulations of State Department of Health regarding tuberculosis: prevention, treatment and enforcement.

The State Department of Health shall make rules and regulations for the care of persons suffering with tuberculosis, and for preventing the spread of the disease. The department shall enforce the rules and regulations and see that they are enforced, for which purpose it may issue orders to local boards and practicing physicians. Every local board shall also enforce said rules and regulations.

§ 309. Commitment of tubercular who fails to observe rules or who is a menace; discharge.

A person with communicable tuberculosis who fails to obey the rules or regulations promulgated in accordance with § 270, or who is an actual menace to the community or to members of his household, may be committed to a hospital or institution for the care and custody of such person or persons by the Superior Court, upon proof of service upon him of the rules and regulations and proof of violation thereafter, or upon proof that he is suffering from tuberculosis and is an actual menace to the community or to members of his household. Two days' notice of the time and place of hearing shall in all cases be served upon the person to be committed. The superintendent or person in charge of said hospital or institution to which such person has been committed shall detain said person until the person has recovered to the extent that he will not be a menace to the community or to members of his household or that the person will so conduct himself that he will not constitute such a menace.

COLUMBIA CODE OF REGULATIONS
DEPARTMENT OF HEALTH
CHAPTER 8. COMMUNICABLE DISEASES

§ 857. Isolation and restriction for communicable disease.

(a) The State Department of Health ("Department"), or any state or county health officer, upon receiving a report of a communicable disease, shall, by written order, establish such isolation or other restrictive measures required by statute or rule to prevent or control the spread of the disease. If, in the judgment of the Department or health officer, it is necessary to provide adequate isolation, the Department or health officer shall promptly cause to be removed to a hospital a person who is ill with a communicable disease. Such order shall remain in force until terminated by the Department or health officer.
(b) The Department or health officer may restrict access of the individuals permitted to come in contact with or visit a person who is hospitalized or isolated under authority of this section.
(c) The Department or health officer may, by written order, restrict any person who has been exposed to a communicable disease under conditions the Department or health officer may specify, provided such period of restriction shall not exceed the period of incubation of the disease.
(d) A person who is responsible for the care, custody, or control of a person who is ill or infected with a communicable disease shall take all measures necessary to prevent transmission of the disease to other persons.

Adopted 1912; amended 1942, 1972.

SELECTED FEDERAL STATUTORY AND REGULATORY PROVISIONS

AMERICANS WITH DISABILITIES ACT, TITLE II, SECTION 202

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

CODE OF FEDERAL REGULATIONS

§ 35.104 Definitions.

For purposes of this part, the term--

(1) “Act” means the Americans with Disabilities Act.

(2) “Disability” means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(3) “Physical or mental impairment” means--

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(C) Any contagious and noncontagious disease or condition such as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(4) “Public entity” means--

(A) Any State or local government;

(B) Any department, agency, special purpose district, or other instrumentality of a State or States or local government.

(5) “Qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the

participation in programs or activities provided by a public entity.

In re H.H.
Columbia Supreme Court (1983)

The case before us focuses our attention on the plight of individuals who have been committed in mental institutions for most of their adult lives. The status of the appellant, Discharged Pending Placement (DPP), is not formally recognized by any statute, administrative regulation, or court rule. Nevertheless, administrators of the mental health system and many judges have assumed the existence of such a status, and have used the DPP classification for patients who cannot live independently outside the institution but who are no longer legally committable under conventional standards. These patients, although technically "discharged," remain in mental hospitals until appropriate outside placements become available.

H.H. was involuntarily committed in 1980 after a period of nine years' confinement in Greystone Park Psychiatric Hospital on a transfer from the Department of Mental Retardation. H.H. had been classified by a court as DPP because she no longer met the legal standards for commitment due to remission or the effects of aging and physical disease. In late 1980, H.H. was notified that a further hearing would be conducted to review her possibilities for placement. At this hearing, conducted on November 18 and December 17, 1980, a second court refused to recognize the validity of the previous adjudication of H.H. as DPP, finding the DPP classification to be a nullity. The court instead conducted a commitment review hearing and found that appellant met the legal standards for commitment and was not eligible or entitled to be discharged.

The central issue in this appeal implicates the legal rights of patients in state mental hospitals who have been discharged under current standards governing civil commitments, but who cannot survive independently outside the institution without some care and supervision. The resolution of this issue requires careful examination, determination, and definition of the appropriate legal status of H.H.

The Public Advocate, representing H.H., urges the Court to give formal recognition to the DPP status as an intermediate stage between involuntary commitment and immediate discharge. He argues that DPP status is a logical hybrid status that responds to the legal and human situation of these patients and is consistent with the existing statutory, regulatory, and decisional law. He emphasizes that recognition of the DPP classification and promulgation of appropriate procedural guidelines will ensure that committed persons who are no longer dangerous will be integrated in an expeditious manner into settings less restrictive of their liberty.

We begin our evaluation of these various contentions by reviewing certain basic principles governing the civil commitment process. The authority of the State to civilly commit citizens is said to be an exercise of its police power to protect the citizenry and its *parens patriae* authority to act on behalf of those unable to act in their own best interests. *Parens patriae* literally means "parent of the country." It refers traditionally to the role of the state as sovereign and guardian of persons under legal disability. However, because commitment produces a great restraint on individual liberty, this power of the State is constitutionally bounded. In order to comply with due process, the State must adhere to certain procedures

when committing individuals. The individual is entitled to a judicial hearing at which the State must establish the grounds for commitment by clear and convincing evidence. The individual who is the subject of the hearing has the right to notice of the hearing, the right to present evidence, and the right to be represented by counsel.

In addition to these procedural guarantees regulating the commitment process, the scope of the commitment power itself is limited. The State cannot constitutionally commit individuals to mental hospitals solely on the basis of mental illness. As the United States Supreme Court explained in *O'Connor v. Donaldson*:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming the term can be given a reasonably precise content, and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.
>
> May the State confine the mentally ill merely to ensure them a living standard superior to that which they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely, if ever, a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.
>
> In short, a State cannot constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

In order to justify commitment in Columbia, the State must show that an individual is likely to pose a danger to self or others or property by reason of mental illness. In addition to a showing of mental illness, commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future. When commitment is necessary, we require that the commitment order be molded so as to protect society's very strong interest in public safety, but to do so in a fashion that reasonably minimizes infringements upon the individual's liberty and autonomy and gives him the best opportunity to receive appropriate care and treatment.[1]

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[1]We note that individuals who are mentally ill, like the rest of the citizenry, are subject to the statutory procedures of guardianship when shown to be mentally incompetent. In these instances, the court, through the court-appointed guardian, may establish the ward's place of abode, shall provide for the ward's care, comfort and maintenance, and may receive money payable from any source for the support of the ward. See Columbia Welfare and Institutions Code § 972 (detailing procedure for appointment and powers of guardian to manage the estate of "a person who has not been judicially

We also require periodic review hearings to ensure that an individual's commitment continues only as long as required. Further, the conditional discharge of institutionalized persons must be available in instances where lesser forms of restraint are sufficient to ensure the public safety and the individual's own well-being. If H.H. had the capacity to exist safely in freedom, it is beyond dispute that she would be entitled to immediate release (*O'Connor v. Donaldson)*. Unfortunately, she lacks the capacity to survive independently.

The Task Force on Mental Commitments encourages us to expand the standards of commitment to cover "an individual who by reason of mental illness is unable to care for himself without some level of aid or supervision." We respectfully refuse this invitation. The civil commitment process must be narrowly circumscribed because of the extraordinary degree of state control it exerts over a citizen's autonomy. To widen the net cast by the civil commitment process in the manner suggested by the Task Force is inconsistent with the central purposes of the commitment process. It would permit the State to commit individuals to mental institutions solely to provide custodial care. This authority cannot be justified as a measure to safeguard the citizenry under the police power. Nor is it a proper exercise of the State's *parens patriae* authority, because confinement in a mental hospital is not necessary to provide the care needed by individuals simply incapable of living independently.

Although the State may not commit persons who are mentally ill but not dangerous, we believe the State does possess certain authority in regard to these individuals. H.H. has been institutionalized for over 30 years. Although legally entitled to leave the mental hospital, she is incapable of competently exercising that right due in part to the effects prolonged confinement have had on her personal capacity to survive in the outside world and on her relationships with friends and family who might provide support and assistance. Although the State does not have the authority to continue her legal commitment, it is not required to cast her adrift into the community. In a proper exercise of its *parens patriae* authority, it may therefore, of necessity, continue the confinement of such persons on a provisional or conditional basis to protect their essential well-being, pending efforts to foster their placement in proper supportive settings outside the institution.

When a court determines at a commitment review hearing that an individual is no longer dangerous to self, others, or property due to mental illness, the individual shall be entitled to leave the mental hospital and reenter the community. The court, however, shall make a further inquiry to determine whether the individual is capable of leaving the institution. If the court determines the individual is not able to survive in the community independently or with the help of family or friends, it shall direct that the individual remain in the institution, but immediately schedule a placement review hearing to occur within 60 days. At this hearing, the court shall inquire into the needs of the individual for custodial and supportive care, the desires of the individual regarding placement, the type of facility that would provide the needed level of care in the least restrictive manner, the availability of such placement, the efforts of the State to locate such placement, and any other matters it

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declared incompetent but who by reason of advanced age, illness, or physical infirmity is unable to care for or manage his property or has become unable to provide for himself or others dependent upon him for support").

deems pertinent. In the event that placement can be arranged in a facility able to provide the care needed in a setting not unduly restrictive of liberty, the court shall order such placement. If immediate placement is not possible, the court shall continue the individual's confinement, require the individual to be placed in the environment least restrictive of his or her liberty within the institution, and schedule a subsequent placement review hearing to occur within six months. While the individual remains confined in the institution, all manageable efforts shall be made to improve the individual's ability to function in a placement outside the mental hospital.

At the subsequent placement review hearings, occurring at least every six months, the court shall reexamine the factors of the initial placement review as well as the conditions of the individual's confinement. If placement is not possible, the court must determine whether the State has undertaken all good faith efforts necessary to place the individual in an appropriate setting outside the mental institution, and whether in the interim the State has placed the individual in the least restrictive setting in the institution. When an individual is discharged from the institution and placed in an alternate facility, the court may require as a condition of placement that the parties submit a report within a six-month period as to the overall adequacy of the individual's placement. At any time thereafter, any party or the court on its own motion may reinstitute proceedings concerning the continuing care, supervision, placement, or commitment of the individual.

The individual shall have the right to counsel in all such proceedings. Both the individual and counsel shall be served with notice of the time and place of each placement review hearing no later than ten days prior to the hearing. The patient's counsel shall also be entitled to inspect and copy all records relating to the patient's condition and placement, to introduce evidence and compel testimony, and to cross-examine adverse witnesses. Thus, the individual must be afforded: (1) an adequate written notice detailing the grounds and underlying facts on which continued commitment or confinement is sought; (2) the right to counsel; (3) the right to be present, cross-examine, confront, and present witnesses; (4) the standard of proof to warrant commitment by clear and convincing evidence; and (5) the right to a verbatim transcript of the proceeding for purposes of appeal. These procedural guidelines will ensure that the continuing confinement of individuals not meeting standards for commitment and eligible for discharge, but unable to survive independently, will be in accord with due process.

Because we recognize the existence of an intermediate status for those failing to meet the standard of commitment, we remand this case for an immediate commitment review hearing to determine whether H.H. remains committable and, if not, whether immediate release should be deferred to permit placement efforts on her behalf.

Idell S. v. Albert L. DiDario
United States Court of Appeals (3d Cir.1995)

We are asked to decide if the Pennsylvania Department of Public Welfare ("DPW") is violating Section 202 of Title II of the Americans with Disabilities Act (the "ADA" or the "Act") by the manner in which it operates its attendant care and nursing home programs. Idell S. alleges DPW is violating the ADA by requiring that she receive mandatory care services in the segregated setting of a nursing home rather than through DPW's attendant care program. That attendant care program

would allow her to receive those services in her own home where she could reside with her children. On summary judgment, the district court ruled that DPW is not violating the ADA because it is not discriminating against Idell S. For the following reasons, we reverse.

Idell S. is 43 years old and the mother of two children ages 22 and 14. In 1973, she contracted meningitis, which left her paralyzed from the waist down and greatly reduced her ability to care for herself. As a result, she has been a patient at the Philadelphia Nursing Home since December 26, 1989. Idell S. uses a wheelchair for locomotion and requires assistance with certain activities of daily living, including bathing, laundry, shopping, getting in and out of bed, and house cleaning. She is able to cook, dress herself (except for her shoes and socks), and attend to her personal hygiene (using a transfer board to access the toilet) and her grooming. The parties agree that, although Idell S. is incapable of full independent living, she is not so incapacitated that she needs the custodial care of a nursing home.

DPW operates two different programs providing physically disabled persons with assistance in daily living, one funding nursing homes and the other providing attendant care. The attendant care program provides basic and ancillary services enabling an individual with physical disabilities to live in his or her home and community rather than in an institution, and carry out functions of daily living, self-care, and mobility. DPW's average cost of caring for a person in a nursing home is $45,000 per year. The Commonwealth pays 44% of this amount ($19,800) and the difference ($25,200) is paid by the federal government. DPW's average cost of caring for a person in the attendant care program is $10,500 per year. That amount is totally borne by the Commonwealth.

In 1993, Idell S. was evaluated, and it was determined she was eligible for attendant care services. However, due to a lack of funding, she was placed on a waiting list for that program and continues living in a nursing home, separated from her children. The parties agree if Idell S. were enrolled in the attendant care program, nursing home care would be inappropriate. Except for access to skilled nursing care that she neither needs nor wants, Idell S. receives the same kind of services in the nursing home that the attendant care program would provide.

Section 202 of Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Because Title II was enacted with broad language and directed the Department of Justice to promulgate regulations as set forth above, the regulations the Department promulgated are entitled to substantial deference.

Idell S.'s challenge to DPW's treatment of her is based upon an ADA regulation that provides: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

In furtherance of the objective of eliminating discrimination against the disabled, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Similarly, in response to its mandate, the Department of Justice stated "...integration is fundamental to the purposes of the Americans with Disabilities Act."

Thus, the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled. Accordingly, the district court erred in holding the applicable provisions of the ADA "may not be invoked unless there is first a finding of discrimination."

In reaching its conclusion, the district court relied in large part upon our own decision in *Clark v. Cohen* (3rd Cir. 1986). Our holding in *Clark* is not based upon the ADA, but upon the Due Process Clause of the Fourteenth Amendment. There, Clark, a forty-five-year-old, mentally retarded woman had been committed to a state-operated mental institution since she was fifteen years old. She filed a complaint against the Commonwealth of Pennsylvania and the County of Philadelphia alleging various constitutional violations. She alleged that her confinement was illegal, and sought placement in a community-living arrangement supervised by the County of Philadelphia. She based her discrimination claim upon the fact that the Commonwealth was providing community living arrangements to persons with disabilities similar to hers while requiring her to remain in an institution. The district court ruled Clark had not established disability-based discrimination.

The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity, rather than in a manner which shunts them aside, hides, and ignores them. "[M]uch of the conduct that Congress sought to alter in passing the ADA would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander v. Choate* (U.S. 1985). Thus, we will not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt "discrimination."
DPW's obligation to provide appropriately integrated services is not absolute, as the ADA does not require that DPW make fundamental alterations in its program:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. (Code of Federal Regulations § 35.130)

In *Southeastern Community College v. Davis* (U.S. 1979), and *Alexander v. Choate* (U.S. 1985), the Supreme Court attempted to define the limits of the requirements under the ADA. In *Davis*, the court held that the law imposes no obligation to engage in "affirmative action." In *Choate*, the court explained that "affirmative action" as used in *Davis* “referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental alterations' in the nature of a program . . . rather than to those changes that would be reasonable accommodations." The test, therefore, to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program.

Here, DPW agrees that "the most integrated setting appropriate to Idell S. is her home,” but argues that it cannot comply with Idell S.'s request for the most integrated services appropriate absent a fundamental alteration of its program. The only explanation DPW has offered for this position is its assertion that funding for nursing home and attendant care for fiscal year 1993-1994 has already been appropriated by the General Assembly of Pennsylvania, and that it cannot, under state constitutional law, shift funds from the nursing care appropriation to attendant care. However, Idell S. is not asking that DPW alter its requirements for admission to the program, nor is she requesting that the substance of the program be altered to accommodate her. Even if we assume that DPW cannot (or will not) cause the necessary shift of funds under its current procedures and practices, it is clear from this record that providing attendant care services to Idell S. in her home would not

be a fundamental alteration of the attendant care program nor of the nursing home program. We fail to see how this requires DPW to fundamentally alter its attendant care program, nor do we perceive how the requested modification would place an undue burden on DPW. On the contrary, the relief that Idell S. is requesting merely requires DPW to fulfill its own obligations under state law. This is not unreasonable. The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner does not constitute a valid justification for separate or different services under Title II of the ADA.

DPW asserts that it cannot change Idell S.'s care because the nursing home and attendant care programs are currently funded on two separate lines of its budget. It is not now our responsibility to invent a funding mechanism whereby the Commonwealth can properly finance its nursing home and attendant care programs. However, the ADA applies to the General Assembly of Pennsylvania, and not only to DPW. DPW cannot rely upon a funding mechanism of the General Assembly to justify administering its attendant care program in a manner that discriminates, and then argue that it cannot comply with the ADA without fundamentally altering its program.

Accordingly, we will vacate the order granting summary judgment in favor of DPW and remand this case to the district court for proceedings consistent with this opinion.

## ANSWER 1 TO PERFORMANCE TEST A

## TASK A

**MEMORANDUM**

To: Ann Ruger, General Counsel

From: Applicant

Re: Jerome Sloane

As you indicated in your interview with Dr. Garwin, most patients have the right to refuse treatment even if it's medically unwise. However, under the factual circumstances, Dr. Garwin's department can make several persuasive arguments to lawfully commit Sloane to the County Hospital for treatment (1) until he completes his treatment program entirely or (2) at least until he is no longer contagious.

(1) Until Sloane completes his treatment program entirely

Sloane should be committed to the County Hospital for treatment of his TB because he is likely to pose a danger to himself and to others in the community. Sloane has refused treatment despite being informed of the danger his condition poses.

Sloane suffers from active TB. This diagnosis was confirmed by a preliminary sputum sample taken at the hospital. TB is a communicable disease that is transmitted by a person by airborne droplets projected by coughing and sneezing. Usually, the disease is spread by close or prolonged contact with a person with active TB. However, it can be contracted in as little as a few hours.

While TB is relatively easily transmitted, most patients do not require hospitalization. Sloane's case is different, however, for several reasons.

First, Sloane is homeless. His living situation makes this case unique because it's difficult to isolate Sloane from others while he's still contagious. He likely lives in and around many other people in tight living areas. In addition, his homelessness makes it difficult for Sloane to comply with treatment demands. In fact, Sloane has a prior history of failing to complete treatment regimens following his release.

The last time Sloane was discharged from the hospital, the cab driver was given the address of a shelter to which he was to be driven. Sloane never showed up at the shelter and subsequently failed to keep his scheduled appointment at a nearby TB clinic.

Because of Sloane's inability to keep his own treatment ongoing, commitment is necessary to protect his health and the safety of the community. A report by the CSU School of Medicine indicates that a failure to continue with medication may lead to a relapse and the development of multiple drug resistant TB (or MDR-TB). If this happens, the active TB is

very difficult to cure and the contagiousness continues for longer periods.

So while it may seem that Sloane's potential commitment should be terminated immediately after the threat of contagiousness is eliminated, the risk of MDR-TB coupled with Sloane's proven inability or unwillingness to treat himself indicates that Sloane must be committed until he has entirely completed the treatment program.

Another reason why Sloane should be committed is that he is HIV positive. TB is more serious in persons with impaired immune systems. Such persons are more likely to develop active TB if they already harbor the TB bacilli. Moreover, once a person with HIV develops TB, that person is classified as having AIDS.

Thus, Sloane's precarious health status warrants a quick and lasting treatment for the TB. In addition, one might be able to argue that the area in which Sloane tends to stay is a "public health war zone." This would require additional research, but if shown to be so, it indicates that Sloane poses an additional risk not only to himself, but to others in his community as well.

Sloane's complete course of treatment would last six to twelve months. Failure to complete the entire course of therapy risks a relapse and the development of MDR-TB, the consequences of which are discussed above.

Finally, commitment for the entire course of treatment is Sloane's best opportunity to receive treatment. This ultimately reduces the risk of danger he poses to himself and to society.

While it seems clear that some length of commitment is necessary, the arguments in favor of commitment for the entire duration of treatment may be outweighed by Sloane's liberty and autonomy rights.

(2) <u>At least until he is no longer contagious</u>

As you indicated, there is generally a right to refuse treatment. However, for the reasons indicated above Sloane poses a threat of harm not only to himself but to the community too. So because the state's police power to protect society is limited by individual right to liberty and autonomy, Sloane's commitment might only be permissible to the extent that Sloane poses risk to society.

To the extent that Sloane poses risk to society, the state has a right to curb the risk. After the risk of contagion subsides, the county can find an alternative, equally suitable way for Sloane to continue his treatment and thereby prevent a relapse of the disease.

Conclusion

In order to protect the safety of both Sloane and the community, Sloane should be committed to the county hospital for treatment. The length of his stay depends on the continuing risk posed. Because Sloane is at heightened risk for MDR-TB, commitment for the entire duration of treatment is warranted. However, at minimum, Sloane needs to be committed until the contagiousness ends, at which time suitable alternatives can be found.

**TASK B**

In connection with each alternative commitment option, the department must look to statutory and constitutional authority and comply with appropriate standards and procedures.

Statutory Authority

Columbia Welfare and Institutions Code §270 gives the State Department of Health the authority to make rules and regulations. Further, §309 provides that a person with communicable TB who is an actual menace to society may be committed to a hospital or institution for treatment provided certain procedures and standards are met as detailed in §309 and attending Regulation §857.

There is a question of whether the state statutes are still viable since they were passed nearly 90 years ago, in 1912. There is no available case law breathing continued life into the statute. However, the attending regulations were last amended in 1972, fewer than 30 years ago. This suggests that the statutes are probably still viable, particularly since the latest amendment postdates the development of anti-TB drugs introduced in the 1940's.

Section 309 states that the person should be detained until he has recovered to the extent that he will not be a menace to the community or until the person will so conduct himself that he will not constitute such a menace. Similarly, Regulation §857(c) states that the period of restriction shall not exceed the period of incubation of the disease.

Taken together the statutes indicate that Sloane's commitment might only be permissible to the extent of his contagious period. However, as discussed above, if Sloane cannot be trusted to continue his regimen of treatment after release, and then relapse occurs, the period of contagiousness recurs and then we're back where we started.

Another relevant source of statutory guidance is the Americans with Disabilities Act (ADA). The ADA provides:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of services . . . by any such entity.

Sloane suffers from a physical impairment which is a disability within the meaning of the statute §35, 104(2), (3)(c).

The Third Circuit interpreted the ADA in Idell. There the court stated that integration is a fundamental purpose of the ADA and so the fact that it's more convenient to provide services in a segregated manner isn't a sufficient justification.

This indicates that the Department must have a good reason to commit Sloane rather than treat him as an outpatient. The court laid on the test as follows: The program need not absolutely provide integrated services so long as providing such services would require a fundamental alteration in its program. Here, the Department doesn't appear to have a set program for treating TB patients who pose a threat to society, but the Department probably must show that commitment, segregated service, is necessary to achieve the health and safety of the community.

Constitutional Authority

According to In re HH the state has the authority to civilly commit citizens through exercise of its police and parens patriae power. However, this power is limited by the Due Process clause, which requires that the state adhere to certain procedures when committing individuals. In addition, to the procedural limitations, the Due Process clause also limits the scope of the power itself. In short, the State cannot constitutionally confine a nondangerous person who is capable of living on his own or with family members.

Standards

As indicated above, the Due Process clause limits a state's authority to commit its citizens. As such, the court in In re HH articulated the following standards:

1) individual poses danger to self or others,
2) substantial risk of dangerous conduct in reasonably foreseeable future,
3) limited to protect individual's liberty,
4) period review hearings to determine confirmed necessity of commitment.

Section 309 details the standard as whether the individual poses a menace to the community.

Further, the Department must establish grounds for commitment by clean and convincing evidence. See In re HH.

Procedure

The Department should follow the procedures laid out in §309. This requires determination by Superior Court, proof of service on the person to be committed, written order by the Department, §857.

However, this is just to establish the initial confinement. As indicated, the Due Process clause requires periodic hearings to determine whether continued commitment is warranted.

As such, individual shall have right to counsel, notice, right to inspect all relevant records, right to present evidence, and right to need clear and convincing evidence to warrant continued confinement. See In re HH.

So, the Department may seek to commit Sloane under the state statute, but must be aware of the constitutional limitations. Thus, it's likely that Sloane needs an additional hearing to determine if his commitment should continue after he's no longer contagious.

TASK C

In the event that Sloane is not committed for any period of time, there are several possible solutions available to the Department.

Goals are to protect the public and to ensure that Sloane completes his treatment. As such the Department could seek to have a guardian appointed for Sloane under §972.

In addition, the Department should look to find if Sloane has any family members who would be willing to help care for him. This would get him off the streets and might ensure his continued treatment.

Further, perhaps the County has a program similar to that of other nearby counties. Dr. Whit's program seems to be remarkably successful due in large part to the fact that the services provided include not only medical treatment but ministry to their broken spirits as well. The Brotherhood Project has become a place of healing for all walks of life.

If Jackson County doesn't have a similar program in place it may be too late for Sloane. But the Department should still look for other county programs that may provide similar services. Perhaps there's a place where Sloane would be comfortable seeking outpatient treatment.

Or, perhaps there is other community assistance available to provide either permanent or temporary housing for Sloane. If he had a house, the threat to society would diminish because he wouldn't be in close proximity to other people. This doesn't solve the issue of continued treatment, however, because of Sloane's demonstrated unwillingness to finish treatment in the past.

Finally, the Department could seek out the services of a social worker who could help Sloane with his medications by checking on his progress.

The journal article indicates that the level of infectiousness is markedly reduced after only a few days. Then, after 2 - 4 weeks, most people are no longer contagious. As such the Department should at least try to administer preliminary medicine.

## ANSWER 2 TO PERFORMANCE TEST A

## MEMORANDUM

To: Ann Ruger; Dr. Garwin

Re: Jerome Sloane

From: Applicant

Ms. Ruger and Dr. Garwin:

In the following memorandum, I will outline the arguments the Department of Health and Human Services ("HSS") can make to support either short-or long-term commitment of Mr. Sloane. After discussing each set of factual arguments for committing Mr. Sloane, I will suggest the statutory and constitutional authority that would allow such a commitment. I will outline the procedures and standards for the commitment following those sections. Finally, I will suggest alternatives to commitment that will protect the public and ensure that Mr. Sloane completes treatment.

Option 1: Factual Persuasive Arguments - Confinement Until Program Complete

It is in the best interests of Mr. Sloane and the community to have him committed until the program is complete.

Mr. Sloane has active TB and HIV. He seeks to leave the hospital "against medical advice." *Transcript.* Mr. Sloane does not have a place to live, and because he is homeless, it is unlikely that he has an adequate support network.

The risks of TB are significant and can continue for a lifetime. Mr. Sloane may experience fatigue, loss of weight, weakness, and may be subject to massive hemorrhages. *Communicable Diseases*. If active TB is not treated, death may result. Given that Mr. Sloane also has HIV, he is at particular risk. *Id.*

TB requires continued therapy for six to twelve months. The treatment requires attention on the part of an independent patient because a person must take the drugs each day. Failure to complete the entire course of therapy risks a relapse and development of MDR-TB -- that is, TB that is resistant to multiple drugs. Mr. Sloane is "noncompliant," that is, Mr. Sloane has repeatedly ignored medical advice to his detriment, has failed to complete treatment regimens following prior releases, and has not showed [sic] up at at least one TB clinic appointment despite its convenience; it is likely that this time will be no exception. Mr. Sloane has also been found dressed and ready to leave the County Hospital. Given these facts, Mr. Sloane is unlikely to complete his course of treatment without commitment. This puts him at particular risk of developing MDR-TB, which would mean that any subsequent attempts to treat him would be made significantly more difficult and that his risk of death would be higher. Indeed, as Dr. Garwin notes, he may die. *Transcript.* MDR-TB is not only a problem for Mr. Sloane, but a problem for the community, because as TB mutates, fewer drugs will be efficacious.

Additionally, it is the opinion of the admitting physician, pulmonary disease specialist, hospital social worker, floor nurse, infectious control nurse, Deputy Director of the hospital, and County Chief that commitment is in Mr. Sloane's best interests.

Furthermore, committing Mr. Sloane for the duration would decrease other risks he poses to the community, which I discuss *infra*. The legal implications of these facts, including how they support his commitment, are discussed *infra*.

Option 2: Commitment Until No Longer Contagious

If Mr. Sloane's best interests are insufficient justification for committing him until his course of treatment has been completed, the community's best interests require him to be committed at least until Mr. Sloane is no longer contagious.

Mr. Sloane has active TB as confirmed by a sputum sample. *Transcript*. This means that Mr. Sloane is infectious and can transmit TB to others. Transmission is particularly easy -- TB can be transmitted by airborne droplets projected by coughing or sneezing. Given that Mr. Sloane is homeless and already has HIV and has experienced numerous health problems, it's likely that he will contract diseases which cause him to cough and sneeze. Although TB is usually transmitted only after close and prolonged contact, even exposure as short as two hours can result in contraction. Dr. Garwin notes that a shelter is in fact the worst place Mr. Sloane could stay, because those at the shelter are likely to have impaired immune systems. Therefore, Mr. Sloane represents an even greater danger to the community. Moreover, the potential damage of the disease is significant and there is a potential for death.

Compounding the danger to the community is the fact that 258 active cases were reported last year. Although Jackson County is not, as yet, experiencing a crisis, TB claimed 2 million lives last year. *Columbia Times*. It is a serious problem and "getting them offered treatment is really a strong measure for preventing the spread of TB," according to the director of the state's infectious disease program.

Mr. Sloane does not appear to have a support network -- he is homeless -- therefore no steps short of commitment will ensure his return to health. Moreover, because he is homeless, it is impossible to tell whom he will be in contact with - therefore, prophylactic treatment is not an option. There are therefore no less restrictive means.

Given that the active state is usually easily treated and a short medication protocol will allow a return to daily activities with safety, commitment until Mr. Sloane is no longer contagious is the most prudent course for protecting the citizens of Jackson.

Statutory and Legal Authority for Committing Mr. Sloane

*Statutory Authority*

Under Section 270 of the Columbia Welfare Code, the State Department of Health is allowed to make regulations for the care of persons suffering TB and to prevent the spread of disease. The Department of Health has promulgated Section 857, which requires county

health officers like Dr. Garwin to, upon receipt of a report of a communicable disease (which active TB is), remove a patient to a hospital and "take all measures necessary to prevent transmission of the disease to other persons." Although Section 857 is not promulgated explicitly through Section 270, it almost certainly applies because Section 270 authorizes the Department to promulgate rules to prevent TB, and the Department has promulgated a rule to prevent communicable diseases, like TB.

Section 857, operating through 270, clearly permits Dr. Garwin to prevent transmission of the disease to other persons. Given that Mr. Sloane is contagious and is, as noted *supra*, unlikely to adhere to his course of treatment without commitment, Section 857 allows him to be committed to "prevent transmission of the disease." This language clearly contemplates committing Mr. Sloane only for the amount of time necessary to prevent transmission. Therefore, this section only supports option 2, that is, confinement until Mr. Sloane is no longer infectious. But confinement is certainly contemplated by Section 857, which explicitly permits "all measures necessary."

Section 309 also permits Dr. Garwin to commit Mr. Sloane until he is no longer infectious. That section allows commitment of a person who "is an actual menace to the community" to be committed either on the order of the Superior Court or upon proof that he suffers from TB and is an actual menace. Certainly, Dr. Garwin can pursue commitment via the Superior Court, but the statue clearly permits her to commit Mr. Sloane regardless. The sputum sample clearly indicates that Mr. Sloane has TB. Moreover the sample indicates that Mr. Sloane has contagious TB. Given Mr. Sloane's "noncompliance" with prior medical advice, including an order to visit a TB clinic just one bus stop away, Mr. Sloane represents an active menace to the community -- he poses a risk of infecting other members. However, Mr. Sloane must be released if he would "conduct himself so as to not constitute such a menace." As noted, Mr. Sloane's history of noncompliance makes that situation unlikely.

You mentioned that you were concerned that the statute's vitality might be undermined by the passage of time. As the *Communicable Diseases* note indicates, when the statute was enacted in 1912, TB was the leading cause of death until the 1940's [sic]. Therefore, the legislative imperative was much greater when the statute was enacted since the risk of death was much higher. However, TB still poses a risk of death. Moreover, the Department of Health Regulations do not limit their application -- they apply to all communicable diseases. The plain language of the statute supports commitment for TB. Had the Department wished to eliminate TB from the list of communicable diseases, it could have done so when it amended the regulations in 1972.

Therefore, the statutes support actions by Dr. Garwin to confine Mr. Sloane until he is no longer contagious.

*Procedural Requirement Under Section 309*

Under Section 309, if Dr. Garwin pursues commitment via Superior Court, she must prove service on Mr. Sloane of the rule and regulation (presumably Section 857). Then, Dr. Garwin must give two days notice of the time and place for the hearing. As noted above, however, Dr. Garwin has the authority to act unilaterally without these processes. If she

does act unilaterally, she must do so by written order.

Due process might impose a constitutional limit on this unilateral action. I discuss this *infra*, in HH.

Case Law

*In re HH* - Confinement Post Contagious

In *In re HH*, the Columbia Supreme Court indicated that persons who pose a danger to themselves may be committed until they are capable of living independently and in a safe manner. If applicable, this case would allow Mr. Sloane to be committed until his course of treatment is complete. Although *HH* applied to a case of mental illness, there is no reason that it could not be applied to physical illness resulting in disability of a similar extent.

*In re HH* involved a patient the state sought to commit despite the fact that "she no longer met the legal standard for commitment due to remission." *In re HH*. Similarly, once Mr. Sloane has been treated sufficiently to eliminate the contagious nature of his TB (but before he is actually cured), Mr. Sloane will no longer meet the statutory standard for commitment. See *supra*.

However, *HH* indicated that patients who cannot survive independently outside the institution without some care and supervision may be confined (on a provisional basis). The Constitution imposes limits. First, a person cannot be committed if "they are dangerous to no one and can live safely in freedom." *O'Connor*. Here, after Mr. Sloane is [sic] no longer contagious, he will not be a danger to others, but it is not clear that he would be the second part of this conjunctive test -- he may not be able to live safely in freedom. As noted above, Mr. Sloane has repeatedly ignored medical advice. This puts him at risk of relapse and of contracting drug resistant TB. Given the morbidity of drug resistant TB, Mr. Sloane probably cannot be said to be able to live safely in freedom. The Supreme Court also indicated that if "friends and family" would be able to assist in safe living that continued commitment would not be appropriate. Mr. Sloane, however, is homeless and does not appear to have any friends or family. This argument is not availing. Even if Mr. Sloane did have friends and family, they would have to be both "willing and responsible."

It should be noted that the state cannot fully commit individuals solely to provide custodial care, nor may they be committed to provide care of those simply incapable of living independently. *HH*. However, as discussed, provisional confinement may be continued to protect the patient's essential well-being pending efforts to foster their placement in proper supportive environment outside the institution. *Id.* Here, confinement is appropriate to ensure the noncomplaint Mr. Sloane's continued well-being. Moreover, in the absence of appropriate alternatives, the county can probably restrain Mr. Sloane. However, this commitment cannot be permanent, and must be pending efforts to find an alternative. Thus, while Mr. Sloane can be kept longer than he is contagious under *HH*, the commitment will be provisional. As soon as Dr. Garwin finds an alternative, she must use it.

*Procedural Aspects of Continued Confinement Under HH*

There are several procedural aspects that must be met in order to continue confinement and to satisfy the constitutional requirement of due process. First, the state must demonstrate that the individual is likely to pose a danger to himself or others. Second, commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future. Third, commitment must be molded to minimize infringements upon liberty.

The first requirement is easily met. Mr. Sloane's refusal to obey medical advice renders him a danger to himself. While contagious, he will be a danger to others. Second, there is a substantial risk of immediate dangerous conduct. While contagious, Mr. Sloane can infect a person in as little as two hours. After he is no longer contagious, Mr. Sloane puts himself at risk of remission if he does not continue his treatment. Given that Mr. Sloane has repeatedly ignored treatment advice - including that related to TB - the risk is substantial. Given the fatality of TB in many cases, the risk of immediate dangerous conduct is satisfied by Mr. Sloane's probable refusal to complete his therapy.

Therefore, under HH, Dr Garwin will have to seek an order by the Superior Court. Upon a showing that Mr. Sloane is not able to survive independently, the court will attempt to determine if outplacement is appropriate balancing the needs, desires, facilities, availability of alternative facilities, and other pertinent matters in order to reduce restrictions on liberty. Mr. Sloane's needs have been discussed above and he clearly does not desire to be committed; however, if Dr. Garwin is unable to locate an alternative and less restrictive facility, additional review will not occur for six months. By this time, Mr. Sloane's course of treatment will be complete.

In the interim, Dr. Garwin will have to make all good faith efforts to place Mr. Sloane in a less restrictive setting, or at least, in the least restrictive setting in the hospital. During any of these proceedings, Mr. Sloane must be served with notice at least ten days prior to the hearing. Dr. Garwin will also have to provide Mr. Sloane's counsel with all records relating to condition and placement. Mr. Sloane will also have to be provided with counsel and the right to confrontation. Moreover, Dr. Garwin will have to prove all the above requirements by clear and convincing evidence -- at least as to the confinement after Mr. Sloane is no longer contagious.

There is an additional concern. Although the statute appears to authorize unilateral action by Dr. Garwin, *HH* indicates that the constitutional requirements of Due Process require a judicial hearing where the state must establish grounds by clear and convincing evidence. The individual must also be granted notice, the right to present evidence, and the right to be represented by counsel. Since Due Process trumps the Columbia statute, Dr. Garwin will probably have to pursue judicial procedure.

<u>Case Law Limits on Confinement</u>

Although *HH* provides authority to confine Mr. Sloane even after he no longer has active TB, the ADA may impose a limit on that confinement. Mr. Sloane comes within the ADA because the ADA applies to all persons with physical impairments, including "any

contagious and noncontagious diseases." Title 2, 202, 25.104(C). The ADA applies to HSS because it is a public entity -- a "department . . . of a State or local government." *Id*. at 4(A).

In *Idell*, the Third Circuit ruled on an ADA regulation that required a public entity to "administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." As noted above, the present case satisfies the jurisdiction requirements of the ADA.

*Idell* requires HSS to provide Mr. Sloane with the least intrusive care possible that does not require a substantial alteration to its program. This is to facilitate the ADA's goal of providing "independent living" for individuals like Mr. Sloane.

However, *Idell* is distinguishable on several grounds. First, in *Idell*, the parties agreed that outpatient services (that is, those that do not require confinement) were more appropriate and that Ms. Idell did not require the services only commitment can provide. Here, given Mr. Sloane's history of noncompliance, this is not the case -- outpatient services are not more appropriate, nor unnecessary, because Mr. Sloane will not use them.

Second, HSS will not be required to provide a noncommitment alternative if those changes would be "substantial" or constitute a "fundamental alteration" that "imposes an undue burden or hardship in light of the overall program." It is less clear that HSS can avail itself of this factor since HSS might be able to commit Mr. Sloane to a halfway house. In *Idell*, the court found that when the state could provide in-home nursing, commitment wouldn't be appropriate. Here, HSS cannot provide any in-home care because Mr. Sloane is homeless.

A final problem is that Dr. Garwin is not convinced that Mr. Sloane's treatment will, in fact, be effective. This undercuts the argument for necessity -- although given the potential harm, as long as Dr. Garwin believes that the course has substantial value, this should not be a problem.

Last, because *Idell* is a Third Circuit case, it is just persuasive authority, not mandatory.

Non-Commitment Options to Protect the Community and Mr. Sloane

*Guardianship*

HSS may attempt to pursue guardianship. Columbia Welfare Code Section 972 allows appointment of a guardian when a person who is not declared judicially incompetent, but who by reason of "advanced age, illness or physical infirmity" is unable to care for himself. Mr. Sloane may not be incompetent, but he is certainly ill. Moreover, because he has been returned numerous times under emergency situations to Dr. Garwin's hospital, this indicates that Mr. Sloane is not, in fact, able to care for himself. Once HSS is appointed guardian, it may "establish the ward's place of abode and shall provide for the ward's care." HSS may even be entitled to payment. However, guardianship is onerous. Instead, HSS may wish to have someone like Dr. Whit appointed guardian. *Columbia Times*.

*Transfer to private clinics*

Capital City has undertaken Project Brotherhood. This project has allowed men with difficulties and illness to receive therapy and treatment. It seems to be successful even with recalcitrant patients like Mr. Sloane. HSS might attempt to transfer him to the Project or a local equivalent. Although this may not comport with HSS duty to care for the residents, it may be the only option.

HSS could also try to create its own program, modeled on the Project. However, this might be beyond the department mandate.

*Convince Mr. Sloane to Cooperate*

Although Mr. Sloane does not wish to cooperate, it may be possible to convince him that the state will eventually commit him. If so, the hospital will have the authority to order an involuntary sputum. Given that the procedure is extremely painful, Mr. Sloane might decide to cooperate.

The Department may also try to bribe Mr. Sloane. Mr. Sloane is homeless and presumably in need of assistance. The Department might offer him some bonus if he takes his medication.

# THURSDAY AFTERNOON
JULY 26, 2001

California
Bar
Examination

## Performance Test B
INSTRUCTIONS AND FILE

**PEOPLE v. WILS**

**INSTRUCTIONS**

**FILE**

Memorandum from Susan Sola to Applicant

Office Memorandum re Drafting of Opening Appellate Briefs

Excerpts From Arno Pir's Direct Examination at Trial

Excerpts From Vivian Pir's Direct Examination at Trial

Excerpts From Thomas Wils' Direct Examination at Trial

Jury Instructions: Given

Jury Instructions: Refused

## PEOPLE v. WILS

## INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

3. You will have two sets of materials with which to work: a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. Grading of the two tasks will be weighted as follows:

Task A — 40%
Task B — 60%

# OFFICE OF THE STATE PUBLIC DEFENDER
# STATE OF COLUMBIA

## MEMORANDUM

**To:** **Applicant**

**From:** **Susan Sola, Supervising Deputy State Public Defender**

**Date:** **July 26, 2001**

**Subject: People v. Wils, Columbia Court of Appeal No. 1610201**

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Our office has recently been appointed by the Columbia Court of Appeal to represent Thomas Wils, an indigent Ruritanian émigré, on his appeal from a judgment of the Columbia Superior Court convicting him on a jury's verdict of burglary and robbery.

I believe that Wils' only potentially meritorious claims of error on appeal are that the trial court: (1) refused to instruct the jury on a *bona fide* belief in a claim or right to another's personal property relating to burglary; (2) refused to instruct the jury on a *bona fide* belief in a claim or right to another's personal property relating to robbery; and (3) failed to instruct the jury *sua sponte* on trespass as a lesser included offense of burglary.

Please draft for my approval the following two sections of an opening appellate brief *only*:

1. A statement of facts.

2. An argument demonstrating, for each of the three claims of error identified above, that the trial court erred and that its error requires reversal of the judgment.

I shall draft the remaining sections of the brief in due course.

In performing each of these tasks, please follow the guidelines set out in the memorandum on the drafting of opening appellate briefs.

# OFFICE OF THE STATE PUBLIC DEFENDER
STATE OF COLUMBIA

MEMORANDUM

**To:** **Deputy State Public Defenders**

**From:** **Beth Jay, State Public Defender**

**Date:** **April 5, 2000**

**Subject: The Drafting of Opening Appellate Briefs**

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All opening appellate briefs must conform to the following guidelines.

- All opening appellate briefs must include the following sections: a table of contents; a table of cases; a summary of argument; a statement of the jurisdictional basis of the appeal; a procedural history; a statement of facts; an argument comprising one or more claims of error; and a conclusion.
- The *statement of facts* must contain the facts that support our client's claims of error and must also take account of the facts that may be used to support the People's opposition. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the People's favor. Above all, it must tell a compelling story in narrative form and not merely recapitulate each witness's testimony.
- The *argument* must analyze the applicable law and bring it to bear on the facts in each claim of error, urging that the law and facts support our client's position. It need not attempt to foreclose each and every response that the People may put forth in their brief, but must anticipate their strongest attacks on our client's weakest points, both legal and factual. It must display a subject heading summarizing each claim of error and the outcome that it requires. The subject heading must express

the application of the law to the facts, and not a statement of an abstract principle or a bare conclusion. For example, do *not* write: "The Trial Court Erroneously Instructed the Jury on Defense of Others." *Do* write: "By Failing to State That Defendant Was Entitled to Defend Strangers as Well as Members of His Family, the Trial Court Erroneously Instructed the Jury on Defense of Others."

***

BY DEPUTY DISTRICT ATTORNEY JAMES LEIBSON

Q Your name, sir?

A Arno Pir.

Q Where were you born?

A Ruritania.

Q When did you come to this country?

A More than 50 years ago, as a child. My parents fled as refugees.

Q Where do you live?

A I live with my wife at 2211 Blake Street in New Hope.

Q What do you do for a living?

A I'm a wine merchant.

Q Do you know the defendant, Thomas Wils?

A Yes, I did, I do.

Q Can you identify him?

A Yes, he's the young man at the far table, in the dark suit and tie.

THE COURT

Let the record reflect that the witness has identified the defendant. Proceed.

BY MR. LEIBSON

Q When did you meet him?

A I welcomed him to New Hope two or three years ago; I was the Secretary of the Ruritanian-American Freedom League.

Q What is the Ruritanian-American Freedom League?

A It is an organization dedicated to obtaining freedom for our homeland, which has long been dominated by its neighbor Caledon.

Q You said you met him two or three years ago?

A Yes, he had fled from Ruritania and had just received political asylum.

Q Did he come to live with you?

A Yes, with my wife Vivian and me.

Q How was that?

A He was alone in a new country, and Vivian and I had never had any children.

Q You invited him to live with you?

A Yes.

Q Did you have an arrangement?

A What do you mean?

Q For instance, did he have to pay you rent?

A No, no, no, of course not. We provided him with room and board, and I think my wife would give him some spending money.

Q Did he have to repay you?

A Not at all. All he had to do were some odd jobs around the house, jobs Vivian wanted me to do but I didn't get around to.

Q Did you agree to pay him for any of his work?

A No, absolutely not. I provided him with room and board.

Q Did you agree to give him anything for his work?

A No, I didn't, but I think Vivian did.

Q If you know, what?

A I think Vivian promised him an old car that I no longer used, a Triumph Spitfire, if he finished some work in the garage.

Q How much was it worth?

A Maybe $2,000.

Q Did you end up giving it to him?

A No.

Q Why?

A I believe he wanted it before he finished the work, Vivian refused, they got into an argument, and she threw him out.

Q Did she consult you?

A Consult? Vivian is not a person who consults.

Q When did she throw him out?

A I think in April of 1999, or maybe May.

Q Did you hear from him afterwards?

hanging up on him before long.

Q If you would, please go back in thought to July 3, 1999.

A OK.

Q Do you remember what happened that day?

A Yes, Thomas came by my shop.

Q Did he look like he looks today?

A No, he was very thin and dirty and smelly.

Q Did he say anything to you?

A Yes, he said he wanted the Triumph. He demanded it.

Q What did you do?

A I tried to get rid of him as quickly and quietly as I could. I had lots of regular customers in the shop, getting ready for the Fourth of July.

Q What did you do?

A I told him I didn't have the car; it was at home. I also told him I didn't have the title documents; Vivian probably kept them in her purse.

Q Did he leave?

A No, he kept demanding the car.

Q What happened next?

A I told him I was leaving on a business trip later that day, and I would return on July 20th or 21st, and I would give him the car and the papers at that time.

Q Did he leave then?

A Yes, he did.

Q Did you go off on your business trip later that day?

A I did.

Q And you returned —

A On July 5th, right after the incident.

Q Subsequently, did you receive any bills for credit cards issued to you and your wife?

A Yes, I did.

Q Did you notice any charges that were not made by you or your wife?

A Yes, I did.

Q What were they?

A An airline ticket to New York on our Bank of Columbia card, and motel bills, restaurant bills, clothing, I think, jewelry, and such things on our Columbia Federal Savings and Loan card.

Q Do you remember the amounts?

A Roughly, I believe, $1,200 for the ticket, almost $2,000 for jewelry, maybe about $800 for the rest.

Q What was the first date for these charges?

A July 5th.

Q And the last?

A July 31st.

Q You didn't notify the issuers of these credit cards of their loss before the 31st?

A No, I'm embarrassed. Vivian and I had so many credit cards I didn't realize these were missing until the bills arrived.

* * *

BY DEPUTY DISTRICT ATTORNEY JAMES LEIBSON

Q Ma'am, what is your name?

A Vivian Pir.

Q Where were you born?

A Ruritania.

Q When did you come to this country?

A Almost 50 years ago.

Q Did you come with your parents?

A Yes, we escaped; I was 8.

Q Where do you live?

A In New Hope.

Q What do you do for a living?

A I'm a certified public accountant.

Q Are you married?

A Yes, to Arno Pir.

Q Do you know Thomas Wils, the defendant here?

A I do.

Q Can you identify him?

A Yes, he's at that table, in the navy blue suit and cobalt tie.

THE COURT

Let the record reflect that Mrs. Pir has identified the defendant. Proceed.

BY MR. LEIBSON

Q When did you meet him?

A About two or three years ago, when I was President of the Ruritanian-American Freedom League.

Q Did you meet him here in New Hope?

A Yes, I did. He had recently escaped from Ruritania.

Q At some point, did he come to live with you and your husband?

A Yes, he did.

Q Did you and your husband invite him?

A Arno did; I was hesitant.

Q Why?

A Well, we never had any children, and Thomas was an adolescent.

Q Did you and your husband have an arrangement with the defendant?

A We agreed to provide him with room and board, and he agreed to do construction work, including remodeling the garage.

Q Did you pay him any money?

A No; I think he got some from other Ruritanian-Americans; he would do odd j jobs.

Q Why didn't you pay him?

A We provided all that he needed. And I wanted him to get on his own two feet, go to college, or at least get a real job.

Q Did he want to do that?

A No.

Q How did you know?

A He would say, again and again, that he wanted to enjoy life, and that he didn't want to be a "working stiff."

Q Did you agree to give him anything for his work?

A I agreed to give him an old car that Arno no longer used, but not in exchange for work.

Q For what?

A I told him I would give it to him for transportation if he went to college.

Q Did he ever go to college?

A No.

Q Did he ever ask you for the car?

A Yes, he demanded it. He said he needed to sell it for money; his odd jobs were drying up. I could understand why, with his attitude.

Q Did you have an argument with him in April or May of 1999?

A Late in April.

Q Can you describe it?

A Yes, it was heated but short. He demanded the car and I refused and threw him out.

Q Did you hear from him afterwards?

A I didn't; Arno did.

Q Do you remember what happened on July 5, 1999?

A Yes.

Q Was Arno in town?

A No, he was away on a business trip.

Q What did you do on that morning?

A About 9 or 9:30, I went to the dentist.

Q When did you return home?

A Sometime before noon.

Q Did you see anything unusual when you entered your house?

A No, not when I entered, but when I got near the kitchen.

Q What did you see?

A The kitchen was in disarray. Then I saw Thomas stuffing food into his mouth.

Q Were you startled?

A Yes, I screamed and demanded that he get out immediately or I'd call the police.

Q Did he go?

A No, he demanded the car, and started at me.

Q What did you do?

A I grabbed for a broom or mop to protect myself.

Q What did he do then?

A He punched me hard in my shoulder, pulled my purse from my arm, and started rummaging through it.

Q Did he say anything?

A Yes, he hollered, “If you won’t give me the papers for the car, then I’ll take what I can get.”

Q What did you do?

A I was stunned that he would actually punch me; when I came to my senses, he had turned to run out of the house; I tried to chase him, but he got away.

* * *

BY DEPUTY PUBLIC DEFENDER THEODORE STROLL

Q What is your name, please?

A Thomas Wils.

Q How old are you?

A Almost 21.

Q Where were you born?

A Ruritania.

Q You learned English there?

A Yes, I started studying it in elementary school.

Q When did you leave?

A I didn't leave; I escaped, about three years ago. Ruritania is a police state.

Q When did you arrive in this country?

A The same year. I landed in New York, and then came to New Hope. I received political asylum.

Q Were you welcomed by the Ruritanian-American community?

A Yes, at first.

Q And by Arno and Vivian Pir?

A Yes, Arno was the President of the Ruritanian-American Freedom League, and Vivian was the Secretary. They invited me to live with them — in a way.

Q What do you mean?

A They offered me room and board if I helped around the house.

Q You accepted?

A Yes, but I didn't know —

Q Let me interrupt, what was your arrangement?

A I was supposed to do handyman work, but Vivian made me turn the garage into a guest house with a bathroom and kitchen.

Q Did they pay you anything?

A No, just room and board; Vivian bought me cigarettes and things like that, and sometimes she gave me a few dollars to rent a video.

Q How old were you?

A About 19.

Q Did you try to change your arrangement?

A Yes, I told Vivian I would not finish the work in the garage unless she paid me.

Q Did she agree?

A She promised to give me an old car that Arno didn't use anymore, a Triumph, so that I could sell it.

Q How much was it worth?

A I don't know, maybe $4,000.

Q You didn't want it to drive?

A No, I'm afraid to drive; I black out sometimes. The Secret Police in Ruritania beat me.

Q Did you finish the work?

A Yes, I did.

Q What happened then?

A I asked for the Triumph. She said no, told me to leave, and threw me out.

Q Did you go?

A Yes.

Q When was that?

A In April of 1999.

Q Where did you go?

A To stay with Ruritanian friends in New Hope.

Q Did you settle with anyone in particular?

A No, I went from one to another, until they all turned me away.

Q Do you know why they did that?

A Vivian told them all I was a bum, used drugs, got drunk; I overheard her saying that once.

Q What happened then?

A I had to live on the streets and beg for food; it was worse than Ruritania.

Q How long did you do that?

A More than two months.

Q Do you remember what you did on July 3, 1999?

A Yes, I went to Arno's store — he has a liquor store — and I asked for the Triumph.

Q What happened?

A He said he didn't have the ownership papers, Vivian did, and she had them either in her purse or somewhere in the house. He said that he was going away on a business trip later that day, and would give them to me when he got back in two weeks.

Q Do you remember what you did on July 5, 1999?

A Yes, I went to Arno and Vivian's house to get the Triumph and the ownership papers.

Q You got into the house?

A Yes.

Q How?

A When I lived there, I put in a new lock in the kitchen door. I knew how to take it out.

Q Was Vivian home?

A No. I had waited for her to leave.

Q Did she return?

A Yes, about 45 minutes after I got there. I sat in the kitchen and waited for her. After a while, I made myself a sandwich out of some liverwurst I found in the refrigerator. I was starving. I hadn't eaten for days.

Q What happened?

A She came in the front door, walked into the kitchen, and when she saw me she started to scream and then to curse, and she told me to get out before she called the police.

Q Did you leave?

A No, I asked for the Triumph.

Q Did she give it to you?

A No, she threatened to hit me with a broom.

Q What did you do?

A I pushed her shoulder and took her purse from her arm; I opened the purse and looked for the ownership papers.

Q Did you punch her in the shoulder?

A No, that's a lie, I just pushed her shoulder.

Q Did you find the ownership papers?

A No, I saw some credit cards and a silver mirror and a cellular phone, and just took them instead. I figured if they wouldn't give me the car I had worked for and earned, I'd take what I could get.

Q What happened next?

A I ran away. She chased me, but I was faster.

Q What did you do with the mirror and the phone?

A I pawned them.

Q For how much?

A Maybe $5 for the mirror and $10 for the phone.

Q What about the credit cards?

A I used them to go to New York and live there awhile. I ran up about $4,000 worth of credit card debt. That's what the Triumph was worth, and so I guess I got even with them.

Q Did you stay with any Ruritanian-American friends in New York?

A I thought they were friends, but Vivian poisoned their minds, and they turned me in to the police.

Q You were arrested?

A Yes, on July 31st.

* * *

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF LAKEPORT

| | | |
|---|---|---|
| THE PEOPLE, | ) | No. 1020161 |
| | ) | |
| Plaintiff, | ) | JURY INSTRUCTIONS |
| | ) | |
| v. | ) | GIVEN |
| | ) | |
| THOMAS WILS, | ) | |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

* * *

Defendant is accused in Count 1 of the Indictment with having committed the crime of burglary.

In order to prove such crime, the People must prove each of the following elements, and must do so beyond a reasonable doubt:

1. Defendant entered a house, apartment, or other building;

2. Defendant entered such house, apartment, or other building without consent; and

3. Defendant entered such house, apartment, or other building with the intent to commit larceny.

* * *

Defendant is accused in Count 2 of the Indictment with having committed the crime of robbery.

In order to prove such crime, the People must prove each of the following elements, and must do so beyond a reasonable doubt:

1. Defendant took personal property;

2. The personal property belonged to another;

3. Defendant took such personal property from the person or immediate presence of the other;

4. Defendant took such personal property without the consent of the other;

5. Defendant took such personal property by using force against the other or by causing the other to fear; and

6. Defendant took such personal property with the intent to commit larceny.

* * *

Larceny is the taking of the personal property of another, without his consent, with the intent to steal.

* * *

Dated: October 30, 2000. /s/ Patricia C. Sheehan

Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF LAKEPORT

| | | |
|---|---|---|
| THE PEOPLE, | ) | No. 1020161 |
| | ) | |
| Plaintiff, | ) | JURY INSTRUCTIONS |
| | ) | |
| v. | ) | REFUSED |
| | ) | |
| THOMAS WILS, | ) | |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

* * *

A *bona fide* belief on the part of the taker of personal property in his right or claim to the property taken negates the intent to steal.

Requested by: Defendant

* * *

Dated: October 30, 2000. /s/ Patricia C. Sheehan

Judge of the Superior Court

# THURSDAY AFTERNOON
JULY 26, 2001

California
Bar
Examination

Performance Test B
LIBRARY

**PEOPLE v. WILS**

**LIBRARY**

Selected Constitutional and Statutory Provisions

*People v. Brown* (Colum. Ct. App. 1957)

*People v. Cutler* (Colum. Ct. App. 1967)

*People v. Alvarado* (Colum. Ct. App. 1982)

SELECTED CONSTITUTIONAL AND STATUTORY PROVISIONS

*Section 13 of Article VI of the Columbia Constitution*. Harmless Error.

No judgment shall be reversed, in any case, on the ground of any error of any kind, unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

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*Section 211 of the Columbia Penal Code*. The Crime of Robbery.

Robbery is the larcenous taking of the personal property of another, from his person or immediate presence, and without his consent, accomplished by means of force or fear.

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*Section 459 of the Columbia Penal* Code. The Crime of Burglary.

Every person who, without consent, enters any house, apartment, or other building, with intent to commit larceny, is guilty of burglary.

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Section *484 of the Columbia Penal Code*. The Crime of Larceny.

Larceny is the taking of the personal property of another, without his consent, with the intent to steal.

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*Section 602 of the Columbia Penal Code*. The Crime of Trespass.

Every person who, without consent, enters any house, apartment, or other building is guilty of trespass.

## People v. Brown

Columbia Court of Appeal (1957)

Defendant was convicted in the superior court of the crime of burglary, which had been alleged in the indictment to have been committed by entering a certain house with intent to commit larceny involving a certain bicycle. The entry was conceded, as was the taking. Defendant now appeals.

Defendant was a youth of 18 years of age, and, for a few days immediately prior to the taking of the bicycle, was staying at the home of one Ralph Yount, working for his room and board. He took the stand as a witness, and testified: "I took the bicycle to get even with George, and of course I didn't intend to keep it. I just wanted to get even with him. He was throwing oranges at me in the evening, and he would not stop when I told him to, and it made me mad, and I left Yount's house Saturday morning. I thought I would go back and take George's bike. Instead of getting hold of his, I got Frank's, but I intended to take it back Sunday night; but before I got back they caught me. I took it down by the grove, and put it on the ground, and covered it with brush, and crawled in, and Frank came and hauled off the brush and said: 'What are you doing here?' Then I told him that I covered myself up in the brush so that they could not find me until evening, until I could take it back. I did not want them to find me. I expected to remain there during the day, and not go back until evening."

Upon the foregoing state of facts, the superior court gave the jury the following instruction: "I think it is not necessary to say very much to you in this case. I may say, generally, that I think counsel for the defense here stated to you in this argument very fairly the principles of law governing this case, *except in one particular*. In defining to you the crime of larceny, he says it is essential that the taking must be 'larcenous'. That is true: The taking must be with the intent to deprive the owner. But counsel adds the conclusion that you must find that the taker intended to deprive him *permanently*. I do not think that is the law. I think in this case, for example, if the defendant took this bicycle, we will say for the purpose of enabling him to get away, and then left it, and intended to do nothing else except to help himself get away, it would be larceny, just as much as though he intended to keep it forever."

This instruction is erroneous, and demands a reversal of the judgment as a miscarriage of justice under section 13 of Article VI of the Columbia Constitution. Section 459 of the Columbia Penal Code states: "Every person who, without consent, enters any house, apartment, or other building, with intent to commit larceny, is guilty of burglary." If defendant's story is true, he is not guilty of larceny in taking the bicycle and hence is not guilty of burglary; yet, under the instruction, the words from his own mouth convicted him. The court told the jury that larceny might have been committed, even though it was only the intent of the party taking the property to deprive the owner of it *temporarily*. We think the authorities form an unbroken line to the effect that the larcenous intent must be to deprive the owner of the property *permanently*. While the larcenous intent of the party taking need not necessarily be an intent to convert the property to his own use, still it must in all cases be an intent to permanently deprive the owner thereof.

For the foregoing reasons, it is ordered that the judgment be reversed.

*People v. Cutler*
Columbia Court of Appeal (1967)

Defendant was charged with the robbery of Joseph H. Anderson. A jury convicted him of the offense. The superior court sentenced him to a term of imprisonment of six years. We reverse.

At trial, Anderson testified as follows. He operated a catering service in Lakeport. On the evening of May 18, 1965, the doorbell of his home rang shortly before midnight. He stepped out onto the porch. Defendant approached with his hand in his coat pocket. After some conversation, he pulled out a gun. Anderson attempted to seize the weapon and succeeded in knocking it out of defendant's hand. Defendant then snatched Anderson's wallet from his back pocket and fled.

Defendant testified that he met Anderson several weeks before the incident and that Anderson employed him on one occasion to do some catering work. Anderson did not pay him for the work and, when defendant requested payment, Anderson asked him to wait a few days. On the evening of May 18th, he went to Anderson's home to obtain payment. While the two were discussing the debt on the porch, Anderson proposed giving him some marijuana instead, and defendant said no; Anderson offered to pay him double the money he owed him if he waited a month; defendant again said no, telling Anderson he needed his money and wished only to be paid. At this point, Anderson agreed to pay him. He started to remove his wallet from his back pocket to get the money. He apparently changed his mind and returned to discuss his earlier marijuana proposal. Defendant persisted in his refusal, and Anderson again started to remove his wallet. Stopping suddenly, Anderson moved his hand to his waistband and pulled out a knife. Defendant had armed himself before going to Anderson's home because he had heard stories about Anderson's brutality; when he saw a knife in Anderson's hand, he brought out his gun to defend himself. Anderson then knocked the weapon out of defendant's hand. Taking advantage of the opportunity that presented itself in the struggle, defendant snatched Anderson's wallet and fled. Defendant did not intend to rob Anderson when he went to the house, but intended only to recover money owed to him.

Over defendant's objection, the prosecutor argued to the jury, "If you think a man owes you a hundred dollars, or fifty dollars, or five dollars, or a dollar, and you go over with a gun to try to get his money, it's robbery." And, "If you go to a man's home, and merely because he's supposed to owe you some money, take money from him at gunpoint, you have robbed him." Again objecting to further argument by the prosecutor that a robbery was committed even if defendant believed Anderson owed him money, defendant suggested that a necessary element of larceny, the intent to steal, was requisite to robbery, but was overruled by the court.

Defendant's objection was well taken. Under Section 211 of the Columbia Penal Code, "[r]obbery is the larcenous taking of the personal property of another, from his person or immediate presence, and without his consent, accomplished by means of force or fear." An essential element of robbery is the larcenous intent that accompanies the taking. Since robbery is but larceny aggravated by the use of force or fear to accomplish the taking of personal property from the person or immediate presence of the other, the larcenous intent

requisite to robbery is the intent requisite to larceny. The taking of property is not larceny in the absence of an intent to steal, i.e., an intent to deprive its owner of it permanently.

Although an intent to steal may ordinarily be inferred when one person takes the property of another, particularly if he takes it by force, proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of either larceny or robbery. It has long been the rule in this state, and generally throughout the country, that a bona fide belief, even though mistakenly held, one has a right or claim to the property negates larcenous intent. A belief that the property taken belongs to the taker, or that he has a right or claim thereto, is sufficient to preclude larcenous intent. Larcenous intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it.

Defendant testified that, in going to Anderson's home, "my sole intention was to try to get my money, and that was all." The jury was properly instructed that if the intent to take the money from Anderson did not arise until after defendant brought out his gun, there was no robbery. Since the jury returned a verdict of robbery, it believed defendant intended to take money from Anderson by force before he went for his gun. Accordingly, defendant's only defense to robbery was the existence of an honest belief that he was entitled to the money. The trial court's approval of the prosecutor's argument that no such defense exists was erroneous. It removed completely from the consideration of the jury a material issue raised by substantial evidence. It precluded any finding that intent to steal was absent. It thereby caused a miscarriage of justice within the meaning of Article VI, Section 13 of the Columbia Constitution, and requires reversal.

*People v. Alvarado*
Columbia Court of Appeal (1982)

Defendant Rita Ann Alvarado was charged with burglary. Following a jury trial in the superior court, she was convicted and sentenced to four years in prison. She appeals.

This case arises from a dispute between defendant, a user of heroin, and Julian Habecker, a dealer in the substance. On the morning of May 6, 1979, defendant gained entry into Habecker's house. No one was present. Defendant claimed to have bought from Habecker a day or two earlier some fake heroin. Rummaging about, defendant proceeded from room to room, taking several hundred dollars, some heroin, several phonograph records, and a few posters that had been tacked to the walls. She then left. She boasted of her exploit to fellow heroin users, who subsequently informed on her and caused her arrest.

This was primarily a case that featured recalcitrant prosecution witnesses. The defense essentially relied on the absence of direct proof and on the untrustworthiness of the prosecution's witnesses. But there was evidence, albeit self-serving and ambiguous, that defendant was motivated by a desire to have retribution for Habecker's sale of bogus heroin. Defendant used this evidence as a basis for arguing the theory that she was not guilty because she took only the property she had given Habecker for the "drugs."

The first of defendant's two contentions is that the evidence is not sufficient to support her conviction for burglary. Under Columbia law, evidence is sufficient to support a conviction for a particular crime if a rational trier of fact, viewing such evidence in the light most favorable to the People, could find the defendant guilty of all of that crime's elements beyond a reasonable doubt.

Section 459 of the Columbia Penal Code states: "Every person who, without consent, enters any house, apartment, or other building, with intent to commit larceny, is guilty of burglary." It effectively defines "intent to commit larceny" as an element.

Defendant's claim focuses on the asserted insufficiency of the evidence for the element of intent to commit larceny. Her theory rests upon the observation there was no proof the property she took was not previously hers, which she recovered because Habecker cheated her. Under *People v. Cutler* (Colum. Ct. App. 1967), it is an established principle that a bona fide belief in a right or claim to the property taken, even if mistaken, negates the element of intent to commit larceny because it negates the intent to steal.

With specific reference to this case, we can identify three rational inferences from the evidence. One is that defendant intended to, and did, retrieve *only* the property she had given for the bogus heroin. Another is that she intended to, and did, merely take items for the general purpose of economic gain. But by far the most reasonable inference is that she intended to, and did, take what she took to "settle the score," and was not especially concerned with obtaining the *exact* amount of money and *exact* property she had given; rather, she meant to obtain whatever money and property were conveniently available, in retribution for the fraudulent drug deal. We note, for example, that she took some *heroin*. Reason does not suggest she had given Habecker heroin as some or the entire purchase price for other heroin.

The inference of intent to commit larceny is reasonable and credible. Any rational trier of fact could surely have drawn it and concluded beyond a reasonable doubt that defendant intended to steal. The other elements of the crime are essentially conceded and are well supported by the evidence. There was sufficient evidence to support the burglary conviction.

The second of defendant's two contentions is that the superior court erred by failing to instruct the jury *sua sponte* on trespass as a lesser included offense of burglary. Her trial counsel did not request any such instruction.

A trial court must instruct the jury *sua sponte* on a lesser included offense only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser — in other words, only if there were substantial evidence showing the absence of the element distinguishing the greater from the lesser. Evidence is substantial only if capable of inspiring belief on the part of the jury.

We agree with defendant that trespass is indeed a lesser included offense of burglary. The test is whether the greater included offense contains all the elements of the lesser included offense and others in addition. It is satisfied here. Like trespass, burglary contains the (1) unconsented (2) entry (3) into a building. But, unlike trespass, burglary contains as well (4) intent to commit larceny, which entails intent to steal.

We do not agree, however, there was substantial evidence that, if accepted, would absolve defendant from guilt of burglary but not trespass. Defendant argues there was indeed such evidence: When she entered Habecker's house, she did not intend to commit larceny, but intended *only* to take items as to which, to quote *People v. Cutler*, *supra*, she had a "right or claim" under a "bona fide belief," a state of mind that would have "negate[d]" any intent to steal. We cannot deny that *some* evidence existed, but it was hardly *substantial*. The only evidence on the point was a completely ambiguous statement by defendant's mother to the effect that defendant had once said she had intended to recover some property Habecker had stolen from her. Yet the evidence disclosed that defendant conducted a general ransacking of the house, indiscriminately taking items never specifically related to any right or claim.

It follows that the superior court did not err in failing to instruct *sua sponte* on trespass as a lesser included offense of burglary. But even if the superior court had in fact erred, we could not reverse the judgment. Article VI, Section 13 of the Columbia Constitution declares: "No judgment shall be reversed, in any case, on the ground of any error of any kind, unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In *People v. Watson* (Colum. Supreme Ct. 1956), the Supreme Court held that a court may form such an opinion only "if it is reasonably probable that a result more favorable to the complaining party would have been reached in the absence of the error." In light of the altogether insubstantial evidence supporting trespass rather than burglary, no reasonable probability of this kind shows itself here.

The judgment is affirmed.

## ANSWER 1 TO PERFORMANCE TEST B

I. STATEMENT OF THE FACTS

Nature of the relationship between the alleged victims and Defendant

Arno and Vivian Pir, a Ruritanian couple in their late fifties, welcomed defendant, Thomas Wils, into their home several years before the events giving rise to this action. The Pirs had emigrated from Ruritania many years ago and both were officers in the Ruritanian-American Freedom League.

Through their activities in the league, the Pirs became aware of Thomas Wils, who had recently escaped from a dictatorship in Ruritania. The Pirs had never had any children, and Thomas was a young man, approximately 19 years old. Thomas had been granted political asylum in the United States because of the abusive treatment he had received at the hands of the Ruritanian government.

It is undisputed that Thomas came to live with the couple under an informal relationship, something between an adoptive family relationship and an employer-employee relationship. The agreement was that the couple would provide Thomas with room and board and Thomas agreed to do "odd jobs" around the house. Vivian would sometimes give Thomas spending money. At times, Thomas was asked to do assorted routine maintenance jobs for the couple. Thomas described his duties as those of a "handyman" around the house.

The couple had an admitted interest in seeing Thomas get on his own two feet, and either go to college or get a "real job."

This arrangement lasted until some time in April or May of 1999.

Promise to give defendant the Triumph Spitfire

At some point during the relationship between Thomas and the Pirs, Vivian Pir agreed to give Thomas an automobile, a Triumph Spitfire. There is some dispute on the record with respect to whether the car was given in exchange for work Thomas had agreed to do on the garage. Mr. Pir stated during his direct examination that Vivian had agreed to give the car in exchange for work. Vivian stated that she "agreed to give" the car to Thomas, not in exchange for work, but so that Thomas could use it for transportation if he went to college.

The testimony of Thomas is more in line with the belief of Arno. Thomas testified that Vivian agreed to give him the car after Thomas had requested payment for his assigned task of "turn[ing] the garage into a guest house with a bathroom and kitchen." At some point during the work, Thomas, apparently concerned about the amount of time and effort involved, believed he should be paid for this work. Thomas testified that Vivian offered him the automobile as payment because, though Thomas could not drive, Thomas could sell the auto and use the cash from the sale as payment for services rendered. Thomas was not capable of driving because of his blackouts as a result of having been beaten by the police in Ruritania.

Events of April 1999

In [or] around April of 1999, Thomas completed the task of turning the garage into a guest house -- though Arno's recollection was that he had not completed "the work" in the garage. Upon completion, Thomas demanded the payment of the car from Vivian. She refused to pay him -- though the precise facts vary according to the testimony. The two apparently exchanged heated words and Vivian "threw Thomas out."

Following that incident, Thomas made a handful of attempts to request that the couple give him the car, which Thomas clearly believed was rightfully his.

He also sought shelter and support from fellow Ruritanians, and also sought employment as a handyman, but was turned down at every juncture.

Events of July 3, 1999

On July 3, 1999, after being essentially without a home for three months, Thomas approached Arno at his place of business, and requested, once again, that the car be delivered to Thomas.

Arno told Thomas that Arno did not have the car with him, but that Vivian probably had the title documents in her purse. He also told Thomas that the car was at home.

After repeated requests for the automobile, Arno informed Thomas that the car would be delivered to Thomas when Arno returned from his vacation on July 20th or July 21st.

Thomas left peacefully.

Events of July 5, 1999

Though there is some disagreement in the testimony regarding the particulars, the essential facts are that Thomas entered the house of the Pirs while both were away, in order "to get the Triumph and the ownership papers." Thomas' understanding from the conversation with Arno was that the title papers were somewhere in the house or in Vivian's purse. Thomas waited for Vivian to leave before attempting to get the car. Thomas also testified that he waited for Vivian to return before asking her about the car. After waiting for a while, he made himself a sandwich because he had not eaten in days.

When Vivian returned, she saw Thomas, and reacted in an aggressive manner, shouting at Thomas and telling him to leave. She also grabbed a broomstick and threatened to hit Thomas with it, though Vivian's testimony was that Thomas demanded the car and "started at her" before she grabbed the broom. Thomas then pushed Vivian aside -- though Vivian testified that Thomas punched her in the shoulder -- and pulled the purse from Vivian's arm. After rummaging through the purse, Vivian claims that Thomas yelled, "If you won't give me the papers for the car, then I'll take what I can get."

After rummaging through the purse looking for the title papers, unable to find the papers, Thomas instead took some credit cards, a silver mirror and a cellular phone.

As Thomas began to leave, Vivian chased after him, but he ran away from her.

Defendant's subsequent actions

Thomas testified that he believed that the value of the car was $4,000. Although Arno testified that the value was, in his opinion, about $2,000, there is nothing in the record to show that Thomas knew that this was or may have been the actual value of the car.

Seeking to exact payment for his services, Thomas pawned the mirror and the phone for $15. Thomas ran up about $4,000 worth of credit card debt (what he believed the Triumph was worth), and therefore believed that he had "got[ten] even with them."

Thomas was arrested on July 31st.

II. ARGUMENT

A. BY FAILING TO INSTRUCT THE JURY THAT A BONA FIDE BELIEF OF CLAIM TO PROPERTY NEGATES THE INTENT TO STEAL IN A BURGLARY CASE, THE JURY WAS UNABLE TO CONSIDER OVERWHELMING EVIDENCE THAT WOULD HAVE NEGATED DEFENDANT'S INTENT TO COMMIT LARCENY, THE TRIAL COURT COMMITTED ERROR RESULTING IN CAUSING A MISCARRIAGE OF JUSTICE

The elements for a claim of burglary in the State of Columbia require that the defendant enter a house, without consent, with the intent to commit larceny. Section 459 of the Columbia Penal Code; People v. Alvarado (Ct. App. Columbia, 1982); People v. Brown (Ct. App. Columbia, 1957). The issue here is whether the trial court's failure to give an instruction that would have negated an element of larceny is manifest injustice requiring the defendant's conviction to be overturned.

In Brown, the Court of Appeals overturned a jury verdict on the grounds of an erroneous instruction on the elements of burglary. The court found that the jury instruction failed to properly set forth an element of the claim of larceny. In that case, the necessary element required to convict defendant missing from the jury instruction was the intent to deprive the defendant of his or her property permanently. Since the crime of burglary requires there to [sic] be a larceny, the judge was required to instruct the jury on the elements of larceny as well. The appellate court ruled that the trial court was in error in refusing the defendant to introduce this particular instruction and, accordingly, vacated the verdict of the trial court.

Although the element of larceny missing in the present case is not the intent to deprive permanently, the principle stated in that case holds completely true in the case at bar.

Here, the jury was instructed only that defendant enter a house, without consent with the intent to commit larceny. The Superior Court refused defendant's proffered instruction, that a bona fide belief on the part of the taker of a right or claim to the property negates the intent to steal.

The law is settled that "a bona fide belief in a right or claim to the property taken, even if mistaken, negates the element of intent to commit larceny because it negates the intent to steal." People v. Cutler (Columbia Ct. App. 1967); cited in People v. Alvarado (Columbia

Ct. App. 1982). In other words, showing a bona fide belief in the ownership or right to the property negates a necessary element of larceny, intent.

It should be pointed out that although the court in Alvarado held that the defendant's actions in that particular case did not demonstrate a bona fide belief in the right to the property under a burglary conviction, the facts are easily distinguishable from the case at bar. In the Alvarado decision, the defendant entered the residence of an individual she did a drug deal with, allegedly in order to exact payment because the drugs she bought were "fake." Defendant rummaged through the house, taking more heroin, some money, posters, and other items. The trial court found the defendant's evidence of a claim of bona fide right completely implausible, because the defendant would not have paid someone heroin in order to obtain heroin.

Here, by contrast, at the time Thomas entered the house of the Pirs, he had the intent merely to collect on the car that had actually been promised to him and that he actually believed was his. Vivian, the witness who most contradicts Thomas' testimony, admitted herself that she had "agreed to give" the car to Thomas. Whether consideration was paid for the car or not is irrelevant with respect to whether Thomas had a bona fide belief in his entitlement. None of the parties has disputed his bona fide belief in his entitlement to the car, and the record is replete with evidence that he believed that the car was his as a matter of right.

Under the holding Brown, because the trial court failed (in fact, refused) to instruct the jury on a necessary element of larceny in a burglary case that a bona fide belief of entitlement would negate intent, the court committed error and a miscarriage of justice occurred.

Under Section 13 of Article VI of the Columbia Constitution, where the error complained of has resulted in a miscarriage of justice, the appellate court should overturn the judgment. Here, but for the failure to include the jury instruction, the jury would have been free to consider the bona fides of defendant's belief in his entitlement to the car. Since the record is so replete with evidence of the bona fides of his belief, the error was clearly a miscarriage of justice and the conviction should be reversed.

B. BY FAILING TO INSTRUCT THE JURY THAT A BONA FIDE BELIEF OF CLAIM TO PROPERTY NEGATES THE INTENT TO STEAL IN A ROBBERY CASE, THE JURY WAS UNABLE TO CONSIDER OVERWHELMING EVIDENCE THAT WOULD HAVE NEGATED DEFENDANT'S INTENT TO COMMIT LARCENY, THE TRIAL COURT COMMITTED ERROR RESULTING IN CAUSING A MISCARRIAGE OF JUSTICE

The State of Columbia defines robbery, in relevant part, as a "larcenous taking of the personal property of another." Columbia Penal Code Section 211. The courts have construed this to require that in order to convict someone of robbery, that person must have the necessary intent to steal at the time of the robbery. Cutler, at 5.

The facts of Cutler are controlling here. Cutler involved a defendant who went to another's house, claiming that he only went there to collect a debt which he believed was owed to him. On facts which were hotly disputed, a scuffle ensued, pursuant to which the defendant obtained possession of the victim's wallet, which the defendant then claimed was sufficient

to extinguish the debt. The defendant ended the encounter by running away with the wallet of the victim.

The trial court excluded an instruction to the jury proffered by defendant that "a necessary element of larceny, the intent to steal, was requisite to robbery." Cutler, at 5. This court overruled the trial court's exclusion of that instruction, finding that "[a]n essential element of robbery is the larcenous intent that accompanies the taking." Id. Refusing to allow the jury to consider evidence of defendant's bona fide belief that the debt was owed to him was prejudicial error, said the court, since such a finding would have negated intent, and therefore defeated a robbery charge.

In the present case, the defendant's bona fide belief that the property was his is even stronger than it was in Cutler. In Cutler, the defendant and the victim completely denied that the debt was even due. Here, one of the defendants has, in fact, admitted that the car was going to be given to defendant. In addition, defendant was looking in victim's purse, exactly the place he was told he could find the title to the car. Therefore, regardless of whether defendant's taking of property other than the title to the car, it is manifestly evident, not even disputed, in fact, that defendant lacked the intent to steal when he allegedly committed the burglary and when he allegedly committed the robbery.

The fact that defendant allegedly punched the victim is also immaterial, since it does not help to show felonious intent. Whomever's story you believe, the victim was clearly either defending himself or at least responding to hostility of the victim.

Therefore, for the same reasons that it was manifest injustice to exclude the jury instruction with respect to the burglary charge, it was manifest injustice with respect to the robbery charge, and the conviction should be overruled.

C. THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY SUA SPONTE ON TRESPASS AS A LESSER INCLUDED OFFENSE OF BURGLARY BECAUSE THERE IS SUBSTANTIAL EVIDENCE DISTINGUISHING THE LESSER INCLUDED OFFENSE OF TRESPASS FROM BURGLARY, CAUSING A MISCARRIAGE OF JUSTICE AND REQUIRING THAT THE TRIAL COURT'S JUDGMENT BE OVERTURNED

There is yet another ground for overturning the burglary conviction. A trial court is required to instruct the jury sua sponte on a lesser included offense where there is substantial evidence that distinguishes the lesser offense from the greater one. Alvarado, at 9. Trespass has been held unequivocally to be a lesser included offense of burglary. Id. Trespass involves unconsented entry into a building. Id. Burglary requires the additional element of an intent to commit larceny. Accordingly, if there were substantial evidence that the defendant did not commit larceny, then the burglary charge would have been distinguishable from the trespass offense and the court would have been required to instruct the jury on trespass, rather than burglary. Id.

As discussed above, there is more than substantial, there is overwhelming, indeed uncontroverted, evidence that the defendant lacked the intent to steal at the time he entered the home of the victims. Not only did the defendant so testify, one victim outright [sic] admitted defendant's entitlement to the car; the other admitted that she had agreed to give

defendant the car. In addition, the defendant searched through plaintiff's purse, where he was told the papers would be. Although there could have been a mischievous reason for going into plaintiff's purse, this is rendered doubtful by the fact that the victim admitted that defendant yelled that if he could not get the papers to the car, then he would take what he could get. He even waited around for Vivian to return home so he could ask her about the car.

This establishes that defendant did not have the intent to steal when he entered the premises.

The court in Alvarado held differently, as discussed above. The court reasoned that although the defendant came forward with some evidence that she did not have the intent to steal, that evidence was only a comment made to her mother that she was going to the victim's house to get back property the victim had stolen from her. In addition, the court ruled that defendant's actions, once inside the house, did not comport with the defendant's story. Cutler.

Here, the facts show overwhelmingly that the defendant's actions, once inside the house, only ratified his belief that he was entitled to ownership of the car.

It should be pointed out that the fact that defendant took property other than the title to the car is immaterial as to whether he had the intent to steal at the time of the trespass. It is evident, even from the words of the victim's mouth, that defendant only took the property because he could not find the title to the vehicle.

Also, the fact that it was possible that defendant could have charged more on the credit card but for the coincidence of his arrest upon having spent about $4,000 is likewise immaterial. It does not help the prosecution establish a case against defendant for burglary, his intent at the time of the trespass having been otherwise established.

Because the court improperly failed to instruct the jury sua sponte on trespass, manifest injustice occurred. Manifest injustice can be seen from the fact that the jury would almost certainly have preferred to convict defendant of trespass, rather than burglary, given the facts. The exclusion of the trespass instruction gave the jury no choice but to convict defendant of burglary, causing a miscarriage of justice.

For the foregoing reasons, the judgment of the trial court should be overturned to prevent a miscarriage of justice.

## ANSWER 2 TO PERFORMANCE TEST B

Statement of Facts

Thomas Wils is a Ruritanian emigre who fled his home country approximately three years ago at the age of nineteen. He landed in New York, where he was granted political asylum. Arno Pir and his wife, Vivian Pir, who were members of the Ruritanian - American Freedom League, offered to give Wils free room and board in exchange for certain work around the Pir household.

The Pirs insist there was never any agreement to pay Wils for his work around the house; they simply provided room and board and some occasional spending money. Wils also agrees that this was the initial arrangement between them.

However, the parties' accounts differ when it comes to certain work in the garage that Wils was to do. Wils stated in his testimony that he told Vivian he would not complete the work in the garage unless she paid him. According to Wils, Vivian then promised to give Wils an old Triumph in return for his work. When Wils finished his work and asked for the promised car, Vivian refused to give it to him and threw him out.

Vivian, on the other hand, insists that she never promised Wils the car in exchange for work, but only for transportation if he were to go to college. Arno Pir testified that he believed that Vivian had promised Wils the car if he finished the work in the garage, but that he also believed Vivian threw him out because he demanded the car before the work was done.

All parties agree that there was an argument [in] April or May 1999 when Wils demanded the car, Vivian refused, and threw Wils out of the house. Wils then went to live with other Ruritanian friends. After he ran out of money and places to live, he started to live on the street and beg for food.

Finally, Wils went to Arno's liquor store on July 3, 1999, when he asked Arno for the car. Arno told him he didn't have the car, that it was at home, and that Vivian had the title documents in her purse. Arno further promised that he would give Wils the car and the ownership papers when he returned from his business trip on July 20[th] or 21st.

On July 5, 1999, Wils went to the Pirs' home to obtain the car and the ownership papers. Wils stated that he waited for Vivian to leave, then removed a lock that he had installed himself in order to enter the house. He remained in the kitchen waiting for Vivian to return. Wils admits that he made himself a sandwich because he hadn't eaten in days and was starving.

After 45 minutes, Vivian returned and discovered Wils in the kitchen eating. She told him to get out before she called the police. Wils asked Vivian for the car again. Here, the testimony of Vivian and Wils differs -- Vivian stated that Wils began to approach her threateningly, whereupon Vivian grabbed a broom to protect herself. Wils then punched her in the shoulder, grabbed her purse, rummaged through it, and ran away.

Wils stated that after he asked for the car, Vivian grabbed a broom and threatened to hit him with it, whereupon he pushed her shoulder and took her purse, rummaging through it looking for the ownership papers. Not finding the papers in question, Wils took credit cards, a silver mirror and a cellular phone instead.

Wils pawned the mirror and the phone, then went to New York and ran up approximately $4000 in credit card debt on the Pirs' card because "that was what the Triumph was worth."

Wils was arrested on July 31st. He was convicted of burglary and robbery in Columbia Superior Court. The only jury instructions given concerned the elements of burglary, robbery and larceny.

As discussed further below, Wils has three meritorious claims of error on appeal: that the trial court (1) refused to instruct the jury on a bona fide belief in a claim or right to another personal property relating to burglary; (2) refused to instruct the jury on a bona fide belief in a claim or right to another's personal property relating to robbery; and (3) failed to instruct the jury sua sponte on trespass as a lesser included offense of burglary.

Argument

I. By failing to instruct the jury that a bona fide belief on the part of the taker of personal property in his right or claim to the property negates the intent to steal, the trial court erroneously instructed the jury on the crime of burglary.

It is well settled that a bona fide belief, even though mistakenly held, that one has a right to property negates larcenous intent. See Cutler, Alvarado. Wils has made it clear that he believed he was entitled to the car in payment for the work he had done for the Pirs. Whether or not he actually had such an arrangement is irrelevant, as is the fact that Vivian disputes Wils' account of the promise of the car. The important issue is that Wils had a bona fide belief that the car was owed to him, which he did.

Burglary comprised the entering of a dwelling without consent with the intent to commit larceny. Section 459 of Columbia Penal Code.

Crucial to the crime of burglary is the intent to commit larceny. A belief that the property taken belongs to the taker, or that he has a right or claim to it, is sufficient to preclude larcenous intent. See Cutler. Wils did not intend to rob Vivian when he went to her house, only to recover what he believed was owed to him: the car. The taking of property is not larceny in the absence of an intent to steal, according to the Cutler court.

The People, however, will argue that Wils waited until Arno was away on a business trip, broke into the Pirs' home and waited for Vivian alone. Furthermore, he helped himself to their food, without consent, while he was waiting. Even worse, the People will contend, when Vivian told him to get out of the house, Wils grabbed her purse and ended up taking credit cards and other items to which he had no arguable right or claim. The prosecution will argue that, like the defendant in Alvarado, Wils conducted a "general ransacking," indiscriminately taking items never specifically related to a right or claim.

However, this case is more like Cutler than Alvarado. In Alvarado, it is unclear that the defendant ever intended to retrieve the property she believed was hers, as opposed to merely taking items for the purpose of economic gain. In this case, Wils went to the Pirs' house with the express purpose of getting the car and the title. Believing, as Arno had told him, that the papers he wanted were in Vivian's purse, he grabbed her purse and rummaged through it.

His sole purpose when he grabbed her purse was to retrieve the papers he believed belonged to him. If, as in Alvarado, Wils truly wanted to simply take items for the purpose of economic gain, he could have easily ransacked the house instead of waiting 45 minutes in the kitchen for Vivian to return.

In Cutler, the defendant, believing he was owed money, took the [sic] Anderson's wallet when the opportunity presented itself while the two were struggling. Cutler did not intend to rob Anderson when he went to his house, only to recover money owed to him. The Cutler court found that an honest belief that he was entitled to the money was a defense, and that approval of the prosecutor's argument that no such defense exists was erroneous. The appeals court reversed the trial court's decision, and concluded that the trial court's approval of the prosecutor's argument removed completely from the consideration of the jury a material issue raised by substantial evidence, and resulted in a miscarriage of justice.

Wils' case is much like that of Cutler. He rummaged through the purse looking for ownership papers, and only when he and Vivian began to struggle did he take the other items and run away. His intent upon entering the house was to retrieve the car he honestly believed belonged to him. He may have changed his mind later in the heat of the moment, but the fact remains that he entered with the intent to retrieve his items only.

A key element of burglary is entering a dwelling with the intent to commit larceny. By refusing to give the jury instruction that a bona fide belief on the part of the taker of personal property in his right or claim to the property negates the intent to steal, the trial court did not allow the jury to consider a natural issue raised by substantial evidence -- that Wils believed he owned the car and entered only to retrieve his car.

Accordingly, the district court caused a miscarriage of justice pursuant to Article IV, Section 13 of the Columbia Constitution that requires reversal.

II. By failing to instruct the jury that a bona fide belief on the part of the taker of personal property in his right or claim to the property taken negates the intent to steal, the trial court erroneously instructed the jury on the element of intent in the crime of robbery.

According to Section 211 of the Columbia Penal Code, robbery is the larcenous taking of the personal property of another, from his person or immediate presence, and without his consent, accomplished by means of force or fear.

Like burglary, robbery requires the requisite intent to steal. See Cutler. An essential element of robbery, stated the Cutler court, is the larcenous intent that accompanies the taking.

As explained under Section I above, substantial evidence was provided at trial that Wils did not have the requisite intent -- that he grabbed Vivian's purse (the act that would constitute robbery) with the sole intent of retrieving the ownership papers he believed belonged to him. Again, as stated previously regarding burglary, it is well settled that a bona fide belief that one has a right or claim to the property negates the larcenous intent required for robbery.

The People will argue that Wils ended up taking credit cards and other items to which he had no ownership interest. However, Wils stated that he took those items only because he was unable to locate the papers he wanted, and also that he only charged $4000 on the credit cards, or what he believed the car to be worth, and thus what was owed to him.

There is a stronger argument that Wils did not have the requisite larcenous intent when he entered the Pirs' house than there is in conjunction with the taking of the credit cards and other items. However, using Cutler, there is still sufficient support for an argument that the jury should have been instructed on a bona fide belief in a claim or right to another's personal property relating to robbery. Substantial evidence was given at the trial court such that if the jury should have been allowed to consider the issue of lack of intent to steal.

Accordingly, the district court caused a miscarriage of justice pursuant to Article IV, Section 13 of the Columbia Constitution that requires reversal.

III. By failing to include trespass as a lesser included defense of burglary, the trial court erroneously failed to instruct the jury sua sponte regarding trespass.

A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser. There must be substantial evidence showing the absence of the element distinguishing the greater from the lesser. According to Alvarado, evidence is substantial only if capable of inspiring belief on the part of the jury.

According to Section 602 of the Penal Code, every person who, without consent, enters any house, apartment, or other building is guilty of trespass. The crucial element distinguishing trespass from burglary is the intent to commit larceny within at the time of entering.

As discussed in Section I above, there was substantial evidence (capable of inspiring belief on the part of the jury) that Wils did not have the requisite intent for the crime of burglary.

The appeals court in Alvarado refused to reverse the judgment based on defendant's contention that the trial court failed to instruct the jury sua sponte on trespass as a lesser included offense of burglary. Wils' case, however, is distinguishable from Alvarado. In Alvarado the court did not find substantial evidence of lack of intent, whereas in Wils' case there is such substantial evidence.

Furthermore, the Alvarado court, citing People v. Watson, stated that a court may only come to the opinion that there has been a miscarriage of justice if it is reasonably probable that a result more favorable to the complaining party would have been reached in the absence of error.

Given the substantial evidence presented regarding Wils' belief that he was owed the car, there is a strong argument that Wils would have been found guilty of trespass instead of burglary had the court instructed the jury on the lesser included offense of trespass.

Therefore, the appeals court should find that the district court caused a miscarriage of justice pursuant to Article IV, Section 13 of the Columbia Constitution that requires reversal.