California Bar Examination

Performance Tests and Selected Answers

July 2008

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2008 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2008 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.

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FILE

PEARSON v. SAVINGS GALORE

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.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. 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 performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it 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.
6. 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.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Applicant

From: Mary Hamline

Date: July 29, 2008

Re: **Chris Pearson v. Savings Galore**

Our client, Chris Pearson ("Pearson"), was held for about an hour by the Savings Galore supermarket because his buddy, with whom he shopped, was suspected of shoplifting and took off when confronted. I've checked out the criminal aspect, and Pearson did not commit any illegal acts.

Please write a memorandum that evaluates his possible civil claim against Savings Galore. Your memorandum should do the following:

1. Explain the elements that must be proven in order for Pearson to succeed on a false imprisonment claim.
2. Apply the facts of Pearson's situation to the elements and assess the likelihood that Pearson would prevail on the merits of the claim.
3. Identify the injuries incurred by Pearson that would be compensable given these facts and assess the likelihood that punitive damages would be awarded given these facts.
4. Identify any defenses the store may raise, and explain and assess the likelihood that the store would prevail on each defense.

TRANSCRIPT OF JULY 24, 2008 INTERVIEW WITH CHRIS PEARSON

Mary Hamline (Q): The tape recorder is running now. As I said, the reason why I like to record initial interviews is that it will give me an accurate record of what you say, and I will be able to listen and use it later on.

Chris Pearson (A): Okay.

Q: I understand that you got into some sort of a dispute with a store, and that you might want to sue them, but that's about it.

A: Well, I live with about 5 other people in a rented house over near the campus.

Q: Okay. Are you a student at the University of Columbia?

A: Yes, I'm a student, a biosciences major. I'm going to finish up pretty soon. I'm 22 years old, single, and pretty much impoverished. Well, one of my roommates and I went to do the weekly food shopping for the whole house.

Q: Went where?

A: Right. We went down to that combined warehouse store and market, you know, that huge thing down on the corner of Euclid and Sligo?

Q: Do you mean Savings Galore?

A: Yes, that's the name of it. We almost always go there to do the shopping unless we can get a car, and then we go somewhere better.

Q: What was your roommate's name, the one who went with you?

A: Do I have to tell you that?

Q: It is always possible that we might need to talk to this person or even get him to testify, depending on what is going on. But for now, just use a first name at least, just so you can tell the story.

A: Okay. My roommate is named Jeff.

Q: Is he a student at the University of Columbia too?

A: No. He finished up about a year ago.

Q: Why don't you just tell me what happened when you and Jeff went shopping?

A: Well, we started to do the shopping, putting some stuff in the cart. We would split up to go get things; we had a list, but then we would come back to the cart and talk and look for other stuff, too. After we had been there for about 20 minutes, I thought I saw

Jeff open up a can of cashews and eat them while we were shopping. But I didn't pay too much attention to it.

Q: How long did it take you to shop?

A: About an hour. There was a long wait at the check-out stand, and we finally got up to the front and paid and headed out of the store. We were both kind of loaded down - I was carrying about 6 bags of groceries, and Jeff had about 4 bags.

Q: How were you carrying so many bags?

A: If you get your hand through the handle of those plastic bags, you can hold a whole bunch - I had three in each hand - well balanced.

Q: I'll have to try that some time. Had you paid for the cashews?

A: At that point, I didn't really notice. I didn't think we had, but there was quite a wait at the check-out stand and I had forgotten about it, to tell you the truth.

Q: How long ago was this?

A: About 2 months ago.

Q: What happened next?

A: We were walking out of the parking area and towards the street back to our house, when a big, strong-looking woman came walking right up to us. She yelled, "Hold it right there!" And I remember thinking "Who is this lady?" She got right next to us and grabbed me and said, "I saw you take those cashews and you didn't pay for them." I said, "I didn't take any cashews." She said, "That's right, you didn't; it was this guy, right here." And she grabbed hold of Jeff's arm. Jeff said something like: "Oh yeah, I forgot to pay for them; here, let me pay for them right now." And the lady said: "No, it was deliberate; I'm going to have to take you in."

Q: Interesting. Did you both go back to the store?

A: No. As soon as that woman said "I'm going to have to take you in" - and you could just tell she was trouble and meant it from the tone in her voice and her look - Jeff dropped his bags of groceries, shook himself off from her hold, and took off around the corner of the store. There is a wetlands area around the back.

Q: But you didn't go with him?

A: No. He split, and I was left holding the bags. I just stood there with my mouth open.

There I was with a couple of hundred dollars worth of groceries, that detective, and no Jeff.

Q: Did she identify herself as a detective?

A: Not until later. She just gave me a glare and said, “You come with me.” I said, “I didn’t do anything,” but she said, “I don’t care. You come with me right now. You and your fast friend are in big trouble.”

Q: Did you think at all about running yourself?

A: Not really. She looked like a big, strong football player, and I was holding a lot of stuff.

Q: Did she grab you or force you into the store?

A: Not exactly. She picked up the bags Jeff had dropped and got sort of in back and sort of to the side of me and herded me in, kind of like a dog herding sheep.

Q: What would have happened if you had tried to just walk away at that point?

A: I don't know for sure, but it didn't seem like an option to me. She would probably have tackled me.

Q: So did you go on your own?

A: I sure wouldn't say that. I went along, but I didn't see what else I could do.

Q: What happened when you got into the store?

A: We went into an office and she tossed the bags down, and I put the ones I was carrying down, and I said something like “Why don’t you leave me alone? I didn’t take any cashews and you know it.” She took me to another office, way in the back, one with no windows. I had no idea they had rooms like that in those buildings. We sat down in there and she called someone on the phone and after a few minutes two very large men, who looked like they were former boxers, came in. They left me in there for a while with the door locked and I could hear her talking to them right outside the door.

Q: How do you know the door was locked? Did you try to get out?

A: Well, no. It sounded like they locked the door. I wasn’t about to try to take off. I was pretty scared, actually. I get anxious sometimes, and I was having some trouble breathing and my heart was pounding, so I just sat there and tried to take some deep breaths. Then all three of them came back in. The woman told me she was the house detective, and the two guys were security staff, and that they just wanted to talk to me.

They said, “Let’s see some identification.” I told them, “You have no right to do this.” But I showed them my student registration card, partly because I figured it was better if they knew who I was and that I was a student at the University, and partly because I didn’t really see any choice. I didn't give them my address.

Q: Did you think they were going to rough you up?

A: Actually, no, even though Jeff and I look like young punks and they looked like professional wrestlers. I thought they were going to try to intimidate me somehow, and I didn’t think they were going to let me go for maybe a long time, but they didn’t say they were going to beat me up, either.

Q: Okay. What did they say to you?

A: They said: “Because you are a college kid, you must be pretty smart. Is your friend a college student too? He was pretty dumb to run.” I didn’t want to say anything about Jeff, so I tried not to look at them, and that kind of angered them. The lady said: “Your friend isn’t much of a friend - he took off and left you to take the rap. We’ve got you. But if you give us his name and address, we’ll let you go.” I was pretty scared about that. I was mad at Jeff, because he is always pulling stuff like that.

Q: What do you mean, stuff like that? Has he ever been caught shoplifting before?

A: No. But he is such a clueless idiot. He actually is kind of a slacker. You know, he opens up food in stores, forgets to pay for it, and I think he steals stuff from time to time. But he’s never been caught.

Q: What did you do when they asked you for his name?

A: They kept saying, “Give us his name and address and we’ll let you go.” And I was mad at him, especially for taking off and leaving me with all of this trouble but I wasn’t about to give them his name. So I kept saying: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” And they kept saying stuff like: “Hey, figure it out; we don’t have to let you go, but we will if you give us his name and address.” And I just kept saying the same thing: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” Sort of like a mantra. I just kept repeating that and trying not to make eye contact. I didn’t want to antagonize them.

Q: Did you think you were actually right about their having no right to hold you?

A: I didn't think they were going to let me go, but I didn't think they could prove I did anything illegal, because I hadn't. So I didn't know. I was trying not to be anxious.

Q: They must have eventually let you go?

A: Yeah. This went around and around, and they'd come ask, all three, and then they would leave for a while, and then come back and try again, and I'd say the same thing. I never tried to just walk out of there, but I thought if I did they would just grab me and put me back there, or arrest me, so I just waited. After I had been there quite a while, I'm guessing about an hour, I was starting to get worried, because the only person who knew I was there was Jeff, and he obviously wasn't going to get me out, and then they came in with a piece of paper and said, "Here, if you sign this, we'll let you go." I signed it and they let me go. I don't know what happened to the groceries; I didn't even think about them until much later.

Q: What did the piece of paper say?

A: Here. This is the copy of what they gave me. But I didn't read it too closely. I probably would have signed it no matter what it said. At the time, I just wanted to get out of there.

Q: Can I keep this?

A: Sure.

Q: Did they ever find out who Jeff was and have him arrested?

A: No, they never did. He was amazed I didn't tell. He was going around the house looking for anything the police would be interested in when I showed up. He also told me he had stuck a pair of garden gloves in his pants, which was one reason why he had taken off, as it was more than just the cashews.

Q: Am I right that they never physically harmed you, and never did arrest you or even really make a move to arrest you?

A: In thinking back on it, I'm not sure they ever actually touched me other than when the detective first put her hands on me in the parking lot. They never did strike or hit me, or arrest me. So maybe I should just leave it alone.

Q: Well, you can always just leave things where they are. But it sounds like you want to at least consider your options?

A: Yes. I'm kind of mad because of what they did, so I'm interested in knowing, I guess, if I can sue that store. I haven't really been able to sleep at all since then. If I do get to sleep I have nightmares about being locked away in little places. I've been to a psychiatrist quite a few times since this happened, and I don't have any health insurance, and that actually has been expensive. We all lost the money from the food. Who knows what they did with it? Although I guess that was sort of Jeff's fault for just dropping those bags, and mine for not remembering them. But I don't think they should be allowed to get away with that, when I didn't do anything except go shopping with a screw-up. I could have had a panic attack or heart failure in there. I was really scared and I'm not sure they had any right to do that to me. So I guess I think someone should call them on that, and not let them get away with it. And it sure can't be Jeff.

Q: Would it be okay with you if I talked with your psychiatrist briefly about how you are feeling and what treatment is necessary? It would be helpful if your doctor could verify your condition.

A: That's okay.

Q: What is his name, and if you have it, his phone number?

A: His name is Dr. Romeo. I don't have his phone number with me right now, but we could look it up in the phone book. That's what I do when I want to change an appointment.

Q: That's okay; we'll look it up. How do you spell it, like the Shakespeare character?

A: R-o-m-e-o. So do you think I should sue the store? Or is it not worth it?

Q: I'd like to have someone do a little research so we will know for sure what we are dealing with before we give you advice. Why don't you set up a meeting with my secretary and . . .my secretary is the guy sitting over in the other office. There isn't a real hurry on this. Can you come back in a week?

A: Sure.

END OF TRANSCRIPT

SAVINGS GALORE, INC.

SUSPECTED SHOPLIFTER RELEASE FORM

YOU HAVE THE RIGHT TO REMAIN SILENT. RATHER THAN SPEAK WITH US, YOU MAY FIRST CONSULT WITH AN ATTORNEY.

NOTICE: THIS IS A LEGALLY BINDING AGREEMENT. By signing this agreement, you waive your right to bring a court action to recover compensation or obtain remedy against Savings Galore, Inc.

WAIVER/RELEASE/COVENANT NOT TO SUE

In consideration for Savings Galore, Inc. releasing me from their custody, and in consideration for Savings Galore, Inc. not filing criminal charges against me or seeking civil liability against me, I hereby release Savings Galore, Inc., a Columbia corporation, and its officers, agents, and employees from and WAIVE MY SUBSTANTIAL RIGHTS TO ASSERT any cause of action, claims or demands of any nature whatsoever, including but not limited to a claim of false imprisonment, false arrest, intentional infliction of emotional distress, duress, or negligence which I, my heirs, representatives, executors, administrators and assigns may now have, or have in the future against Savings Galore, Inc. on account of the store detaining me on 5/29/08 for purposes of investigation of shoplifting. I further agree that Savings Galore, Inc. had reasonable cause to detain me because they suspected me of shoplifting and that they did not detain me for longer than a reasonable period of time. I understand that the terms of this agreement are legally binding and I certify that I am signing this agreement, after having carefully read it, of my own free will.

Chris Pearson 5/29/08	John de Majo
Signature and Date	Witness
Chris Pearson	Kent Wong
Printed Name	Witness

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Chris Pearson Client File

From: Mary Hamline

Date: July 24, 2008

Re: **Phone conversation with Dr. Fred Romeo, a psychiatrist treating Chris Pearson**

On July 24, 2008 I called Dr. Fred Romeo, phone # 555-3882, 550 Bootwide Ave., Santa Claritan, Columbia. Dr. Romeo is a psychiatrist who has been treating our client Chris Pearson. He has been a practicing psychiatrist for over 10 years. I explained that Pearson was our client, and that Pearson had authorized Dr. Romeo to discuss his current condition with me as a privileged communication. Romeo said that Pearson had told him I might call, so he wasn't surprised by it. We then had a conversation concerning whether Pearson had suffered emotional injuries due to the episode at Savings Galore, the nature of the suffering, and whether Romeo would be willing to sign an affidavit and/or testify if Pearson asked him to.

Dr. Romeo said he knows and remembers Pearson quite well, but he also went and retrieved and reviewed his notes. He said that Pearson had been to see him a couple of times before the episode at Savings Galore, so he had a chance to compare, but only a little. Dr. Romeo said he concluded that Pearson was currently suffering from significantly lower than usual energy and low motivation, as well as sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities. He said these symptoms were all quite consistent with posttraumatic stress disorder, and predicted that they may persist, on and off, for as long as a year, and

might return. He also said, however, that he had seen a lot worse cases of posttraumatic stress disorder, although Pearson does seem to be suffering.

I asked him if he was reasonably confident that the posttraumatic stress suffered by Pearson was brought about by the episode at Savings Galore. Dr. Romeo said yes. He said Pearson hadn't mentioned the episode extensively, but that his current condition was connected to a traumatic event. I asked if Pearson's symptoms could be triggered even though there was not any physical injury associated with the event. Dr. Romeo said, "Oh, sure. Posttraumatic stress is often created by a stressful event that turns out not to cause physical injury. It is the fear and lack of control over the situation that create the conditions for posttraumatic stress in a lot of cases."

Dr. Romeo said he has never testified in a court setting, but has had his deposition taken several times. He would be happy to sign an affidavit concerning Pearson's condition, and he would be willing to testify if necessary, although he'd like to avoid it. I thanked him and said that it was probable that we would get back to him on this, although that decision in the end was up to Pearson.

TUESDAY AFTERNOON
JULY 29, 2008

California
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Performance Test A
LIBRARY

PEARSON v. SAVINGS GALORE

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA PENAL CODE

§13-1 Shoplifting; detaining suspect; defense to wrongful detention

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, such person knowingly obtains such goods of another with the intent to deprive that person of such goods by:

1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
4. Transferring the goods from one container to another; or
5. Concealment.

B. Any person who knowingly conceals upon himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment shall be presumed to have the necessary culpable mental state pursuant to subsection A of this section.

C. A merchant, or a merchant's agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting as defined in subsection A of this section for questioning or summoning a law enforcement officer.

D. Reasonable cause is a defense to a civil or criminal action against a peace officer, a merchant or an agent or employee of such merchant for false arrest, false or unlawful imprisonment, or wrongful detention.

Alice James v. Smitty's

Columbia Court of Appeal (1998)

Alice James ("James"), her son Steven James ("Steven"), and her friend Nancy Robertson ("Robertson") were shopping at Smitty's, a supermarket chain store. James placed a pair of children's sandals in her shopping cart and covered them with an advertising flier. James later said she: (1) placed the sandals in the cart to quiet Steven, who wanted them; (2) covered them to make Steven forget them, planning to return them; and then (3) forgot them herself. Robertson later said she was only vaguely aware that James had placed the sandals in the cart and was entirely unaware that James had placed the flier over the sandals.

Karen Wilkerson, a Smitty's security officer, observed James's actions on a surveillance monitor and followed James and Robertson to the check-out stand. Though James paid for other items, she did not pay for the sandals, which remained in the bottom of her cart.

James and Robertson left the store. Robertson waited outside the car while James placed the groceries and her purse inside the car and then lifted Steven from the cart. She then picked up the sandals. She later said she had just discovered them and was about to return them to the store. At that moment, Wilkerson approached, identified herself as a Smitty's security officer, pointed to the sandals, and motioned James and Robertson back into the store. James, who is very hard of hearing, originally did not understand what Wilkerson said. She first thought Wilkerson wanted the advertising flier. When Wilkerson pointed at her purse, James thought Wilkerson was trying to rob her. When Wilkerson pulled at her purse and pointed at the sandals, James understood that Wilkerson thought she had stolen the sandals and, accompanied by Robertson and Steven, followed Wilkerson to the security offices inside the store.

Wilkerson directed Robertson to remain in one small office. (There is conflicting evidence concerning whether the door to Robertson's office was locked, but that fact is

not relevant to the issues in this appeal.) Wilkerson then escorted James and Steven to a separate office. Wilkerson searched James's purse, photographed her against her will, showed her part of the surveillance video, and presented a form letter demanding payment of a statutory civil penalty plus the sandals' purchase price. James, increasingly distraught, wrote her phone number on the form letter, hoping Wilkerson would call her husband. Wilkerson did not perceive a hearing problem and did not call the number that James had written. James (and Robertson, who claimed she could hear through the wall) claimed that Wilkerson was abusive, yelling and slamming objects. After about 45 minutes in the office, James hyperventilated and lost consciousness. Wilkerson and the night manager called for paramedic assistance. Wilkerson testified that she took Steven from the security office when the paramedics arrived to attend to James and that Robertson and one of the paramedics took Steven to the parking lot to see a fire engine. The paramedics took James to the hospital. Robertson called James's husband, who came to pick up Steven and went to the hospital where the paramedics had taken his wife.

James and Steven sued Smitty's for negligence and false imprisonment. The jury awarded James $8,500 in damages on her false imprisonment claim and awarded Steven $12,500 on his false imprisonment and negligent infliction of emotional distress claims. From judgment on the verdict and the denial of its posttrial motions, Smitty's appeals. These appeals concern the finding of liability and award to Steven.

At the close of Plaintiffs' evidence, Smitty's moved for a directed verdict on Steven's negligent infliction of emotional distress claim, arguing that Plaintiffs neither alleged nor presented evidence of compensable harm. Smitty's claims that the trial court was required to grant their motion for a directed verdict against Steven because there was no evidence offered that Steven suffered physical injury. His damages were transitory nightmares and sleep disturbance, for about two months, which subsided without medical treatment. Under these facts, this motion should have been granted.

In Columbia, a plaintiff may not recover for negligent infliction of emotional distress unless the shock or mental anguish is accompanied by or manifested as a physical injury. Transitory physical phenomena such as nightmares and sleep disturbance are not the type of bodily harm that would sustain a cause of action for emotional distress. In contrast to a negligence claim, however, a false imprisonment claim does not require proof of physical injury to go forward. Steven's false imprisonment claim is therefore not impeded by the absence of physical damages. Consequently, the injuries suffered by Steven are sufficient injuries to justify an award under a false imprisonment claim.

Smitty's, however, alleges errors concerning Steven's false imprisonment claim. It claims that the trial court should have directed a verdict because Smitty's neither accused nor suspected Steven of shoplifting. We disagree.

Smitty's intended to confine James with the necessary consequence of also confining Steven, her four-year-old child. Its liability to Steven under these circumstances is explained in the Restatement (Second) of Torts. According to Restatement §35, an actor is subject to liability for false imprisonment for the wrongful confinement of another if "he acts intending to confine the other or a third person within boundaries fixed by the actor. . .his act directly or indirectly results in such a confinement of the other, [and] the other is conscious of the confinement or is harmed by it." If a confinement of one party imposes confinement on another party, "the actor is subject to liability to such other as fully as though it were intended so to affect him."

These provisions are dispositive of Smitty's first argument. That Steven was merely an indirect, not the direct, target of confinement does not relieve Smitty's of liability on Steven’s false imprisonment claim. Steven is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, he is entitled to damages for mental suffering, humiliation, and the like. The damages that flow

foreseeably from a false confinement of a caretaker flow equally foreseeably to an accompanying small child.

Smitty's also argues that Steven's false imprisonment case should have been dismissed due to the statutorily granted shopkeeper immunity for detaining suspected shoplifters. A merchant may detain a suspected shoplifter without incurring liability if the storekeeper has reasonable cause to believe that the person shoplifted and if the detention is performed in a reasonable manner and for a reasonable length of time. Columbia Penal Code §13-1 C and D. Reasonable cause for the shopkeeper to detain a suspected shoplifter is not dependent on guilt or innocence of the person detained, or whether a crime was actually committed. If the facts and reasonable inferences therefrom are not subject to material dispute, reasonable cause is a question of law to be determined by the court.

Smitty's argues that it had reasonable cause to detain James, and thus it had reasonable cause to detain Steven as well. While we agree that ordinarily reasonable cause to detain a parent suspected of shoplifting gives the merchant reasonable cause to detain minor children of the suspected parent, given the facts of this case we do not agree that Smitty's had reasonable cause to detain Steven.

We have previously indicated our acceptance of Restatement §35, which explains the potential linkage of false imprisonment of a suspect and another. Had Smitty's detained James without reasonable cause, it would have detained Steven without reasonable cause as well. But Smitty's had reasonable cause to detain James, because she picked up the sandals, placed them in the cart, covered them with an advertising flier, and left the store without paying for them. This may have been inadvertent; it may have been deliberate; but the appearance was such that it gave Smitty's reasonable cause for suspicion of shoplifting.[1]

[1] Because no fact-finder could reasonably conclude otherwise, the trial court could have directed a verdict for Smitty's on the issue of reasonable cause to detain James.

But the real question is whether Smitty's needed to detain Steven, a person not suspected of shoplifting, for as long as they did under these circumstances. We conclude that it was not reasonable under the circumstances for Smitty's to detain Steven for more than the time necessary to make sure Steven would be under proper supervision.

Smitty's had several alternatives available for Steven's supervision other than detaining him. Most notably, Wilkerson could have immediately asked Robertson to care for Steven while James was detained for investigation of shoplifting, yet she made no effort to do so and in fact impermissibly detained Robertson as well as James and Steven. There was no reasonable cause to detain Robertson. Wilkerson had no basis to believe Robertson had shoplifted or assisted in the shoplifting in any way, and Wilkerson testified that she did not consider Robertson to have been involved in any illegal activity. A merchant does not have immunity to detain a companion of a suspected shoplifter unless the store has reasonable cause to believe the companion was involved in the illegal activity. Because Smitty's did not have that reasonable cause, Robertson was a fully viable alternative for the supervision of Steven. If in fact James had not wished Robertson to supervise Steven, Smitty's would have grounds for avoiding liability for false imprisonment of Steven. Smitty's took all of that opportunity away by simply detaining James, Steven, and Robertson. In addition, they could have had Steven come into the store, asked James to call an acceptable supervisor for Steven, and detained Steven only until the acceptable supervisor arrived.

Accordingly, Smitty's was not by statute granted immunity from liability on Steven's suit for false imprisonment.

Affirmed.

Gaspard v. American Telco

Columbia Court of Appeal (2001)

Tracey Gaspard sued her former employer, American Telco, for retaliatory discharge after she filed a workers' compensation claim. The trial court granted summary judgment to her employer on the basis that Gaspard had signed a release of all claims against it. Gaspard appeals, contending that the release was ambiguous and procured by duress, and thus the trial court erred in granting summary judgment. We affirm.

Gaspard worked for American Telco as a district sales manager. While driving to the office after a sales appointment in August 1997, she was involved in a car accident in which she claimed neck and back injuries. She continued to work, although in pain and under the care of a chiropractor, for two months. Then, in October 1997, she was unable to get out of her bathtub without assistance. An MRI revealed two ruptured discs in her back. A doctor advised that she take several weeks off work in order to rest.

Just eleven days later, while at home on medical leave, an American Telco employee who "shared lodgings" with Gaspard came home with bad news. He told Gaspard that she was being fired from her job. He gave her a release, by which she was allowed to resign, receive $4,500, and keep her health insurance for another month in exchange for her waiver of all claims against her employer. If she did not sign the release, she would be terminated without continued benefits or pay. He told Gaspard she had until the next morning to make her decision.

Gaspard signed the release and received the month's insurance and money. Two years later, she brought suit for wrongful termination, alleging the discharge was in retaliation for her having filed a worker’s compensation claim. The trial court granted summary judgment to her former employer based on the release, and Gaspard appeals.

To prevail on a motion for summary judgment, a defendant must establish that no material fact issue exists and that it is entitled to judgment as a matter of law. If a

defendant moves for summary judgment on the basis of an affirmative defense, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. In conducting our review of the summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.

In general, a release surrenders legal rights or obligations between the parties to an agreement. A release is a complete bar to any later action based on matters covered by the release. American Telco, who in this case is the party asserting summary judgment on the basis of the release, undertook its burden to prove the elements of its defense as a matter of law by attaching a copy of the release signed by Gaspard to its motion for summary judgment. A signed release contains a strong presumption of enforceability. To presume otherwise would throw into doubt the validity of every settlement and create strong disincentives for parties to settle. Because American Telco has provided presumptive evidence of the release, the burden then shifts to Gaspard to directly attack the release or establish a fact issue in avoidance of it.

Gaspard first attacks the validity of the release by arguing it is ambiguous. The release that Gaspard signed states in pertinent part as follows:

"I hereby release American Telco from any and all claims, charges, liabilities, causes of action, and demands arising from or in connection with my employment with American Telco or the termination thereof, which I ever had, now have or may have from the day of the commencement of my employment to the date of this waiver and release. This waiver and release includes, without limitations, claims and causes of action arising under federal and state fair employment practice laws as well as the common law of torts and contracts, relating in any way to my employment with American Telco, treatment while employed with American Telco and the termination of my employment. I hereby agree not to bring any lawsuit, charge or claim against American Telco in any court or administrative proceeding relating in any way to my employment, my treatment while employed, and the termination of my employment."

This release expressly includes all claims arising from Gaspard's employment or termination from employment with American Telco. Because the release mentions claims arising from termination of employment, we hold that the release unambiguously bars Gaspard's retaliatory discharge claim.

Gaspard also argues that she was under duress when she signed the release. In the early common law, duress *per minas*, i.e., by threats, was available to void a contract where the threat involved imprisonment, mayhem, or loss of life or limb. Through the years, there has been a steady expansion of the duress principle such that direct dire harm is no longer essential, the focus instead being on whether the threat is so overbearing that the victim had no reasonable alternative. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Thus the modern defense of duress, used to avoid enforcement of an agreement, is met by demonstrating the following elements: (1) The promise must be made in response to a threat. Ordinarily it must be the promisee who created or issued the threat, although in some cases a successful showing of duress was made when the threat did not originate with the party seeking to enforce the promise. (2) The threat needs to be severe enough to reasonably convince the will of the promisor to make the promise. If sufficient alternatives to making the promise were available to the promisor, the threat will not be considered severe and duress will not succeed as a defense. (3) The threat must be improper rather than just hard bargaining.

A difficult issue is determining what type of threat is sufficient to invoke the rule. Courts tend to use as a shorthand summary, words such as "wrongful," "oppressive," or "unconscionable" to describe conduct, but the complexity of the term "threat" is demonstrated in Section 176 of the Restatement (Second) of Contracts, which provides:

> “(1) A threat is improper if:
>
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(b) what is threatened is a criminal prosecution;

(c) what is threatened is the use of civil process and the threat is made in bad faith; or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat;

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat; or

(c) what is threatened is otherwise a use of power for illegitimate ends."

In this case, Gaspard's argument is that she faced economic duress. She does not claim that she was physically threatened as a reason to have agreed to the release promise. Gaspard claims in her affidavit "I had no money in the bank and I was in financial straits." Economic duress may be claimed, however, only when the party against whom it is claimed was responsible for claimant's financial distress. None of the summary judgment evidence indicates that American Telco was responsible for Gaspard's economic distress. Accordingly, Gaspard has failed to meet her burden of establishing duress.

We find that American Telco established the requisites of release and there is no ambiguity in the language of the agreement. We have also concluded that the release was not obtained by economic duress. Accordingly, we overrule Gaspard's sole issue and affirm the trial court's judgment.

Peterson v. Zelie Corp.

Columbia Court of Appeal (1979)

Defendant Zelie Corp. (“Zelie”) appeals from a judgment finding it liable for false imprisonment and awarding $10,500 in actual damages and $20,000 in punitive damages to Plaintiff Mary Peterson (“Peterson”).

At the time the incidents leading to the false imprisonment suit took place, Plaintiff Peterson was twenty-three years old and pregnant. Plaintiff went to the Zelie store with instructions from her mother to complete the purchase of items which her mother had placed in the store's layaway department. She was driven to the store by a neighbor, Mike Taylor, and was accompanied by her two sons Tom and Jim, ages 1 and 3 years, and by her 14-year-old brother, Bill. The Plaintiff entered the store, went to the layaway department, and handed the clerk the layaway receipt that her mother had given her. According to Plaintiff Peterson, the clerk handed her, in addition to the items listed on the layaway receipt, a box containing a Chipshot hockey set. This item, as boxed, was approximately as large as the counsel's table in the trial court. Plaintiff accepted this item, she argued, because she did not know exactly what was to be picked up from the store.

Plaintiff Peterson paid the balance due on the items listed on the layaway receipt. She then put all the items except the hockey set in a shopping cart along with her two children. At Plaintiff's direction the hockey set was placed in another cart. Plaintiff's brother, Bill, pushed the cart containing the hockey set toward the store's exit, while Plaintiff propelled the cart containing her children and the balance of the items. As they neared the door Plaintiff found a "Paid” sticker on the floor and placed it on the box containing the hockey set. Plaintiff Peterson claimed Bill, her brother, told her that the sticker had fallen off one of the items she had purchased.

A guard at the store's exit checked each item for a paid sticker and allowed Plaintiff Peterson to pass. However, once outside the door Plaintiff was stopped by a security

guard, whose suspicion was aroused because he had observed Plaintiff place the paid sticker on the hockey set's box. The guard identified himself and asked Plaintiff whether she had paid for the hockey set. Plaintiff claimed she had paid for the item. The guard then asked Plaintiff and her brother to follow him to a room in the back of the store used by the security staff. Once in this room three security officers questioned Plaintiff, at various times.

Initially, Plaintiff Peterson maintained she had purchased the hockey set. However, when Plaintiff was shown the layaway receipt, which did not list the hockey set, she admitted that the hockey set was not one of the items that her mother had previously placed in the store's layaway department. She subsequently filed a suit for false imprisonment which resulted in the judgment from which defendant Zelie appeals.

Defendant Zelie argues that the facts did not warrant the imposition of punitive damages. Under Columbia law, punitive damages are recoverable for false imprisonment when the plaintiff proves, by clear and convincing evidence, that the defendant has been guilty of oppression, fraud, or malice. “Malice" is defined as conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

That the jury found Zelie's detention of Plaintiff Peterson constituted a false imprisonment does not necessarily mean the jury concluded the interview was conducted with the intent to cause harm or was despicable. The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion. Thus, the intent element of false imprisonment does not entail an

intent or motive to cause harm; indeed false imprisonments often appear to arise from initially legitimate motives.

Similarly, even if some force had been used to detain Plaintiff Peterson it would not mean there was sufficient evidence of oppression, fraud, or malice to warrant a trial on the punitive damages issue. In *Beau v. Ketchum* (Columbia Supreme Court, 1953) for example, the plaintiff recovered only nominal damages for being falsely imprisoned, because no actual damages were sustained and there was no evidence of oppression, fraud, or malice. Although the defendants in *Beau* had caused the plaintiff's forcible removal and arrest, the court found that the mere use of force does not constitute evidence of oppression, fraud, or malice where only a reasonable and necessary amount of force was used in the detention.

Under a reading of the facts most generous to Peterson, defendant Zelie cannot be viewed as having been guilty of the oppression, fraud or malice necessary to justify a punitive damage award for the tort of false imprisonment. The facts contain no suggestion of fraud. The facts only mildly hint at malice, and while Zelie did confine Peterson, it was for only a brief period of time sufficient to demonstrate that in fact Peterson had not paid for the hockey game. There are no facts indicating the confinement was intended to cause injury to Peterson or was undertaken by Zelie with a willful and conscious disregard of the rights and safety of Peterson. Similarly, there is no evidence that Zelie subjected Peterson to a cruel and unjust hardship in conscious disregard of Peterson’s rights. Zelie thought Peterson was attempting to steal the hockey game, and in fact Peterson had not paid for the hockey game. We note that since these events occurred, the legislature has enacted a "shopkeeper immunity" statute that provides a shopkeeper with immunity not only from punitive damages but from liability at all when the store detains a customer whom the store has reasonable cause to believe was stealing for a reasonable period of time. Columbia Penal Code §13-1. This statute cannot be applied retroactively, but does suggest a societal indication that the store's detaining, investigating, and ultimately releasing Peterson under the circumstances cannot be said to be despicable. Accordingly, Peterson did

not present clear and convincing evidence of oppression, fraud or malice sufficient to justify a punitive damages award.

Defendant Zelie also argues the trial judge should have granted its motion that judgment for the defendant should be ordered because plaintiff's pleadings and evidence established that plaintiff had released defendant from any liability arising out of plaintiff's detention. Plaintiff Peterson, in response, claims that the release was obtained by duress and it is therefore voidable.

A signed promise by a plaintiff to refrain from suit is entitled to a strong presumption of enforceability. Nevertheless, a plaintiff can avoid summary judgment by demonstrating that there are factual matters to be resolved concerning the existence of the release, the meaning of the release, or the enforceability of the release. For example, if a plaintiff can demonstrate that there are disputed facts concerning whether the release was obtained by overreaching, or was the result of economic duress, or the plaintiff lacked the capacity to enter into the release, the matter cannot be resolved by summary judgment. The parties must go to trial, not on the underlying matter of the lawsuit, but on the issue concerning whether the release is valid and enforceable.

Affirmed in part, reversed in part.

Rafton v. Dorman's Donut House, Inc.

Columbia Court of Appeal (1985)

Plaintiff Nancy Rafton (“Rafton”) appeals from an order of the trial court granting defendant Dorman’s Donut House, Inc.’s (“Dorman’s”) motion for summary judgment. Plaintiff Rafton contends that the trial court erred in entering summary judgment against her because a genuine issue of material fact existed concerning her charge that she was falsely detained and imprisoned. For the reasons that follow, we affirm the trial court's decision.

Plaintiff Rafton’s complaint alleged that she was employed as a clerk in defendant's donut shop in Meyers, Columbia, for approximately three years; that defendant Dorman’s, through its agents and employees, Mac Betts, William Conn, and Joseph Jackson, accused her of selling donuts without registering sales and thereby pocketing defendant Dorman’s monies; and that she was falsely detained and imprisoned against her will in a room located on Dorman’s premises, with force, and without probable and reasonable cause, by defendant Dorman's employees.

Defendant Dorman’s denied the material allegations of Rafton’s complaint and filed an affirmative defense that alleged it was a merchant; that any questioning of Rafton by its employees, Betts, Conn, and Jackson, was performed only after the employees had reasonable grounds to believe that Rafton had committed retail theft while working for defendant Dorman; that any alleged detention for questioning was limited solely to an inquiry as to whether Rafton had failed to account for certain retail sales; and that such inquiry took place in a reasonable manner and for a reasonable length of time. Defendant Dorman’s subsequently moved for summary judgment, arguing that the Plaintiff Rafton's false imprisonment complaint that she was held against her will by her employers in a certain room of a Dorman's Donut House was contradicted by her testimony in a discovery deposition. The transcript of the deposition indicated that Plaintiff Rafton testified that she had voluntarily complied with Betts, Conn, and Jackson’s request to speak privately with her regarding the matter of shortages in her

cash register on April 9, 1981, and that when she no longer wished to continue her conversation with her employers, she got up and went home, electing never to return to her job. Rafton's response to Dorman's motion for summary judgment did not contradict the statements that she had made in her discovery deposition.

The trial court entered summary judgment for defendant Dorman's. Plaintiff Rafton appeals from that order.

Plaintiff Rafton asserts that the trial court erred in granting defendant Dorman's motion for summary judgment as there exists a genuine issue of material fact. She posits that she felt compelled to remain in the baking room, where she had gone after Betts and Conn requested they speak privately with her, so that she could protect her reputation by protesting her innocence to the two men, and that she left the room once she began to shake and feel ill. Additionally, she attributes her "serious emotional upset" to her feelings of intimidation that she contends were caused by: William Conn and Joseph Jackson each sitting directly next to her during questioning, yellow pad and pencil in hand; Mac Betts' repeated statement that his briefcase contained proof of her guilt; and his raised voice.

The common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. Imprisonment has been defined as any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go. In order for a false imprisonment to be present, there must be actual or legal intent to restrain. Unlawful restraint may be effected by words alone, by acts alone, or both; actual force is unnecessary to an action in false imprisonment. The Restatement of Torts specifies ways in which an actor may bring about the confinement required as an element of false imprisonment, including (1) actual or apparent physical barriers; (2) overpowering physical force, or by submission to physical force; (3) threats of physical force; (4) other duress; and (5) asserted legal authority. Restatement (Second) of Torts §§38-41 (1965). It is essential, however, that the confinement be against the plaintiff's will and, if a

person voluntarily consents to the confinement, there can be no false imprisonment. Moral pressure, as where the plaintiff remains with the defendant to clear himself of suspicion of theft, is not enough.

In the case at bar, we are confronted with Plaintiff Rafton's testimony, given under oath, that she voluntarily accompanied Mac Betts and William Conn to the baking room; that she stayed in the room in order to protect her reputation; that she was never threatened with the loss of her job; that she was never in fear of her safety; and that at no time was she prevented from exiting the baking room. Her affidavit, in which she averred that she left the baking room after she began to shake and when she felt that she was becoming ill, does not place into issue material facts which she had previously removed from contention. In her discovery deposition, given under oath, she stated that she "got up and left" when Mac Betts asked her how long the cash register "shorting" had been going on.

In the tort of false imprisonment, it is not enough for Plaintiff Rafton to have felt "compelled" to remain in the baking room in order to protect her reputation, for the evidence must establish a restraint against her will, as where she yields to force, to the threat of force, or the assertion of authority. In the present case, our search of the record reveals no evidence that Plaintiff Rafton yielded to constraint of a threat, express or implied, or to physical force of any kind. Also, absent evidence that Plaintiff Rafton accompanied Betts and Conn against her will, we cannot say that she was imprisoned or unlawfully detained by defendant Dorman's employees.

For the reasons stated above, we conclude that the trial court properly granted defendant Dorman's motion for summary judgment, as there exists no question of material fact in the present case.

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Answer 1 to Performance Test A

Memorandum

To: Mary Hamline
From: Applicant
Date: July 29, 2008
Re: Chris Pearson v. Savings Galore

Below is the requested information regarding our client, Chris Pearson's ("Pearson") possible civil claim against Savings Galore supermarket ("the store").

I. **Elements of False Imprisonment**

Under the Restatement of Torts section 35, an actor is subject to liability for false imprisonment if the actor (1) intends to confine the plaintiff or a third person; (2) within fixed boundaries; (3) there is actual confinement; and (4) the person confined is aware of the confinement or is harmed by it. James v. Smitty's ("James"). Similarly, the common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. Rafton v. Dorman's Donuts ("Rafton").

A. Intent to Confine

First, Pearson must establish that the detective intended to confine him. In the interview, Pearson indicated that as he exited the store, the detective approached him and yelled, "Hold it right there!" The detective then indicated that she was going to "have to take [Pearson] into [the store]." After Pearson's friend fled, the detective told Pearson to come with her into the store. She then picked up the bags and herded Pearson into the store and into the office. She left Pearson in the [room] with the door closed. These facts indicate that the detective intended to confine Pearson.

B. Confinement to Fixed Boundaries

Second, Pearson must establish that the confinement was to a bounded area. As noted, the detective placed Pearson in a room, in the back of the store, with no windows. She left Pearson in the room and closed the door. While Pearson did not check to see whether the door was locked, he believed he heard the detective lock the door. Further, he was frightened and could hear the detective talking to the other security guards right outside the door. Because he was in a closed room, with no

windows, and the store's agents stood directly outside the door, Pearson had no reasonable means of leaving the room. Thus, he was confined to a bounded area.

C. Actual Confinement

To imprison the plaintiff, "there must be an unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or go where he does not wish to go." Rafton. However, actual force is unnecessary and the restraint my be by words alone. Rafton. Similarly, under the Restatement (Second) of Torts, a plaintiff can be confined by actual or apparent physical barriers, overpowering physical force, threats of physical force, other duress, or asserted legal authority. Rafton.

Here, Pearson was compelled to follow [the] detective into the room and to remain in the room against his will. Although the detective did not force him into the room, she picked up the grocery bags and herded him into the store. She was a large and strong woman, and Pearson has indicated that he felt he could not have left at that point because the detective likely would have tackled him if he tried. Further, the detective asserted that she had legal authority to detain Pearson as an associate of a known shoplifter. For example, she stated that Pearson was in "big trouble" and ordered him to come with her. Thus, Pearson was compelled against his will to follow the detective into the room.

Once in the room, Pearson was not able to leave. The room had no windows and only one door. The store might argue that there was no actual confinement because the door was not locked. Although, Pearson is not certain whether the door was locked, he believed that he heard them lock the door. Nonetheless, whether the door was locked is not controlling because imprisonment does not require actual force preventing release. Instead, words or threats of force can be enough to establish actual confinement.

Similarly, the store might argue that there was no confinement because Pearson did not believe that the store's agents were going to physically harm him. However, as noted in Rafton, words alone can be sufficient to effectuate an unlawful restraint. So long as the confinement was against the plaintiff's will and a result of threatening words or conduct, there is imprisonment.

Here, although Pearson did not believe the store's agents were going to rough him up, he believed they were going to try to intimidate him somehow and hold him for a long period of time. While in the room, either the detective or other agents accompanied Pearson or they stood directly outside of the door, physically preventing his exit. Further, the agents directly stated that they did not have to let Pearson go, implying that

they had legal authority to detain him.

It should be noted that where the plaintiff voluntarily consents to the confinement, there can be no confinement. Moral pressure, such as remaining to clear one's own name, is not sufficient to establish actual confinement. For example, in Rafton, the plaintiff voluntarily accompanied the defendants' agents into a room. She stayed in the room to protect her reputation, was never threatened, and never feared for her safety. Further, she was able to actually leave the room when she decided that she wanted to leave. Under those circumstances the court found that the plaintiff was not restrained against her will merely because she felt compelled to stay to protect her reputation.

On the other hand, here, Pearson did not consent to the confinement. Although the detective did not physically force Pearson into the room, she picked up the grocery bags and herded him into the store. The detective was a large strong woman, and Pearson has indicated that walking away did not seem like an option because the detective likely would have tackled him. He felt as if he had no other options and was compelled to follow Pearson into the store. Once he was in the store, the door remained closed and the store's agents continued to indicate that he was not free to leave by implying that he could only leave if he told them his roommate's name and address.

Thus, given that the store's agents confined Pearson by actual or apparent physical barriers (the closed door, lack of windows, and their physical presence) and asserted a claim of legal authority, Pearson will likely be able to establish that he was actually confined against his will.

D. Awareness of or Harm by Confinement

Finally, here Pearson was both aware of and harmed by the confinement. He was aware of the confinement because the detective closed the door, Pearson believed she locked the door, and the agents stood directly outside of the door, preventing his departure. Further, as noted below in the damages section, the confinement harmed Pearson because he suffered mental distress and financial harm as a result of the confinement.

E. Likelihood of Pearson's Success on a Claim of False Imprisonment

Because the store's agents intended to confine Pearson to a bounded area resulting in his actual confinement and his awareness of and harm by the confinement, Pearson will likely to be able to succeed on the merits of a false imprisonment claim.

II. **Compensable Injuries**

A claim of false imprisonment does not require proof of a physical injury. As the court noted in James v. Smitty's (James), while negligent infliction of emotional distress requires a physical manifestation of injuries, a claim for false imprisonment does not required such physical injury. It is sufficient for a plaintiff to suffer "transitory physical phenomena" such as nightmares and sleep disturbances. There, the court awarded claimant, a child incidentally confined because of his parent's confinement, compensation for loss of time, for physical discomfort or inconvenience, and for resulting physical illness or injury to health. The court noted that the injury resulting from false imprisonment is largely mental suffering, including humiliation.

Thus, here, if Pearson establishes his claim for false imprisonment, he will be able to recover damages for his mental suffering. Pearson's doctor, Dr. Romeo, has indicated that Pearson suffers from significantly lower than normal energy and motivation levels, a sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities. Dr. Romeo [is] reasonably confident the injuries are a manifestation of posttraumatic stress disorder caused by the incident at Savings Galore. He is willing to sign an affidavit stating such facts and conclusions and may be willing to testify.

Further, Pearson will be able to recover for any physical and economic suffering, including compensation for loss of time, physical discomfort or inconvenience, and for the groceries lost and retained by the store as a result of the improper detention.

<u>Punitive Damages</u>

Under Columbia law, a plaintiff may recover damages for false imprisonment if the plaintiff establishes, by clear and convincing evidence, that the defendant is guilty of oppression, fraud, or malice. Peterson v. Zelie ("Peterson"). Where the defendant uses reasonable and necessary force to detain the plaintiff, the fact of force is not sufficient to establish oppression, fraud or malice.

For example, in Peterson the court found that the defendant was not liable for punitive damages because they did not act with fraud, malice, or oppression. There, the defendant detained the plaintiff for only a brief period of time sufficient to show that the plaintiff had not paid for the item in question. There was not evidence that the confinement was intended to cause injury to the plaintiff or was undertaken with a willful and conscious disregard of the rights and safety of the plaintiff. Further, there was not evidence of cruel and unusual hardship in conscious disregard of the plaintiff's rights.

Malice

Malice is conduct intended to cause injury to the plaintiff or despicable conduct carried on by the defendant with a willful and conscious disregard for the right or safety of others. Peterson. Here, there does not appear to be conduct rising to the level of willful or conscious disregard for Pearson's rights. The store's agents may have reasonably believed that they had a right to detain Pearson and there is no evidence of an improper motive. The detention was for only one hour and therefore not for an unreasonable period of time. There is no indication that the agents were aware of Pearson's nervousness or tendency to suffer anxiety, and there is no indication that they attempted to exploit this tendency in holding Pearson. As a result, there was no malice subjecting the store to punitive damages.

Oppression

Oppression is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. In this case, there is no indication that Pearson suffered cruel and unjust hardship. The detention was only for one hour and, as noted above, the agents did not exploit a known weakness in Pearson or subject him to physical or severe mental abuse.

Fraud

Fraud is an intentional misrepresentation of concealment of a material fact known to the defendant with the intention of the party of the defendant to deprive a person of property or legal rights or otherwise causing injury. There is no indication that the store's agents misrepresented or withheld a material fact in detaining Pearson. They may have believed they had a lawful right to detain Pearson. They may have believed they had a lawful right to detain Pearson. If they knew they did not have a lawful right to detain Pearson, then their misrepresenting this fact or their failure to disclose this fact might rise to the level of fraud. However, further evidence is needed.

Thus, because the store's agents did not act with fraud, malice or oppression, Pearson is unlikely to succeed if he claims punitive damages.

III. **The Store's Defenses**

The Store will likely argue that they are entitled to the Shopkeeper's privilege in detaining Pearson and that Pearson waived his right to bring a false imprisonment claim against the store by signing the release form.

A. Shopkeeper's Privilege

Columbia Penal Code Section 13-1 provides a defense to a claim of false imprisonment. Subsection C provides that a merchant or a merchant's agent or employee may detain an individual reasonably suspected of shoplifting on the store's premises in a reasonable manner for a reasonable time for questioning. Further, under Subsection D, where the merchant or merchant's agent has reasonable cause to suspect an individual of shoplifting, they have a valid defense to a claim of false arrest, false or unlawful imprisonment, or wrongful detention.

Reasonable Suspicion: The Companion of a Shoplifter

In James, the court discussed the reasonableness of detaining an individual not suspected of shoplifting. There, the defendant detained the person suspected of shoplifting's four year old son. The court held that it was not reasonable for the defendant to detain the son for more than the time necessary to make sure the son would be under proper supervision. Further, in dicta, the court noted that the defendant lacked reasonable cause to detain the individual accompanying the suspected shoplifter because the defendant's agents testified that they did not consider the companion to have been involved in any illegal activity. Thus, it would not have been reasonable for the defendant to detain the companion.

Here, the detective did not suspect that Pearson shoplifted. When she originally stopped Pearson and his roommate, she acknowledged that she did not suspect Pearson of shoplifting. Pearson stated that he did not take the cashews, and the detective stated, "That's right, you didn't." As in James, where the defendant lacked reasonable suspicion to believe the shoplifter's companion was involved in the shoplifting, here, the detective lacked reasonable suspicion to believe that Pearson had shoplifted, and, in fact, admitted that she did not believe that Pearson had shoplifted. Because the store lacked a reasonable suspicion, under the dicta in James, the store cannot invoke the shopkeeper's privilege to justify Pearson's detention.

Reasonable Manner

The store's detective "herded" Pearson into the back office. While the agents did not threaten Pearson with physical force, they did impliedly threaten him with the threat of criminal or civil liability by asserting that they did not have to let him go and that he was not free to leave. However, as noted above, they may have reasonably believed that they were entitled to detain Pearson. Thus, because there was no overt physical force or threats of physical force, a court is likely to find that the manner of detention was reasonable.

Reasonable Time

The store's agents detained Pearson for approximately one hour. This does not appear to be an unreasonable time. However, Pearson can argue that it was an unreasonable time because the detective knew that he did not commit the crime. Nonetheless, as noted above, even if the detective knew he did not commit the crime, the agents may have had a reasonable basis for believing they were entitled to detain Pearson. If the agents had such a reasonable basis, then detaining him for one hour does not appear unreasonable.

Likelihood of Success

Although a court will likely find that the manner and time of detention were reasonable, as noted above, the store cannot invoke the shopkeeper's privilege as a defense to their detention of James because the agents lacked a reasonable suspicion to believe that Pearson shoplifted.

B. Waiver by Release of Liability

"In general, a release surrenders the legal rights or obligations between the parties to an agreement." Gaspard v. American Telco ("Gaspard"). If valid, a release completely bars a later action based on matters covered in the release. A signed release creates a strong presumption of enforceability. Gaspard. Nonetheless, a victim can void a signed release if they establish that the terms of the release are ambiguous or the signing of the release was a result of duress.

Here, Pearson clearly signed the release. Thus, the release is entitled to the presumption of enforceability. However, Pearson may be able to void the release if he establishes that the release was ambiguous or a result of duress.

Ambiguity

In Gaspard, the court held that because the release expressly mentioned the claim that the plaintiff asserted (claims arising from termination of employment), the release was not ambiguous. Similarly, here the release expressly mentioned claims arising from false imprisonment. Thus, under the reasoning of Gaspard, Pearson cannot argue that the release is ambiguous because the release expressly covers his potential claim.

Duress

To establish a claim of duress, Pearson must show that (1) the promise was made in response to a threat; (2) the threat was severe enough to reasonably convince the will of the promisor to make the promise; and (3) the threat was improper rather than just hard bargaining. Gaspard.

The Sufficiency of the Threat

First, Pearson must show that he signed the agreement because of a threat. While there is no clear test for determining what is a sufficient threat to invoke the rule, section 176 of the Restatement (Second) of Contracts indicates that a threat is improper if the threat itself constitutes a crime or a tort, the threat is of criminal prosecution, or the threat is of civil process and is made in bad faith.

Here, it is not entirely clear what the store threatened. The detective told Pearson that if he gave the store his roommate's name and address, the store would let him go. Further, the store directly indicated that they did not have to let Pearson go and told Pearson that if he signed a release, they would let him go.

While the store did not directly threaten criminal prosecution or a civil suit, Pearson could have reasonably believed that, in stating that they had a right to detain him, the store was indicating that they could file criminal charges or bring a civil claim against Pearson. In addition, the continued detention of Pearson might qualify as a tort or a crime in and of itself. As noted above, the store's threats and intimidation led Pearson to reasonably believe that he was not free to leave. This is an element of the false imprisonment claim.

In Gaspard, the plaintiff claimed only economic duress and not a physical threat inducing her to sign the release. Here, on the other hand, Pearson was told that he would not be able to leave if he did not sign the release. This, coupled with the intimidation and Pearson's belief that the door was locked, is a physical threat because it restricted Pearson's movement, making him believe that he had to stay where he was.

Reasonable Inducement to Act

Here, the threat reasonably induced Pearson to sign the waiver because he believed he was not free to leave. Further, Pearson did not believe anyone would come to his assistance. Under the circumstances, a reasonable person would believe they did not have a right to leave and might be held indefinitely. Thus, the threat reasonably induced Pearson to sign the release.

An Improper Threat

Finally, the threat rose above hard bargaining to impropriety. The agents indicated that they had a lawful right to detain Pearson and gave no indication that they would release him. Pearson could have been detained indefinitely, which is a significant violation of his freedom. Thus, the threat rose above hard bargaining.

Conclusion:
Pearson will not be able to rebut the defense of a liability waiver by establishing that the waiver was ambiguous. He may be able to establish that the signing of the release was a result of duress. If he establishes this, then he can void the release and sue under a claim of false imprisonment.

Answer 2 to Performance Test A

Memorandum

To: Mary Hamline
Re: Chris Pearson v. Savings Galore

As requested, here is an evaluation of Mr. Pearson's civil claim for false imprisonment against Savings Galore. The memorandum includes: (I) the elements necessary to succeed on a false imprisonment claim, (2) a factual analysis of the likelihood of Mr. Pearson prevailing on a false imprisonment claim, (3) an analysis of the injuries incurred by Mr. Pearson that may be compensable, (4) the likelihood of punitive damage awards given Mr. Pearson's injuries, and (5) the defenses that Savings Galore may raise and the likelihood o their success.

I. Elements that must be proven for Pearson to succeed on a false imprisonment claim

False imprisonment is defined as the unlawful restraint of an individual's personal liberty or freedom of locomotion (Rafton v. Dorman's Donut House). Under the Restatement (Second) of Torts, an actor is subject to liability for false imprisonment if the actor: (1) acts intending to confine another person within boundaries fixed by actor, (2) the act directly or indirectly results in such a confinement of the other person, and (3) the other person is conscious of confinement or harmed by it.

A. The actor acts intending to confine another person within boundaries fixed by actor.
The actor must actually intend to restrain the victim/plaintiff. The intent may be actual or legal intent. The actual unlawful restraint may be effected via words, acts, or both. Actual force is not necessary for liability in a false imprisonment claim (Rafton).

B. The act directly or indirectly results in such a confinement of the other person.
The act must result in confinement of the victim. Confinement can be brought about in many ways, including (1) actual/apparent physical barriers, (2) overpowering physical force or submission to physical force, (3) threats of physical force, (4) other duress, or (5) asserted legal authority (Restatement Second of Torts). The confinement must actually be, against the plaintiffs will--voluntary consent to a confinement is not against the plaintiff’s will. Furthermore, moral pressure to accede to a confinement is not enough (Rafton).

C. The other person is conscious of confinement or harmed by it.
The victim/plaintiff must know of the confinement or be harmed by it.

II. **Application of the facts of Pearson's situation to the elements and assessment of the likelihood that Pearson would prevail on a claim.**

Mr. Pearson's situation would have to meet all three elements of the false imprisonment tort in order to succeed.

A. Did Savings Galore act intending to confine Mr. Pearson within boundaries fixed by Savings Galore?

Savings Galore (SG) would have to act intending to confine Pearson within fixed boundaries. There are several instances where SG's house detective and security officer's actions could rise to the level of intending to confine Pearson within fixed boundaries.

I. Grabbing Pearson's arm.

The SG detective yelled "Hold it right there!" and grabbed Pearson's arm. Grabbing a person's arm is likely an attempt to prevent them from leaving. Accompanied with her words, it is clear that the detective's actions were meant to prevent Pearson from leaving the area. SG is unlikely to be able to argue against this. However, this confinement only resulted in Pearson's confinement in that spot in the parking lot, and was over once she removed her hold on his arm.

II. Threats to Pearson

Restraint may be affected via words or threats; actual force is unnecessary. Here, the house detective of Savings Galore told Pearson, among other things, "I'm going to have to take you in" and "You come with me right now. You ...are in big trouble." Here, the implied threat that Pearson would be in legal trouble should be enough to constitute action intending to confine. Even though Pearson protested that he had done nothing wrong, the detective replied that she "didn't care," and repeated that he was to go with her. This threat of legal action is likely enough action to lead a reasonable person to believe he had no other choice.

Pearson may also argue the threat of force, since he said that "she would probably have tackled me," if he tried to run. Though this argument is less plausible considering that the detective made no such move, he may argue that her appearance and large[ness], combined with her earlier hold on his arm and the threats that he was in trouble and should come with her, would constitute a threat of force.

The detective also took hold of his groceries that Pearson's roommate had dropped and "herded" Pearson into the room. Although courts have not addressed the issue of whether taking a person's rightful belongings consists of the necessary action for false imprisonment, it is likely that taking the groceries would suffice. The groceries belonged to Pearson and had been paid for; they were his rightful possessions. The detective deprived Pearson of the groceries and implied that she was taking them with her. Pearson could argue that he should not be forced to give up his rightful possessions and was forced to follow her in order to recover them; this could constitute a wrongful threat sufficient for an action to confine.

III. Placing Mr. Pearson into a windowless room

The detective took Pearson to a windowless office in the back of the store, summoned two large security officers, and closed the door, leaving Pearson inside. Pearson also states that he believed they locked the door, although he is unsure. Courts have not addressed issues of belief of confinement via locks, but looking at the totality of the circumstances - the three people standing outside, the windowless room, and the admonition to Pearson that he was in trouble, confinement in the room should be sufficient to constitute an action intending to confine.

B. Did Savings Galore's actions directly or indirectly result in the confinement of Mr. Pearson?

SG would argue that Pearson's confinement was not the direct result of its employees' actions. They would argue that Pearson came voluntarily, of his own free [will], and that he was free to leave at any time. They would also argue that he came with them due to moral pressure, or an attempt to protect his reputation.

However, Pearson would argue that the confinement was due to either threat of physical force or asserted legal authority. The threat of force argument would be that there were three people, all significantly larger than him, standing outside the door or with him in the room at all times. This would be enough to prevent a reasonable person from leaving, due to the threat of being tackled or overpowered. The threat of asserted legal authority was via the detective's statement that P had to come with her, and that he was in "big trouble," which implied trouble with the law. This threat of legal authority should be considered enough to result in P's confinement.

SG may also argue that Pearson was free to leave at any time. If they did not in fact lock the door or intend to hold him, then P's waiting would simply be of his own volition. They would argue that P did not simply try to walk out of there. This argument is unlikely to succeed, again given the circumstances – there were security guards standing

around, and they repeatedly told him that he could leave only after giving up the name and address of his roommate, or additionally after signing the release form. They were aware that P considered himself confined, as he repeatedly requested to be allowed to leave, and did not disabuse him of that notion. Additionally, P feared that if he did try to leave, he would be assaulted by the guards. This is probably a reasonable fear considering the disparities in their sizes and their hostile attitudes towards P. Thus, this argument is unlikely to succeed.

SG may also argue that P stayed due to moral pressure and to clear his reputation. According to Rafton, moral pressure is not enough to constitute confinement. In Rafton, the plaintiff testified that she voluntarily accompanied the defendants into a room and stayed there in order to protect her reputation. Additionally, the plaintiff eventually left the room on her own. Rafton can be distinguished here, as Pearson's interview reveals that his accompaniment was not voluntary - he felt like he had no other choice, as leaving "didn't seem like an option." He makes no mention of staying behind to protect his reputation - he thought he had no other choice, and wished to leave during the confinement. He believed that he was not allowed to leave until they had given him the release to sign. His belief is likely reasonable given the circumstances - 3 people in the room with him, constantly telling him that they would only let him go after he gave them his friend's name and address, and stating that "if you sign [the release], we'll let you go."

Therefore, it is likely that SG's actions will be found to have directly resulted in P's confinement.

C. Was Mr. Pearson conscious of his confinement or harmed by his confinement?
Pearson's testimony is clear that he was conscious of his confinement and also harmed by it. Pearson stated that he "was pretty scared," was having trouble breathing, and his heart was pounding. He repeatedly told SG employees that "You have no right to do this to me," and that he wished to be let go immediately, showing that he understood he was being confined and wished to be let go. (The harm resulting from his confinement is addressed below.) He, at the very least, clearly understood that he was confined. This factor is likely met.

For these reasons, Pearson should be able to make out a prima facie case of false imprisonment.

III. **Identify the injuries incurred by Pearson that would be compensable given these facts**

A claim of false imprisonment does not require proof of physical damages - a plaintiff will be entitled to compensation for loss of time, physical discomfort, inconvenience, resulting physical illness or injury (James v. Smitty's). In Smitty's, a child defendant's injuries consisting of nightmares and sleep disturbances for two months were considered sufficient damages to justify compensation under a FI claim.

A. Sleeplessness and nightmares

Here, P's injuries were very similar to the child in Smitty's. P stated that he cannot sleep, that he has nightmares, and that he has consulted a psychiatrist several times despite not having any health insurance. These damages would probably be recoverable.

B. Posttraumatic stress disorder

Additionally, Dr. Romeo stated that the symptoms P suffers from, including low energy/motivation, sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities, are consistent with posttraumatic stress disorder. Dr. Romeo stated that such symptoms may persist for as long as a year and P does seem to be suffering, and that posttraumatic stress is often created by a stressful or traumatic event. It is likely that the event in question was P's confinement in the store. Dr. Romeo would be willing to sign an affidavit and testify if necessary. Therefore, it is likely that P will be able to recover for his posttraumatic stress.

P also stated that he "could have" had a panic attack or heart failure, and that he was "really scared." These injuries are sufficiently uncertain that he would probably not be able to recover for them.

C. Monetary damages

As stated above, P consulted a psychiatrist for his problems despite not having health insurance. His consultation with the psychiatrist arose directly due to his imprisonment and thus, he would probably be able to recover for the cost of seeing the psychiatrist.

Additionally, P was not allowed to take his food or groceries that had already been purchased for a couple of hundred dollars. The guards kept the food (and P stated that he "lost the money from all the food. Who knows what they did with it"?) P would probably be able to recover the cost of those groceries.

IV. The likelihood of punitive damages given Pearson's situation

Under Peterson v. Zelie, punitive damages are recoverable for false imprisonment when the plaintiff proves by clear and convincing evidence that D is guilty of oppression, fraud, or malice. Under Beau v. Ketchum, the mere use of force is not evidence of oppression, fraud, malice, if the force is only reasonable and necessary for detention.

Here, in order to recover punitive damages, P will have to show that SG acted with fraud, oppression, or malice.

A. Fraud

Fraud is defined as intentional misrepresentation, deceit, or concealment of material facts known to D with the intention of depriving person of legal rights or otherwise causing injury.

Here, there is unlikely to be a showing of fraud. SG's employees did not act to deceive P or misrepresent/conceal a material fact. Though P may have an argument that they knew he was free to leave and did not have any right to keep him there, the fact that they repeatedly told him that he would be free to leave after he did give up his roommate or signed the release could constitute fraud. This is a rather attenuated argument as they never explicitly said that they had the right to hold him, nor did they lie in refusing to let him go after he had signed the release. It is unlikely that P would be able to show fraud.

B. Oppression

Oppression is defined as despicable conduct that subjects P to cruel and unjust hardship in disregard of that person's rights.

Here, P would argue that holding him while knowing he had done nothing wrong is despicable conduct. Although Zelie stated that exercise of a shopkeeper's privilege in detaining a suspect with reasonable cause was not despicable, here it was clear that the SG employees knew P had done nothing wrong. The detective stated that she "didn't care" that P hadn't done anything. The guards repeatedly stated that he would be let go if he gave up his friend show[ing] that they knew P was not at fault and they thus did not have the right to hold him.

P would argue that his confinement for over an hour in a windowless back office, with several security officers surrounding him, was a cruel and unjust hardship. However, although false imprisonment does disregard a person's rights, it may be difficult to argue that confinement of only an hour consists in "cruel and unjust" hardship. P may also

argue that the harassment and coercion he faced during that hour, combined with the confinement, should be enough to constitute oppression. However, this would be a difficult argument. A court is unlikely to find any oppression was present.

C. Malice

Malice is defined as conduct intended by D to cause injury to P, or despicable conduct carried on by D with willful/conscious disregard of rights/safety of others.

P may have the most luck with this prong of the argument. The conduct of the security cops showed that they intended to falsely imprison him (which would qualify as an injury). The despicable conduct analysis would be similar to above, but here the despicable conduct must be accompanied by willful and conscious disregard of P's rights. As analyzed above, the guards clearly knew they did not have the right to hold P and were simply threatening him in order to get information about his roommate - they consciously ignored his right to leave (despite his constant pleading) and continued questioning him. This unfair pressure/coercion may rise to the level of despicable conduct with conscious disregard of P's rights.

In the end, P may be able to obtain punitive damages by showing that SG acted with malice via despicable conduct carried on with willful and conscious disregard of his rights, although this would be a difficult argument.

V. **Possible defenses that Savings Galore may raise, and an assessment of the likelihood that store would prevail on each defense**.

Savings Galore may raise three possible defenses against a claim of false imprisonment. The defenses are the release he signed, voluntariness, and shopkeeper's privilege.

A. Release

Under Gaspard v. American Telco, a release is a complete bar to recovery and comes with a strong presumption of enforceability. If P signed a release, the burden would be shifted to P to attack the release or establish a fact issue in avoidance of it. Releases can be attacked via ambiguity and duress.

Since P did sign the release, he would have to attack it via one of these methods.

1. Ambiguity

A release may be attacked for being ambiguous. In Gaspard, the court held that a release that stated the signor was releasing D from all claims arising from employment

with D was an unambiguous release.

Here, P is unlikely to succeed with this argument. The release clearly and ambiguously states that P released SG from all causes of action, including claims of false imprisonment, on account of his detainment. Although P could argue that he did not read the release, he did sign it and therefore has no defense of ambiguity.

2. Duress

Alternatively, P could attack the validity of the release via duress. Duress traditionally required some sort of harm; modern courts have interpreted it to require an overbearing threat that leaves the victim with no reasonable alternative. (Gaspard). This can be shown by demonstrating three elements: 1. a promise made in response to threat (where the promisee created or issued the threat), 2. that the threat was severe enough to reasonably convince the will of the promisor to make promise, and that there were no sufficient alternatives to making the promise, and 3. the threat was improper, not just hard bargaining.

i. Was the promise made in response to a threat where the promisee created the threat

Here, P would argue that the "threat" was continued imprisonment. SG clearly told him that they would let him go if he signed the release, which he did, so the element of the promise made in response to a threat is met. The threat of imprisonment was also created by SG, since they were the ones who held him in the first place.

ii. Was the threat severe enough to reasonably convince the will of the promisor to make promise to make promise, and were there any sufficient alternatives?

P would argue that the threat was severe enough to make him sign the release. He would argue that he had been there over an hour, had been constantly questioned and harassed, and did not know when he would be let go. P was also extremely anxious and earlier had had trouble breathing. P could argue that the prospect of continued imprisonment was severe enough to convince him to sign the release, and, as he stated, he "would have signed it no matter what it said."

Additionally, no one besides his roommate (who was not going to come to his aid) knew he was there, so he had no alternative since no one else would come looking for him. His only options were to sign the release or wait for SG to release him. It should not be

considered an "alternative" to have to rely on the person creating or making the threat and demanding the promise to provide a better option. Therefore, this prong was likely met.

iii Was the threat improper and not just hard bargaining?

Here, the question is whether the threat (of continued imprisonment) was improper or just "hard bargaining." According to the Restatement (2d) of Contracts, a threat is improper if it threatens a crime or tort. Additionally, a threat is improper if the resulting exchange is not on fair terms, and either the threatened act would harm the recipient and would not significantly benefit the threatening party, or what is threatened is a use of power for illegitimate ends.

Here, the threat was the threat of continued false imprisonment, which is an improper tort. While SG might argue that they never actually threatened to hold him further if he did not sign, they did state that they would let P go if he did sign the release. P's options were therefore to continue his imprisonment and hope that they would release him later, or just sign the release. This is not truly a "choice" made by anyone with free will. Given the totality of the circumstances, including his previous confinement for over an hour, P would likely be able to show that this threat was improper.

Additionally, P could argue that the exchange was not on fair terms. Here, his part of the bargain was to sign a release that gave up his legal right to sue for a wrongful tort. SG's side of the bargain was simply to give up someone who had done nothing wrong and they clearly could not gain any information from. SG had no benefit (or right) to continue keeping P confined, since he was refusing to give any information about his roommate. Therefore, giving up this nonexistent right/benefit in exchange for a waiver of a legal right is an unbalanced bargain. Furthermore, this is a use of SG’s power for illegitimate ends, as they held him in their custody and threatened to continue the false imprisonment if he did not sign.

In the end, P will probably be able to show that the release is invalid because it was a result of duress (a threat by D that left P with no reasonable alternatives).

B. Voluntariness

SG may also raise a defense of P's voluntary acquiescence to the confinement. Although this is not a defense per se and rather goes to one of the elements of the claim, it may still be a valid argument. SG would argue that P accompanied the guard of his own free will, remained in the room despite it not being locked and being free to leave, or stayed there out of a sense of moral pressure (Rafton).

As addressed above, these arguments are unlikely to succeed given the circumstances

of the confinement (threats of legal action, confinement in a small room, 3 guards standing around, harassment, etc.) Please see the above analysis distinguishing Rafton from the instant case.

C. Shopkeeper's Privilege

Lastly, SG may assert the "shopkeeper's privilege" in S.13-1 of the Columbia Penal Code. 13-1 provides that merchant (and its agents/employees) may, with reasonable cause, detain persons suspected of shoplifting in a reasonable manner and for a reasonable time, for questioning or summoning a law enforcement officer. A shoplifter is defined as someone who knowingly obtains the goods of another with the intent to deprive the other of the goods, by removing goods from the establishment without paying, or by concealment. The Code further provides that reasonable cause is a defense to civil action against a merchant (agent/employee) for false imprisonment.

It is difficult for SG to argue that it had reasonable cause to detain P. The detective's statement, upon being told that P had not done anything, was that she "didn't care." The actions of the guards in pressuring P to give up his friend, and their repeated claims that P would be free to go as long as he gave up his friend (who they said was "not much of a friend" since he had abandoned P), all go to show that the guards did not reasonably believe that P was the one who had shoplifted. Rather, they were detaining him because his friend was unavailable.

SG may argue that P knew that his friend had shoplifted, and thus P assisted in the shoplifting. However, James v. Smitty's is directly on point here. In Smitty's, a friend of the Defendant, who was vaguely aware that an item had been placed in the shopping cart and was not paid for, but had not seen the item being hidden, was detained. The court found that the friend was wrongfully detained, since the defendant "had no basis to believe [friend] had shoplifted or assisted…in any way." Furthermore, the court held that "A merchant does not have immunity to detain a companion of a suspected shoplifter unless the store has reasonable cause to believe that the companion was involved in the illegal activity."

Here, P was not involved in taking the cashews or consuming them, nor in leaving without paying. He was also not involved in taking or concealing the garden gloves. Although SG may argue that P did believe that his roommate stole things from time to time, in this case the detective clearly did not have reasonable cause to believe that P was involved in the shoplifting, as she stated that she "didn't care" that he had done nothing wrong and continuously pressured him to give up his roommate [or] rather pressure him to admit to being involved in the shoplifting. Therefore, this defense is unlikely to succeed.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

PEOPLE v. DUNCAN

FILE

PEOPLE v. DUNCAN

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.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. 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 performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it 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.
6. 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.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Warren County Prosecutor
Alicia Ouelette, District Attorney
Averil Park, Columbia

MEMORANDUM

To: Applicant

From: Laurie Shanks, Deputy District Attorney

Date: July 31, 2008

Re: **People v. Duncan**

We have indicted Raymond Duncan for the murder of Jennifer Clark. Mr. Duncan confessed to police detectives during an interview at the Averil Park police station. The interview was tape-recorded. We have, of course, turned the recording and transcript of the interview over to defense counsel. Defense counsel has filed a Notice of Motion to Suppress Evidence, seeking to suppress evidence of all statements made during the interview. We will oppose that motion. The defendant has ten days after filing his notice of motion to suppress to file the actual motion and accompanying Memorandum of Points and Authorities. I, however, want you to start work on our reply immediately. Please prepare a draft of a persuasive Memorandum of Points and Authorities that argues the motion should be denied.

Arguments on motions to suppress require a detailed showing of how the facts in the case relate to specific factors identified by the courts in suppression cases. Therefore, your memorandum should relate specific facts to those specific factors and conclude how your analysis would establish that the evidence should not be suppressed. Where appropriate, explain how the defendant's version of the facts is not credible. Finally, take care to anticipate arguments defense counsel is likely to make and explain why they are not persuasive. Your memorandum should dispense with a statement of facts. I will draft the statement of facts later.

EXCERPTS OF INTERVIEW OF RAYMOND DUNCAN
BY DETECTIVES TIMOTHY JAMES AND GREGORY MANDEL

Detective Timothy James ("James"): Mr. Duncan, it is now 12:25 p.m. on January 2, 2008, and you are here in the Averil Park police station with me, Detective Timothy James, and Detective Gregory Mandel. Is that correct?

Raymond Duncan ("Duncan"): Yes.

James: This interview is being tape-recorded. Is that okay with you?

Duncan: Sure.

James: How old are you, Mr. Duncan?

Duncan: 24.

James: Did you know Jennifer Clark?

Duncan: Yes. I met Jennifer in high school, but I didn't see her after she graduated. Last year, Jennifer and I reconnected through mutual friends.

James: Were you good friends?

Duncan: Sure.

James: How good a friend were you? I mean, did you have a key to her apartment?

Duncan: No. I mean we saw each other occasionally. She allowed me to borrow her car three or four times. I don't have a key to either her apartment or her car.

James: When did you last have contact with Jennifer?

Duncan: It was probably between 10:00 p.m. and 11:00 p.m. on Wednesday, December 20. Jennifer picked me up and left me at her apartment. Jennifer said her rent was due and she had to go somewhere and do something.

James: Were you still at her apartment when she returned?

Duncan: She returned about six hours later, around 4:00 a.m. on December 21.

James: What did the two of you do then?

Duncan: We watched television in the living room. I stayed until maybe 9:00 a.m., when she asked if I wanted to go home because someone was coming over.

James: Who was coming over?

Duncan: She didn't say who it was.

James: Did she drive you home?

Duncan: No. I borrowed her car and left. Jennifer told me to call her in a couple of hours.

James: Did she walk you to the door?

Duncan: Yes.

James: Did she lock the door behind you?

Duncan: She always locked the door. It's not the best neighborhood.

James: Did you see her after that?

Duncan: No.

James: What was Jennifer wearing when you left?

Duncan: She was wearing a short-sleeve, white T-shirt, and light-colored shorts.

James: Did you try calling her like she asked you to?

Duncan: Sure. I drove home in Jennifer's car and took a shower. I called Jennifer's cell and home telephones at least twice between 10:30 a.m. and 12:15 p.m., but there was no answer. Around 1:00 p.m. or 2:00 p.m., I drove to a friend's house and tried to reach Jennifer. Later I went to Pat Kinnikin's house and again tried to reach Jennifer but was unsuccessful. So, Pat and I went to a restaurant later that evening.

James: Did you try to contact her again?

Duncan: Between 6:00 p.m. and 7:00 p.m. we left the restaurant to return Jennifer's car, and Pat followed in his car. We drove to Jennifer's apartment and I parked her car. I hid the key inside the car like the other times I borrowed it.

James: You didn't knock on her door?

Duncan: No. She hadn't been answering the telephone. She did that sometimes. I assumed she wanted to be left alone.

James: When did you find out Jennifer was dead?

Duncan: The next day. I saw it on the news.

James: Mr. Duncan, I'm going to ask you some direct questions and I want you to give me direct answers. And, you need to realize what I'm looking for. I need to establish that what other people told me is credible and I'm also looking to see how truthful you are with me in our conversations here, okay?

Duncan: Sure.

James: Why didn't you contact the police after you learned she was dead?

Duncan: Look, I don't have a clean record. Besides, my fingerprints were probably everywhere around her apartment and car and I figured the police would contact me. And see, that's what happened. You came to my apartment, left a message. I called you back and agreed to come down to this interview. I don't have anything to hide, but let's be real, I have a record.

James: Did you stab Jennifer?

Duncan: No.

James: Did you mess with any windows in her apartment?

Duncan: No.

James: Were you on the patio or did you use the sliding glass door during your last visit? Would your fingerprints be out on the patio?

Duncan: I didn't use the patio the last time I was there.

James: Are you sure?

Duncan: Uh, I think I'd know, unless I--unless-- unless I just peeked out there. But I wasn't out there for a second or two if I was.

James: That's interesting. I talked to the people who live in the apartment complex, and so you're sure?

Duncan: Well, I could have stepped out on the patio. I may have even stuck my head out and looked. I might have, you know. But, I left out of the front door, and she locked the door behind me, and I went to the car.

James: That's a little more in line with what we're hearing, that you were on that patio. Two people were pretty darn sure you left from the patio.

Duncan: Not true. I left through the front door.

James: Who killed Jennifer?

Duncan: I don't know. I don't have a clue.

Detective Gregory Mandel ("Mandel"): I have to tell you, Mr. Duncan, I still am stuck on why you didn't call the police when you found out what happened.

James: Let's cut to the chase. We've talked to a lot of people and you need to be honest because we need to put this thing to an end. If you'd like to tell us that?

Duncan: What do you want to know?

James: I want to know what happened with Jennifer.

Duncan: I swear I don't know what happened with Jennifer.

James: Raymond, Raymond. We're past that, dude. We're way past that. You know what I mean? Would you like to tell me what happened? I know this is bugging you, man.

Duncan: I don't know what happened.

James: You know what happened to her. We already know what happened.

Duncan: Okay, what happened then?

James: Ray. There's no doubt in my mind that you did this to her. You know what I'm talking about. Don't put yourself in a position anymore where you have to lie. Okay? We just need to put a closure to this thing. You know what I mean. If there's a reason, there's a reason. But you need to let us know what that reason was.

Duncan: I have no reason for it, because I didn't do it.

James: Ray, Ray.

Duncan: Yes.

James: Take a deep breath. Okay. Tell me what happened.

Mandel: You made mention of the....

James: Hold on a second....

Duncan: Do you mind if I have a glass of water?

James: Sure.

Duncan: Thanks.

James: Ray, you've got to help us here. Tell us what happened. I have to say, what you've told us so far just doesn't fit with the evidence. Not just the witnesses, either.

Mandel: Come on, Ray. Jennifer's family needs to know. You've got to realize this is tearing them apart.

James: We've got physical evidence and witness statements. Now's the time to tell your side of the story.

Duncan: I've told you my side of the story. I wasn't there. Jennifer was my friend. I had no reason to kill her, and I didn't kill her.

Mandel: I have to say, Ray, all our information points to you. Your story doesn't quite add up and you need to clear the air because I understand it was probably not planned.

Duncan: I can't explain what happened because I don't know.

James: Well, I'll tell you how you can explain it, Ray, because when she died you were there. And I can establish that based on your own statements about the times you were there, coupled with scientific facts establishing the time and cause of death.

Duncan: I'm telling the truth. I wasn't there. I didn't do it.

James: There's no doubt in my mind, Ray, you did it, and I can prove it. The problem here is that you, for no reason, other than maybe fear, are painting yourself into a corner. You're putting yourself in a position where you're having to justify the time of death.

Duncan: Not true.

James: Here's what I think, Ray. You were angry with Jennifer because she slept with another guy that night.

Duncan: I don't know about what she did with other guys.

James: We have no doubt what happened. Ray, she was killed by somebody in that apartment that knew her. That apartment told us a lot of stuff, Ray. You go to church, Ray?

Duncan: Yes. Sometimes.

James: You know then, you've got to be forthright with this thing.

Duncan: I have been.

James: You didn't approve of Jennifer's lifestyle, did you?

Duncan: I don't judge people.

James: Let's go back to the time line.

* * * * *

James: But you did go out on the patio, didn't you?

Duncan: Okay. I unlocked the living room's sliding glass door and went to the patio. But I went back inside and locked the door.

James: See, Ray, this is what I figure. The killer must have been inside the apartment for a while because you had been there, alone, for nine hours on Wednesday evening until Jennifer returned at 4:00 a.m. on Thursday. Jennifer slept on the couch while you watched television until 9:00 a.m. You went out to the patio to look for her car, returned inside and locked the patio door. You said Jennifer locked the front door when you left. Jennifer was killed when she was asleep on the sofa, so how did the killer get inside the

apartment with all the doors locked?

Duncan: That's your problem. Maybe someone could have come over after I left with her car.

James: There's no way anyone came over. Look, Ray, this doesn't appear to be a first-degree murder, but it wasn't a random crime. Looks more like a heat of passion kind of thing. And, I have to tell you, everything points to you, Ray, and you know, again, I'm still sitting right here, trying to appeal to you and your sense of fairness.

Duncan: I didn't do it.

James: I'm going to tip my hand on one thing. Okay? I can put you on that patio. I can put you exiting that way. All right? I need you to give me a justification for going out that way instead of going out the front door. Otherwise, your story doesn't hold water.

Mandel: You need to know, Ray, Jennifer's neighbor was always sitting there watching people come and go. Why did you go out the patio and over that fence on the back porch? Why did you leave that way?

Duncan: Didn't I explain to you that I had entered that way, too?

James: Well, Ray, no you didn't. Explain it to us; put the cards on the table for us, man.

Duncan: I jumped over the balcony and I tapped on the window, and I jumped back over because nobody answered. And that was that morning after I had gone to the car. I went back for something. She didn't answer the door. I didn't have the house key. All I had was the car key. And, I knocked and she didn't answer, and I jumped over the balcony, and then knocked on the glass door, and nobody answered so I jumped back over and I left. I didn't go back into the apartment.

Mandel: Well, the neighbors said something else, so I guess we're still not on the same page. You need some more water?

Duncan: Please.

Mandel: Okay, let me get it for you.... Here, now, let's just sit back and relax for a minute and give this some thought.

Duncan: Can I get a cigarette?

Mandel: We can't smoke in the building, but, hey, let's get some coffee and go sit on the rooftop courtyard for that cigarette. Let me go and check it out.

James: Mandel is a good guy, but more direct than I am. We need to solve this thing.

Duncan: I'll tell you, when I offered to come in for questioning, I felt it wouldn't be too bad, but oh boy!

James: Well, it's a far cry from how it was in the 60's and 70's, where they used to have a bunch of guys yelling at you, threatening and deprivation. Things have changed over the years. You know, we're just doing our job and we won't start yelling at you.

Mandel: I'm back; here's the coffee. You know, I've been thinking about your story about jumping over the balcony and tapping on the window. It doesn't make sense, because Jennifer would have been dead already, and the sliding glass door would have been unlocked. A reasonable person would have tried the door when there was no answer. Did you walk into the apartment when Jennifer was already dead?

Duncan: No. You know what's so bad about this? It's that you guys are saying I did it, and it doesn't matter what I say. Did the neighbors see anyone else at the apartment?

Mandel: We showed your picture at the apartment complex and people have already picked you out. But look, I might be able to understand. Maybe you had to defend yourself if Jennifer's methamphetamine use made her paranoid. You know, that crank can make you crazy. What happened? She tweaked and went nuts?

James: And, I have to say, your story that you jumped over the balcony, knocked on the window, and left wasn't entirely true.

Duncan: I just have the strong feeling that.... If you guys want it to be me, it's going to be me. I don't know what happened.

Mandel: You might not have meant it to happen; it just might be something ticked you off, something got you upset. But, it happened. I'm aware of that, and the only thing I can say is, man, it's going to torment you, and it's going to bug you, and it's going to cause you untold anguish like it's doing to her family right now. I know it's been bugging you. I could tell when I saw your face when you opened that front door earlier today.

Duncan: I did not do it. Can I have some fresh air, please?

Mandel: Sure. It is now 3:30 p.m. and we are stopping the tape recorder.

* * * * *

Mandel: Okay, it is now 3:50 p.m. We've taken a 20-minute break and in the room are myself, Detective Mandel, Detective James, and Ray Duncan.

James: Need some water?

Duncan: No, I just want to get this over with.

James: I think it's almost over. I want to compliment you on how polite you have been in this interview. If you just opened up, the hard part would be over. We know what happened. Did Jennifer do something to get you upset? Give me something.

Duncan: I didn't do it.

* * * * *

James: Look, Ray, we've been at this for hours. We know you did it. We know it. I told you that scene spoke volumes. And it wasn't the scene of a cold-blooded killer. It wasn't that kind of a crazed scene.

Mandel: We're way beyond you not having anything to do with her death. We can place you at the crime scene at the time that she was killed. We have witness statements placing you there. On top of that, you finally have admitted to jumping over that balcony on that patio.

Duncan: I was at the apartment but she wasn't dead and I didn't stab her. I didn't leave through the sliding glass door. I just jumped over the balcony and tapped the glass.

James: There were only two possibilities: either you killed her or you went back into the apartment and saw her dead.

Duncan: Yes. Okay, but I don't know what happened. I entered her apartment through the sliding glass door and saw her lying on the couch. Jennifer was covered by a blanket, she was lying on her stomach and facing the cushions, her right hand was by her face, and there was a bunch of blood. I didn't see any wounds but the blood was just like soaked into the couch. I didn't touch anything. I left through the patio, closed the sliding glass door, and drove Jennifer's car back to my place.

Mandel: When was this?

Duncan: Between 8:30 a.m. and 9:00 a.m. on Thursday, December 21.

Mandel: Did you really spend Wednesday night at her apartment?

Duncan: I spent the night on Wednesday, and left around 4:00 a.m. on Thursday. I walked out through the front door. I took Jennifer's car, drove to my place, and then went to a friend's house. I returned to Jennifer's apartment between 8:30 a.m. and 9:00 a.m. Jennifer didn't answer and the front door was locked, so I entered through the sliding glass door. I left through the sliding glass door and jumped over the patio

balcony. I used Jennifer's car to leave.

Mandel: Did you tell anyone what you saw?

Duncan: No.

James: Why did you call Jennifer's house later that day, even though you knew she was dead?

Duncan: So the police wouldn't suspect me.

Mandel: Why would we suspect you?

Duncan: I was the only one that was there around that time, and I knew that, like I told you before, that I had touched everything.

Mandel: Let's take a break. It's currently 5:15 p.m. and we are turning off the tape recorder.

* * * * *

James: Okay, we are back from our break. It is 5:35 p.m. and Detective Mandel, Raymond Duncan, and I, Detective James, are back in the interview room. Okay, let's finish this up. You killed your friend. Why?

Duncan: Look, I've got a question.

Mandel: Go ahead, ask.

Duncan: I halfway know the answer already. Are you guys going to go ahead and process me, or what are you going to do with me? I appreciate the fact that you guys have been patient with me. What are you guys going to do? I mean, are you guys going to process me, or what? I don't want to go to jail. I didn't stab her. But if you guys are going to process me and say that I did, why don't you just go ahead and do it?

James: What would you like us to book you for?

Duncan: I don't know. 'Cause you guys say I did this murder.

James: Well, I'll tell you what we've done. I think what we've established at this point, Ray, is that you saw your friend in her apartment, stabbed, okay, because you at least established that.

Mandel: You need to get this off your chest. Did you use crank with Jennifer on Wednesday night?

Duncan: We had been smoking crank. Listen, guys, I'm getting scared now.

James: Do you still want to talk to us? To tell us about the crank?

Duncan: Sure, I'll talk. I used a substantial amount of crank with Jennifer that night.

James: What were you thinking, Ray, when you were using the crank?

Duncan: I don't know, man. All of the drugs – I don't know.

James: Was it the crank, Ray? Is that what made you do it?

Duncan: Look, okay, Jennifer was arguing with me when it happened.

James: Were you trying to have sex with her, Ray? Were you trying to rape her?

Duncan: No.

James: But you stabbed her, didn't you Ray?

Duncan: Okay, okay. I don't remember stabbing her, but we argued.

James: Tell us what you remember, Ray.

Duncan: We were near the couch and I stood up. I remember us arguing. I remember standing up, and I remember seeing a knife with blood and then leaving. I left through the sliding glass door to throw off the police. I drove away in Jennifer's car and threw away the knife in a trash can.

James: Where'd you get the knife?

Duncan: I probably got the knife from the kitchen counter.

James: Why 30 times, man? She had to be screaming.

Duncan: No, no. All she did was ask what I was going to do, but she didn't scream.

James: Why 30 times?

Duncan: It was more than once, but not 30 times.

James: I think it's time we read you your rights, Ray. Now, Ray, you have the right to remain silent. Anything you say can and will be used against you in court. You have the right to the presence of a lawyer. If you can't afford a lawyer, one will be provided at no cost. Do you understand these rights, Ray?

Mandel: Ray, you are under arrest for the murder of Jennifer Clark. We may as well turn off the tape recorder. It's 6:03 p.m.

END OF TRANSCRIPT

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	
	)	Criminal Division
v.	)	
	)	2008-2341
	)	
Raymond Duncan	)	
_____	)	

NOTICE OF MOTION TO SUPPRESS EVIDENCE

PLEASE TAKE NOTICE that upon the annexed affidavit of Raymond Duncan, defendant, and upon all the previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 1435 Elm Street, Averil Park, Columbia, on August 7, 2008, at 9:00 a.m. or as soon thereafter as counsel can be heard, for an order:

1. Suppressing evidence of all statements made by defendant to the police during an interview conducted on January 2, 2008, as obtained in violation of *Miranda v. Arizona*; and

2. For such other and further relief as to the Court may deem just and proper.

Dated: July 30, 2008

Mary Lynch

Mary Lynch
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	
	)	Criminal Division
v.	)	
	)	2008-2341
	)	
Raymond Duncan	)	
_____	)	

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

I, Raymond Duncan, being duly sworn, state:

1. I am the defendant in the above-entitled action.

2. At approximately 12:30 p.m. on January 2, 2008, I was arrested and taken into custody at the Averil Park Police Station by Detectives Timothy James and Gregory Mandel ("James" and "Mandel," respectively).

3. Detectives James and Mandel never attempted to question me at my home.

4. Detectives James and Mandel never told me I could have refused to go to the police station.

5. Once I arrived at the police station, Detective James or Mandel never told me I could leave.

6. I was placed in a small interrogation room that unlocked only from the outside.

7. I spent five hours being questioned by the two detectives.

8. Detective James accompanied me on two cigarette breaks and never left me …alone.

9. Detectives James and Mandel repeatedly accused me of killing Jennifer Clark.

10. Detectives James and Mandel communicated their subjective belief that I was the killer and made it objectively reasonable for me to believe I was not going to leave the police station.

11. During the course of this interrogation one or both of the detectives informed

me repeatedly that it was to my advantage to cooperate with them.

12. During the course of the interrogation I was told of several items of evidence, including eyewitnesses and forensic evidence, which allegedly constituted evidence against me, and was told by my interrogators that it was useless for me to deny my guilt in the face of such evidence.

13. Finally, after a total of approximately six hours of interrogation I was placed in handcuffs, left alone in the locked interrogation room for approximately one hour and then transported to the city jail.

14. It was after more than five hours of interrogation that I was advised that anything I said might be used in evidence against me, that I was not required to make a statement, that I had a right to the assistance of counsel, or that if I could not afford counsel, one would be appointed for me without charge.

Raymond Duncan

Raymond Duncan

Subscribed and sworn to before me on July 30, 2008.

Guido Zanani

Notary Public

TRANSCRIPT OF INTERVIEW OF DETECTIVE TIMOTHY JAMES

BY LAURIE SHANKS

Laurie Shanks ("Shanks"): Thank you for coming in, Detective James. As I said on the phone, Ray Duncan's attorney has requested a hearing seeking to exclude the statements her client made to you during your interrogation. We need to prepare for hearing. You're obviously likely to be called, so I wanted to go through your version of the interview. I have reviewed the transcript, but I have a few questions.

Timothy James ("James"): Fine.

Shanks: I'll be tape-recording this so I can refer to it for that preparation. First, how did Duncan come to be at the police station?

James: Well, the fact is he came down on his own.

Shanks: Did he just show up at the station?

James: No. We had been out to his apartment a couple of times and he wasn't there. We called a couple of times and left messages. And, apparently knowing we were looking for him, he called me and left a message saying when he would be home. Detective Mandel and I went out to his apartment and he invited us in. About the time we told him we were investigating Jennifer's death, we got a call from a crime scene and had to leave. He told us he would wait.

Shanks: When was this?

James: About 11:00 a.m., January 2. The call turned out to be nothing, so we went back to the apartment. We got there about 11:30, maybe 11:45.

Shanks: Then what happened?

James: Again, we told him we were investigating Jennifer's death and that he was one of several people we wanted to talk to because her cell phone indicated she had talked to him the day she was murdered. We asked if we could talk to him at his place, but he suggested that it would be better for him if we met him at the police station.

Shanks: Did he indicate why he'd rather be at the police station?

James: Not really. I just assumed he might be concerned about the neighbors, or maybe he didn't want the police there if someone stopped by.

Shanks: So what did you do?

James: He said he didn't have a car and asked if we would give him a lift, so we drove

him down to the station.

Shanks: What kind of car were you in?

James: An unmarked sedan.

Shanks: Where did he sit on the ride to the station?

James: The front seat.

Shanks: Was he handcuffed?

James: No.

Shanks: What were you guys wearing?

James: No uniforms. We were both in business suits.

Shanks: Did either of you ever display your guns?

James: No.

Shanks: During the drive to the police station, what did you talk about?

James: Small talk mostly, but I did advise him that he was going to a voluntary interview and he was free to leave at any time.

Shanks: When did you arrive at the station?

James: About noon. I got a phone call just as we arrived at the station, so we had him sit there in the reception area for about half an hour.

Shanks: When you interviewed Duncan, was he a suspect in Jennifer's death?

James: He was a subject, like everyone we had talked to.

Shanks: Did you say suspect or subject?

James: He was a subject. He was not suspected of doing anything wrong. We wanted to determine if he had any helpful information about the case.

Shanks: Why did you and Detective Mandel not advise Duncan of his *Miranda* rights at the beginning of the interview?

James: Like I said, he was not a suspect, he had not been linked to the murder, there were no independent witnesses, and there was no evidence he had been at the scene. The evidence was developed from Duncan himself during the interview.

Shanks: Did it become apparent to you during the interview that he was being caught in inconsistencies in what he was telling you happened on the day Jennifer was killed?

James: As you can see from the transcript, it became evident that there were several inconsistent statements he was making during the interview.

Shanks: At any time did he ask to leave?

James: After he was inside the interview room, he could have told us he was going to leave and walked out of the police department without talking to anyone. The complete interview lasted about five hours, but he never asked to leave.

Shanks: Was the interview room locked?

James: No, the room doesn't lock. We interview all kinds of people in there. There's no real need to lock the room. If a person was in custody, he'd either be in handcuffs, or there are these rings bolted in the floor and we would chain him to the rings.

Shanks: Tell me about the breaks you took.

James: He asked for water and it was provided for him. We took two cigarette breaks during the interview. The first break occurred when Duncan asked for a cigarette and some fresh air. There is no smoking in the police department building, so we decided to take a break outside and we went up on the roof, which is the building's designated smoking area for employees. It's got a gazebo.

Shanks: Did Duncan have any cigarettes?

James: No. We got one from another officer.

Shanks: Did you stay with him during the break?

James: Yes.

Shanks: Why did you stay with him?

James: No real reason other than the fact that I was just out there. I had given him the cigarette and, you know, I knew he didn't know the way to the smoking area. Also, there are some security concerns. You don't want the general public wandering around the station. Doesn't happen often, but you can imagine what would happen if someone under arrest got violent and someone just happened to walk by and got injured.

Shanks: What did you talk about during the break?

James: Nothing much. He asked if he was under arrest and I repeatedly told him that he was not under arrest and that he was free to leave.

Shanks: Did Duncan ever ask to leave?

James: He never asked to leave and he never tried to leave.

Shanks: Was he handcuffed while on the break?

James: He was not handcuffed or restrained in any way on the trip to or from the roof.

Shanks: You took a second cigarette break later. Was he handcuffed then?

James: No.

Shanks: Did you go with him to the roof?

James: Yes.

Shanks: How long was that break?

James: Like the first, maybe 20 minutes – the length of the time it took to walk and get the cigarette and allow him to smoke the cigarette. We didn't rush the breaks.

Shanks: And, at any time during the breaks, did he tell you that he wanted to leave?

James: No.

Shanks: Did he ask if he could leave?

James: He never made that request.

Shanks: What did you say when he finished his cigarette? I mean, did you say, "Are you ready to go back now?" Or do you recall what you would say in that regard?

James: Well, right before we actually walked out of the gazebo we would ask, "Are you ready to go back and talk some more?"

Shanks: And what did he answer you?

James: I don't recall the specific answer, but I know that the response was affirmative.

Shanks: Now, you interviewed other people as part of your investigation. Were they questioned in the same manner as Duncan? Did you confront other individuals with the accusation that you knew they killed the victim?

James: I interviewed three others before I talked to Duncan. I asked each of them whether they killed Jennifer and if they had anything to do with her murder. These three were also subjects rather than suspects.

Shanks: Did any of these other three interviews last five hours?

James: No, but one might have been for three hours. In fact, I think it was Brandy Gentry. I conducted an interview at the police department that lasted several hours. She made obscene remarks during the interview, and I became more aggressive and accused her of killing Jennifer. She was interviewed in the same room, and she got up, said the interview was over, and left the police station.

Shanks: Was Duncan ever left alone at any point in the interview?

James: No.

Shanks: Could someone have entered the police station and walked to the second floor interview room without interference by any officers?

James: Sure, a person could walk into the station and take the elevator to the second floor, and go to the interview room without being stopped. But, witnesses or suspects are usually accompanied by an officer to protect the integrity of the department's internal security.

Shanks: After Duncan was placed in the interview room, if he had decided to leave, could he have said, “Excuse me, gentlemen, I think I'm going to leave now?”

James: Yes.

Shanks: You know that technique you used with Duncan where you and Detective Mandel told him repeatedly that you knew he committed the crime, you had the evidence to prove it, and you just want to know why, and when he denied doing it you repeated the accusations? Did you use that technique with Gentry or any other person?

James: Yes. I specifically asked Gentry if she committed the crime and accused her of lying, but I never told her there was no doubt in my mind that she killed Jennifer.

Shanks: So, to be clear, was Duncan physically restrained in any way prior to his arrest?

James: He was arrested at 6:03 p.m., when the interview concluded, and he was handcuffed and chained to the bolt in the floor. Up to that point he was not restrained.

Shanks: Thank you, Detective. I think that will do for now.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B

LIBRARY

PEOPLE v. DUNCAN

LIBRARY

State of Oregon v. Mathiason

United States Supreme Court (1977)

Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial he moved to suppress the confession as the fruit of questioning by the police was not preceded by the warnings required in *Miranda v. Arizona* (U.S. S.Ct., 1966). The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Supreme Court reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, the interrogation occurred in a coercive environment of the sort to which *Miranda* was intended to apply. We think that the Oregon court has read *Miranda* too broadly, and we therefore reverse its judgment.

The facts are straightforward. An officer of the Oregon State Police investigated a theft at a residence near Pendleton. The officer asked the lady of the house which had been burglarized if she suspected anyone. She replied that Mathiason was the only one she could think of. Mathiason was a parolee and a “close associate” of her son. The officer tried to contact Mathiason on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at Mathiason's apartment with a note asking him to call because he’d like to discuss something with him. The next afternoon Mathiason did call. The officer asked where it would be convenient to meet. Mathiason had no preference, so the officer asked if Mathiason could meet him at the State Police patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from Mathiason's apartment. The building housed several state agencies.

The officer met Mathiason in the hallway, shook hands and took him into an office. Mathiason was told he was not under arrest. The door was closed. The two sat facing each other across a desk. The police radio in another room could be heard. The officer told Mathiason he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised him

that the police believed Mathiason was involved in the burglary and (falsely stated that) Mathiason's fingerprints were found at the scene. Mathiason sat for a few minutes and then said he had taken the property. This occurred within five minutes after Mathiason had come to the office. The officer then advised Mathiason of his *Miranda* rights and took a taped confession.

At the end of the taped conversation the officer told Mathiason he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when Mathiason left the office.

The Oregon Supreme Court reasoned from these facts that the interrogation took place in a "coercive environment." The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed Mathiason he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and Mathiason was a parolee under supervision. We are of the opinion that this evidence is overcome by the evidence that Mathiason came to the office in response to a request and was told he was not under arrest.

Our decision in *Miranda* sets forth rules of police procedure applicable to custodial interrogation. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Subsequently we have found the *Miranda* principle applicable to questioning that takes place in a prison setting during a suspect's term of imprisonment on a separate offense, *Mathis v. United States* (U.S. S.Ct., 1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. *Orozco v. Texas* (U.S. S.Ct., 1969).

In the present case, however, there is no indication that the questioning took place in a context where Mathiason's freedom to depart was restricted in any way. He came

voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview, Mathiason did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody or otherwise deprived of his freedom of action in any significant way.

Such a noncustodial situation does not become one where *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning occurred in a coercive environment. Any interview of one suspected of a crime by police will have coercive aspects to it, simply by virtue of the fact that the policeman is part of a law enforcement system that may ultimately cause the suspect to be charged with a crime. But the police are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Oregon Supreme Court to be another circumstance contributing to the coercive environment that makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether Mathiason was in custody for purposes of the *Miranda* rule.

The judgment of the Oregon Supreme Court is reversed.

United States v. Cray

United States Court of Appeals, 15th Circuit (2004)

The government appeals from an order of the district court suppressing a written statement that Dr. Michael Cray, a chiropractor, signed at the conclusion of an interview with FBI agents. The district court determined that the statement should be suppressed because it was the product of custodial interrogation that was conducted without informing Cray of his rights under *Miranda v. Arizona* (U.S. S.Ct., 1966). We respectfully disagree, and we reverse.

FBI agents Timothy Bisswurm and Sean Boylan went to Cray's home the morning of February 16, 2001, to interview him regarding a health care fraud investigation. Prior to their arrival, the agents called Cray at 4:30 a.m. to ensure that Cray was home, stating they had the wrong number. At 6:30 a.m., the agents approached the home. When Cray did not answer the door, Agent Boylan called Cray by telephone and told him that he needed to come to the front door. When Cray appeared, Boylan identified himself and Bisswurm as FBI agents and told Cray they would like to speak with him for a few minutes. Boylan further informed Cray that he did not have to speak with the agents.

Cray admitted the agents into his home, and the three men proceeded to the living room to discuss the investigation. Over the course of the ensuing interview, which lasted nearly seven hours, Cray was informed several times that his participation was voluntary, and that he was free to ask the agents to leave his home. About three hours into the interview, Cray told the agents that he was late for work. The agents instructed Cray to call in sick, and directed him not to inform his office about the investigation. Cray complied.

Although the telephone rang several times as the interview progressed, the agents instructed Cray not to answer, and Cray did not do so. When Cray moved about his home on two occasions to go to the bathroom and his bedroom, Boylan accompanied him to check the rooms for telephones. During the interview, Cray was told that if he did

not cooperate, the agents would interview his 75-year-old father and others. The agents further told Cray that they would “light up his world,” and also suggested that if he did not cooperate, then they could use the power of the FBI to pressure insurance companies to withhold payments to his business.

Cray did not resist the agents' questioning during the interview, and he never asked them to leave. At the conclusion of the meeting, Cray signed a written statement (after making one correction and initialing each page) acknowledging that “no one has threatened, coerced, or promised me anything.” The written statement contained admissions that Cray had knowingly caused insurance companies to reimburse at least one hundred false claims, and knowingly paid illegal fees to persons who referred new patients to Cray's chiropractic clinic. There was no threat of arrest during the encounter, and the agents never displayed weapons. Cray was not arrested until weeks later.

Cray was charged in a twenty-seven count indictment with various crimes relating to an alleged health care billing fraud scheme. He brought a motion to suppress his signed statement.

The ultimate question in determining whether a person is in “custody” for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The only relevant inquiry in considering that question is how a reasonable person in Cray's position would have understood his situation. In making that evaluation, we consider the totality of the circumstances that confronted the defendant at the time of questioning.

Courts have identified at least eight factors for consideration in making the custody determination: (1) whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether the person’s conduct indicated an awareness of such freedom; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect voluntarily acquiesced to official questioning

or initiated contact with authorities; (4) whether strong-arm tactics were used, *e.g.*, the police manifested a belief that the person was culpable and they had evidence to prove it, the police were aggressive, confrontational or threatening; (5) whether there was a police-dominated atmosphere, *e.g.*, where the interview took place or how many police officers participated; (6) whether the suspect was placed under arrest at the termination of the questioning; (7) whether the express purpose of the interview was to question the person as a witness or a suspect; and (8) how long the interrogation lasted. *United States v. Jones* (15th Cir. 1995).

The most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will. The FBI agents who interviewed Cray testified they informed Cray at least eight times that his participation in the interview was voluntary, and that he was free to ask the agents to leave his home.

We believe that this abundant advice of freedom to terminate the encounter should not be treated merely as one equal factor in a multi-factor balancing test designed to discern whether a reasonable person would have understood himself to be in custody. That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court, or this court, or any case from another court of appeals that can be located, holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

The weighty inference that Cray was not in custody after receiving such advice is strengthened further by the context in which the interview occurred – the living room of Cray's home. When a person is questioned on his own turf, the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation. Indeed, an interrogation in familiar surroundings such as one's home softens the hard aspects of police interrogation and moderates a suspect's sense

of being held in custody. The custodial surroundings are important to consider. The principal psychological factor of concern is isolating the suspect in unfamiliar surroundings for no purpose other than to subjugate the individual to the will of his examiner.

Although these nonexhaustive factors and their attendant balancing test are often cited in our decisions concerning *Miranda*, there is no requirement that they be followed ritualistically in every *Miranda* case. When the factors are invoked, it is important to recall that they are not by any means exclusive, and that "custody" cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Exploring the nuances of such vague factors as voluntary acquiescence, strong-arm tactics, and a police-dominated atmosphere in order to place them on one side or the other of a balancing scale may tend one to lose sight of the forest for the trees. The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest.

The district court relied heavily on its finding that the FBI agents instructed Cray not to alert others by telephone of the FBI's presence during the interview, and escorted Cray to his bedroom and bathroom to check for telephones before Cray entered the rooms. There are two difficulties with this emphasis on telephones. The first is precedent. In *United States v. Sutera* (15th Cir. 1999), officers conducted a three and one-half hour search of Sutera's apartment, and then interviewed him for one hour. They prevented him from using his phone during the search, and then questioned him in isolation in his apartment. We rejected Sutera's contention that prohibition on use of the telephone was one of several factors that demonstrated custody.

The second difficulty presumably explains the precedent: That a suspect is discouraged from using a telephone in his home during an interview often is not probative of whether he is free to terminate the interview altogether. In this case, the FBI agents testified that they requested (or, as the district court found, "directed") Cray not to use the telephone to disclose the presence of FBI agents, because such disclosure would interfere with

Cray's ability to cooperate with an ongoing investigation. If his cooperation with the FBI were known by alleged coconspirators, then he could not assist the government (and potentially himself) through undercover telephone calls or recorded meetings with other suspects. This likely is a common request (or direction) from investigators who are soliciting cooperation.

We also conclude that Cray's lack of voluntary acquiescence in questioning does not tend to show that he was in custody. The district court thought the mere absence of resistance by Cray, such as his making no attempt to terminate the interview and allowing the interview to proceed to its closing, did not rise to the level of active cooperation that our court has found to constitute voluntary acquiescence as used in our third factor. We conclude that the initiation of questioning by FBI agents in this case is not significant evidence of restraint on Cray's freedom of movement. Against a backdrop of repeated advice that he was free to terminate the interview, Cray's decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest.

Judgment reversed.

People v. Adams

Columbia Supreme Court (1996)

Defendant Joseph Adams appeals from a judgment entered after a jury convicted him of involuntary manslaughter. Defendant claims his statements to police were involuntary and obtained in violation of the *Miranda* rule. *Miranda v. Arizona* (U.S. S.Ct., 1966). We agree and conclude that their admission at trial compels reversal.

Officer Cindy Torres testified that she and her partner Officer Mike Sterner learned from Jessie Badillo that defendant was "involved" in a shooting death by a group of “gang bangers” at Washington School on January 27. They went to defendant's residence and asked him and his mother if he would talk to them at the police station about the homicide. They offered to bring him back home. Defendant and his mother agreed that he would go. Defendant's mother also consented to a search of her house for evidence of the homicide and gang involvement.

The officers brought defendant to an interview room at the police station. Although he was not physically restrained, Officer Torres did not recall whether defendant ever left the room. The interview lasted two hours, and, when it was over, the officers drove defendant back home. Officer Torres told defendant he was not in custody. However, she then said they would bring him home when they were finished, explaining that "[i]t really depends on how long you want to take and how quickly you tell us the truth." Torres later testified that what she meant was if defendant told the truth in one hour or two hours, the interview would take that long. She further explained, "There's a possibility that he would never tell us the truth; then we would give him a ride home without him telling us the truth." However, Torres admitted she did not tell this to defendant.

Officer Torres next informed defendant they knew what had happened at Washington School, who had been present, and who had done what. Officer Sterner said they just wanted to know how he got involved. Defendant denied being involved. He said that,

after school, he declined an invitation to join a group of people and instead walked home with Richard Badillo. The officers rejected this story, and accused him of fabricating an alibi with Badillo. They told him not to "play games" and confronted him repeatedly with incriminating evidence of his involvement with "gang bangers." They falsely suggested they had his fingerprints from one of the cars.

Defendant continued to deny involvement. The officers became exasperated and annoyed and assailed him for hiding behind lies and not taking responsibility for his conduct. They warned that his lies would not protect him and that while the truth might exculpate him, his lies plus the evidence they had would probably lead to murder charges and his being labeled a liar. Defendant nevertheless refused to admit involvement. The officers pressed on. They said other officers were with his mother, and she would not corroborate his story. They said his story might be an effort to conceal complicity in the murder. They asked him to think about family events (his sister's marriage) and personal opportunities (going to college) that he would miss if sent to prison. They said he owed the victim the real story and invoked his mother's guidance to tell the truth.

After a while, the officers decided to leave defendant alone for a while. Before leaving, they advised him to clear his conscience and not to waste any more of his or their time. When the interview resumed, defendant stuck to his story. The officers again said he was lying and continued to pressure him to tell the truth. They warned that "[l]ying isn't gonna get you anything, nothing good. It'll sink you, but it ain't gonna save you." Torres advised him that "[i]f you tell us a lie and we know it's a lie, then that story is what's gonna get tacked onto you, and I can't protect you from that. Nobody can protect you from that."

After further pressuring, defendant partially abandoned his story. Asked if he intended to kill anyone while driving around, defendant said "No." Sterner expressed disbelief, asserted that was the purpose. "That was stated clear and upfront." Defendant denied he intended to get involved if there was fighting and said he thought the group was out

looking for girls. Sterner said others had given this story, but he did not believe it. Defendant then said he just wanted to cruise around with the group but soon realized they were out to "gang bang." He denied seeing a gun but admitted hearing someone mention that somebody else had a gun and that it was "no good."

Defendant then said that after the group left a restaurant, he left them to go with a girl he had seen. Sterner responded, "You know how this is gonna work. You're gonna tell us some girl's name. We're not gonna let you leave here until we go talk to the girl, and she's not gonna be able to confirm the story, Joe." He then pressed defendant to tell him about the incident at Washington School. At that point, defendant dropped all resistance and explained what happened that day.

In *Miranda v. Arizona* (U.S. S.Ct., 1966), the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Statements obtained in violation of this rule cannot be used to establish guilt.

It is settled that the *Miranda* advisements are required only when a person is subjected to custodial interrogation. Custodial means any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

It is beyond reasonable dispute that defendant's interview was reasonably likely to elicit incriminating responses and thus was interrogation within the meaning of the *Miranda* rule. The People do not claim otherwise. The primary issue is whether defendant was taken into custody or otherwise deprived of his freedom of action in any significant way.

To make this determination, a trial court must first establish the circumstances

surrounding the interrogation. It must then measure these circumstances against an objective, legal standard: Would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest?

Courts have identified a variety of relevant circumstances to consider in deciding whether an interrogation was in a custodial environment. *United States v. Jones* (15th Cir. 1995). No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest.

Here, defendant agreed to an interview at the station, and Officer Torres initially said defendant was not in custody. However, we find it significant that Torres then explained that the interview would end and they would bring him home after he told them the truth. Given the officers' repeated rejection of defendant's story, a reasonable person eventually would have realized that telling the "truth" meant admitting the officers' information was correct and explaining how and why one was involved and that until this "truth" came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would not be allowed to leave if they had to go interview an alleged alibi witness.

Next, we note that Officers Torres and Sterner did not tell defendant he was free to terminate the interview and leave if he wished. Furthermore, defendant's conduct here does not indicate he was aware of his personal rights during the interrogation. Indeed, it does not appear that defendant ever left the interview room, and Torres could not recall whether defendant ever did. Nor does it appear defendant had a means of getting home on his own if he had tried to leave before the officers were finished with him.

We observe that the officers did not interview defendant only as a potential witness. The officers unmistakably informed defendant he was a potential suspect and repeatedly

told him they had evidence to prove his involvement. The People candidly concede that defendant was made aware "that the police officers fully suspected the worst possible scenario regarding his involvement in the crime."

Concerning the manner of interrogation, this court has consistently held that accusatory questioning is more likely to communicate to a reasonable person in the position of the suspect that he is not free to leave than would general and neutral investigative questions. Thus, on the issue of custody, courts consider highly significant whether the questioning was brief, polite, and courteous, or lengthy, aggressive, confrontational, threatening, and intimidating.

The "tag team" interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest.

Given the totality of circumstances, we conclude that at least by the time defendant partially abandoned his story, if not before, the environment during the interrogation had become coercive, and a reasonable person would have understood he or she was required to remain for questioning indefinitely at the sole discretion of the officers and was not free to leave until he or she satisfied the officers' demand for the truth.

Thus, a reasonable person would have felt deprived of liberty in a significant way and that the restraint was tantamount to being under arrest. Here the interview was a typical custodial interrogation, during which the suspect feels completely at the mercy of the police and frequently is prolonged, and in which the suspect is aware that questioning will continue until he provides his interrogators the answers they seek.

The judgment is reversed.

Answer 1 to Performance Test B

Memorandum of Points and Authorities Opposing Defendant's Motion to Suppress Evidence

Defendant Raymond Duncan has moved to suppress all statements he made to the police during an interview conducted on January 2, 2008, as obtained in violation of Miranda v. Arizona. The people oppose this motion and respectfully submit, for those reasons listed below, that defendant's motion should be denied.

A**. Defendant's motion to suppress should be denied because he did not confess during a "custodial interrogation," as he was fully informed that he was not under arrest and could terminate the interview at his discretion**.

Under Miranda v. Arizona, police are required to give suspects a litany of warnings before engaging in custodial interrogation. The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Mathiason. In other words, according to the Supreme Court, "Miranda warnings are required to be given only where there has been such a restriction on a person's freedom as to render him in custody." Id (emphasis added).

The Columbia Supreme Court has followed the Supreme Court's lead, and it requires the Miranda warnings to be given only if "a reasonable person in the suspect's position during the interrogation [would] experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest." Adams. In determining whether an interrogation took place under custodial circumstances, the Columbia Supreme Court has adopted the balancing test used by the 15th Circuit in Jones. Under this test, the factors to be considered in determining whether a custodial interrogation occurred are: 1) whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether the person's conduct indicated an awareness of such freedom; 2) whether the suspect possessed unrestrained freedom of movement during questioning; 3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities; 4) whether strong-arm tactics were used; 5) whether there was a police-dominated atmosphere; 6) whether the suspect was placed under arrest at the termination of the question; 7) whether the express purpose of the interview was to question the person as a witness or a suspect; and, 8) how long the interrogation lasted. Jones.

In this case, the vast majority of the factors to be examined weigh in favor of denying defendant's motion to suppress. Though the defendant's questioning might have been an uncomfortable experience, it never rose to the level of custodial interrogation required by this state, the 15th Circuit, or the Supreme Court.

1. **The defendant was repeatedly informed during the interview that his questioning was voluntary, and that he was not under arrest.**

This first factor, weighing whether the suspect knew he could terminate the interrogation, has been described by one court as "powerful evidence that a reasonable person would have understood that he was free to terminate the interview." Cray. In fact, neither the Supreme Court, nor any other court of appeals, has ever held "that a person was in custody after being clearly advised of his freedom to leave or terminate questioning."

Here, the defendant was clearly informed that the questioning was voluntary and that he could leave or terminate questioning. First, The defendant voluntarily agreed to come down to the interview, in fact proclaiming "I don't have anything to hide," He was told by Defective James that he was going to a voluntary interview and that he was free to leave at any time. And, as the interview progressed, it was again indicated to the defendant that he was in control of the interrogation - when the defendant asked for a break, he was given one without hesitation. Even towards the end of the interview, and even after the defendant had contradicted himself several times, he was once again asked "Do you still want to talk to us?" Only after he agreed did the interview continue.

At no point during the interview was the defendant restrained from leaving. The defendant has alleged that he was kept in a locked room, but according to Detective James, the room in which the interview took place does not lock. The defendant was not in handcuffs nor was he chained, and Detective James has noted that while he and the defendant were on the police roof smoking, he "repeatedly told him that he was not under arrest and that he was free to leave." The 15th Circuit has noted that the "most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." Detective James did just that, and so the defendant was fully aware that the questioning was voluntary, that he could ask the officers to leave, and that he was not considered under arrest.

The defendant has claimed that the detectives never told him he could leave. He claims they never told him he could have refused to accompany them to the station, and that while on his cigarette breaks Detective James never left him alone.

But the defendant's recollection is directly contradicted by both his own statements on tape - during which he specifically stated "I called you back and agreed to come down to this interview" - and by the accompanying circumstances. Whenever the defendant asked for a break, he was granted one. When he asked to get fresh air, he was allowed to. He never once asked to leave, and was not physically restrained in any way.

Further, the defendant has rendered himself not credible based on inconsistencies with his affidavit. In his affidavit, the defendant declares that at 12:30 p.m. on January 2, he "was arrested and taken into custody." However, the fact that he was taken into the station in the front seat of an unmarked sedan, was not placed in handcuffs until after 6:00 pm, was allowed to leave the building to smoke, all contradict that contention. Even stronger evidence of this false allegation is his statement on tape that, "I called you back and agreed to come down to this interview." Given such direct contradictions between the defendant's statements on tape, and his declarations in his affidavit, the Court should discount as untrustworthy all the defendant's contentions. What is more, the defendant has every incentive to lie concerning the circumstances of his confession, as suppression of the evidence will likely be the only realistic way for him to defeat liability at trial.

In denying that he was free to leave, the defendant compares his circumstances to that of Adams, where the police told the defendant that the length of his interrogation "really depends on how long you want to take and how quickly you tell us the truth." Given this statement, Adams had every reason to believe that he would be detained as long as was necessary for him to confess. But here, on the other hand, there was never any suggestion that the length of the interview would be the defendant's willingness to confess.

While "any interview of one suspected of a crime by police will have coercive aspects to it, simply by virtue of the fact that the policeman is part of a law enforcement system…..police are not required to administer Miranda warnings to everyone whom they question." Mathiason. Here, the defendant's interrogation was no more coercive than what is inherent in any interview where the police are seeking to solve a crime and interview an individual they believe involved. Therefore, this most important factor weighs in favor of not suppressing the defendant's confession.

2. **The defendant had unrestrained freedom of movement during questioning, and he used this freedom on several occasions**.

Under the second factor, courts examine whether the defendant had complete freedom to move around during the questioning. However, the simple fact that the questioning

took place in a police station does not render a defendant in custody. Mathiason.

Here, detectives had in fact given the defendant a choice of where he wanted the interview to occur. The police offered to question him in his home, where he would have a great deal of freedom of movement and could be free from any of the pressures that might be attached to a police station. See Cray. He chose not to accept their offer. And, during the interview at the station, the defendant was granted every request he made - whether for water, a cigarette, or some more fresh air. During these breaks the defendant was allowed to leave the room, and in fact, went outside onto the station's rooftop gazebo. There was never any show of force made to the defendant - the detectives were wearing business suits, he was never handcuffed, and there was never any display of guns. In fact, as Detective James has stated, the defendant was repeatedly told that he was free to leave.

The defendant has argued that because Officer James accompanied him during his breaks, he was not free to leave. However, in Cray, the court rejected precisely this argument. There, the suspect was followed into his bedroom and to the bathroom to ensure that he was not using the phone. However, even such invasive actions by police was not considered sufficient to render his interview custodial.

The defendant has further argued that he was never told that he was free to leave, and that he of course did not possess unrestrained freedom of movement given all the circumstances. However, this argument is contradicted by the fact that Brandy Gentry, another subject interviewed in connection with this crime, was interviewed under quite similar circumstances - she even got aggressive towards the detectives - and was allowed to walk out the exact same room in which the defendant was interviewed.

The defendant also relies on the Columbia Supreme Court's decision in Adams as evidence that he did not possess unrestrained freedom of movement. He compares his interview to the interrogation in Adams, and argues that he was similarly restrained. However, in Adams, the suspect was repeatedly told that he would not be released until he agreed with the accusations the detectives were levying at him. What is more, the defendant in Adams never once left the examination room, supporting his contention that he really was not free to leave. This situation was different - though the detectives refused to believe the defendant's story, they never once told him that his release would be conditional on his accepting responsibility for the crime. And, though the door to the interview room was closed during the interview, the defendant left it on more than one occasion.

This defendant had every opportunity to move about during question[ing], and his own

decision not to take advantage of such freedom by leaving the station is no reason to suppress his properly obtained confession. This factor thus supports the confession's admissibility.

3. **The defendant and police engaged in a voluntary and informal soliloquy to determine the time and manner of the interview**.

In this case, officers initiated contact with the defendant, but did so in such a way that a reasonable person would not have felt that he had to speak with them. All the evidence suggests that the detectives left several messages for the defendant and went to his apartment a couple times, and that the defendant eventually called and left a message saying when he would be home. Though the officers made the first move to speak with the defendant, this informal back and forth presents strong evidence that there was never any coercion in how they approached him.

In fact, the facts of this case are remarkably similar to how contact was initiated in Mathiason. There, police officers initially left a card with the defendant and asked him to call. Here, the officers left word for the defendant, but the defendant called on his own volition – without the officers asking him to. There was no coercion found based on such actions then, and police here did nothing to materially distinguish that case.

What is more, when the officers got to the defendant's house in this case, there was a back and forth where the interview would take place, and all questioning ultimately took place where the defendant specifically asked it to. It was for the defendant's benefit that questioning took place at the police station.

Therefore, even though officers technically spoke to the defendant before he reached out to them, contact was initiated by both sides, and this factor should be of limited use to the Court in determining whether a custodial interrogation took place.

4. **Strong-arm tactics were not used during the defendant's interview.**

In Cray, the 15th Circuit gave two examples of improper strong-arm tactics that might be used by police. First, the court offered that "police manifested a belief that the person was culpable and they had evidence to prove it." Next, "the police were aggressive, confrontational or threatening."

Here, the police may have manifested a belief that the defendant was culpable, but they only did so once the defendant's statements themselves gave them that reasonable belief. As Detective James has said, the police did not consider the defendant a suspect

when they initially sought him for questioning. Rather, it was only once he contradicted himself that their questioning truly manifested a belief that the defendant was culpable. In fact, reviewing the transcript of the defendant's interview, it is clear that the police became more accusatory only once the defendant contradicted himself for the first time - by stating "didn't I explain to you that I had entered that way, too?" about how he had left the apartment - a clear contradiction to what he had said earlier.

The defendant has also alleged that police told him of several items of evidence that constituted evidence against him, and has insinuated that such statements were false. However, the defendant's contentions are irrelevant. As the Supreme Court declared in Mathiason, "[w]hatever relevance this fact may have to other issues in the case, [a false statement by a police officer to a suspect] has nothing to do with whether Mathiason was in custody for purposes of the Miranda rule."

Further, the police were not aggressive, confrontational, or threatening in this case. They were accusatory, to be sure, but the courts have not suggested that mere accusations of guilt, without being coupled by more aggressive or threatening behavior, are sufficient to rise to the level of custodial interrogation. Rather, in Adams, it was repeated accusations of lying, made in an aggressive fashion, coupled with direct threats that he would miss important family events, that led to the defendant's confession. There, true duress and coercion was imposed on the defendant, and he was made to feel as though he had no way out but to confess.

The defendant relies on these facts in Adams to analogize his case. However, in this case, unlike Adams, the detectives asked "direct" questions but were not rude. They expressly told the defendant that they would not yell at him. Moreover, the defendant's own statements suggest that he was not intimidated by the police. At one point he even joked with Detective James: "I'll tell you, when I offered to come in for questioning, I felt it wouldn't be too bad, but oh boy!" Then, towards the end of the interrogation, he even thanked the police for being so patient with him.

Each of these specific instances belies the defendant's argument that police only obtained his confession through the use of strong-arm tactics. This factor further supports the contention that the defendant did not confess during a custodial interrogation.

5. **Any police-dominated atmosphere at the station existed only due to the defendant's choice of the interview's location.**

The Cray court also offered two examples of when an interview might take place in a police-dominated atmosphere: where the interview took place, and how many police officers participated.
Here, the defendant notes that the interview took place in a police station. However, as described above, the interview took place in the police station only because the defendant chose not to use his house for the interview. The police made every attempt contrary to defendant's contentions, to interview him at his house, and the defendant should not now be entitled to claim a police-dominated atmosphere when it was his choice of atmosphere in the first place.

Further, only two officers participated in this case. There is nothing to suggest that officers were rotated in and out of the interview in order to throw the defendant off, or to confuse or intimidate him.

Therefore, this factor is neutral at best in determining whether the defendant's confession was given in a custodial atmosphere.

6. **Though the defendant was placed into custody at the termination of the interview, this factor offers him only minor support for his claims.**

The defendant was placed under arrest at the termination of the questioning. However, this was not a situation in which the defendant was initially a suspect and would have been placed under arrest regardless of what he had told the police. Rather, the defendant was not a suspect in this crime until after he contradicted himself on material elements of his story. Therefore, this factor provides only minimal support for the defendant's contention that his confession occurred in a custodial environment.

7. **The express purpose of the interview was to question the defendant as a witness, not as a suspect**.

Detective James made it quite clear to the defendant that the purpose of the interview was to question him as a witness. The objective circumstances surrounding how the parties began questioning - the informal back and forth as to where the interview would take place - would have been a strong indication to anyone in that circumstance that he was only a witness in the killing. This fact is further confirmed by the circumstances in which the defendant arrived at the police station – in the front seat of an unmarked sedan, with detectives wearing business suits, without any physical restraint of any kind.

Further, Detective James has unequivocally stated that he repeatedly told the defendant that he was free to leave, and that he was not under arrest. In fact, the defendant, in his affidavit does not contest the fact that the purpose of the interview was to question him as a witness. Nowhere in the defendant's affidavit does he dispute the suggestion that he arrived at the police station as a witness to a crime like any other.

8. The interrogation did not last an unreasonable length of time.

The defendant points to Adams and claims the case provides him strong support for his contention that the long duration of the interview – over five hours – supports his contention that this was a custodial interrogation. And, it is true that the confession suppressed in Adams was obtained after only two hours of interrogation. However, the Adams court, after noting that the interrogation lasted two hours, only once made mention of that fact again, and then in the context of noting the threatening, confrontational, and intimidating atmosphere of the interrogation. It simply was not a fact that the court found especially compelling in determining the confession was taken within a custodial interrogation.

Further, in Cray, the court found that an interview of seven hours was not enough to render a noncustodial interrogation custodial. There simply is no set time limit after which any interrogation is inherently custodial. The defendant was interviewed for five hours, but it was during the middle of the day, between lunch and dinner, and not in such a way so as to prevent him from working or engaging in other activity he had already scheduled.

What is more, the defendant himself did not seem to think the interview was unfairly long. Though he insinuates in his affidavit that the police unfairly kept him in captivity for almost six hours for the express purpose of obtaining his confession, this fact is belied by his own statements on tape. Towards the end of the interview – minutes before it ended – the defendant told the detectives “I appreciate the fact that you guys have been patient with me.” Such a statement is entirely inconsistent with any suggestion that the interview’s length was a major factor in obtaining the confession.

Therefore, though this interview was longer than that in Adams, the difference in length is irrelevant when compared with the vast distinction between the custodial nature of the two interviews.

B. Conclusion

The totality of the circumstances balancing test used by Columbia in determining whether an individual confessed during a custodial interrogation plainly shows that Mr. Duncan did not need to be read his Miranda rights at any point before he confessed. Though balancing is not a strict counting exercise, the factors, viewed as a whole, consistently support the People's contention that the defendant was never restrained as though he were under formal arrest. As in Cray "[a]gainst a backdrop of repeated advice that he was free to terminate the interview," [Mr. Duncan]'s decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest.

Therefore, we respectfully ask this Court to deny defendant's motion to suppress evidence, and to allow his full confession to be admitted into evidence.

Answer 2 to Performance Test B

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia v. Raymond Duncan

Criminal Division 2008-2341

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO SUPPRESS

Raymond Duncan ("Defendant") has been charged with the murder of Jennifer Clark ("victim"). While being questioned by police detectives, Defendant admitted to the killing. He now seeks to suppress his confession as being taken in violation of his right to a Miranda warning. Because Defendant was not subject to a custodial interrogation under the Cray factors, he was not entitled to a Miranda warning. Thus, his confession is admissible.

Applicable Law

The U.S. Supreme Court held in Miranda v. Arizona that police must first warn a person being questioned of his rights in certain circumstances. Oregon v. Mathiason; United States v. Cray; People v. Adams. As noted in Adams, the police must give a Miranda warning only to a person subjected to a custodial interrogation. At issue in the case of Defendant's confession is whether the situation was custodial. "Custodial" includes any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. To make this determination, a court must determine whether a reasonable person in the suspect's position during the interrogation would experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest. Id.

In making this evaluation, courts will consider the totality of the circumstances that confronted the defendant at the time of questioning. Cray; Adams. However, courts have identified eight factors in making the custody determination: 1)whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether that person's conduct indicated an awareness of such freedom; 2) whether the suspect possessed unrestrained freedom of movement during questioning; 3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities;

4) whether strong-arm tactics were used; 5) whether there was a police dominated atmosphere; 6) whether the suspect was placed under arrest at the termination of the questioning; 7) whether the express purpose of the interview was to question the person as a witness or a suspect; and 8) how long the interrogation lasted. United States v. Jones.

While no one factor is dispositive, Adams, courts have found evidence that repeated communications that the person is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. No Supreme Court, Fifteenth Circuit or other appellate precedent holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

Analysis

Applying the United States v. Jones factors, as stated in Cray, establishes that Defendant was not subject to a custodial interrogation when he confessed his murder of the victim.

Suspect Was Informed During the Interview that the Questioning Was Voluntary; Conduct Indicating Awareness of Such Freedom.

As the court of Cray noted, the "most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform[him] that an arrest is not being made and that the suspect may terminate the interview at will." This exactly describes the facts of this case. While Defendant states that the officers arrested him before the questioning began, he was never placed under arrest according to Detective James. He voluntarily accompanied the detectives to the station, as will be discussed later.

Significantly, Defendant was repeatedly informed over the course of his encounter with the police that he was free to leave any time. He was informed of this on his way to the station house, and repeatedly again on his breaks with Detective James.

While Defendant claims that it became objectively reasonable for him to believe he was not going to leave the police station, this was not the case. Though he stated that he thought he had to tell the officers what they wanted to hear in order for him to be able to leave, the officers never indicated anything like that to the Defendant. In Adams, the interview of a high school boy became custodial because the police conditioned taking him home on his telling the “truth.” The court found that a reasonable person eventually would have realized that telling the truth meant admitting the officers’ information was

correct. However, as, demonstrated by the taped recording of the interview with Defendant, the officers in this case never made such statements. They only encouraged Defendant to confess as an appeal to his sense of fairness, and because otherwise living with the murder would "bug" him.

In addition to the statements of the officers being much different from those in Adams, it must further be considered that the police in that case were questioning a high school age boy who had no way to get home except through the police. In this case, although Defendant got a ride from the police, he is a 24 year old man who would certainly find other ways to get home from the police station. (In any event, he requested the ride to the police station.) They never gave him any indication that he couldn't leave unless he told them what they wanted to hear. Though Defendant stated as much during the interview, the test for a custodial interrogation is whether a reasonable person would feel as though they had been restrained as if formally arrested.

Furthermore, the defendant in Adams was told he would not be allowed to leave if the officers had to leave to interview an alibi witness. The officers in this case made no such statements about the Defendant not being able to leave. In addition, the defendant in Adams was never allowed to leave the room, which was not the case here.

Suspect Possessed Unrestrained Freedom of Movement During Questioning

Defendant was not restrained during his interview with the police. According to Detective James, he was never handcuffed or physically restrained in any other way. While Defendant claims that he was in a locked room, in fact the room he was in was not capable of being locked. He could have left at any time, and, in fact, did leave the room he was in. He twice went on cigarette breaks with Detective James on the roof of the police station. Being able to take cigarette breaks and walk through the police station unrestrained would not indicate to a reasonable person that they were in custody and unable to leave.

While Defendant was always accompanied by an officer while he moved about the police station, this would not necessarily indicate custody to a reasonable person. The defendant in Cray was always accompanied by an officer when he moved about his own home during questioning, and the court there found that there was no custodial interrogation.

Suspect Voluntarily Acquiesced to Official Questioning

Though Defendant claims that he was arrested, and thus did not voluntarily acquiesce to questioning, this is not the case. In fact, the detectives tried several times to contact him but were unable to. Defendant was finally the one who got in touch with the detectives. When the detectives came to his home to talk to him, they were called away and left the Defendant by himself. If the officers were going to arrest him, a reasonable person would not think that they would leave him alone while taking care of other business.

In addition, the method by which the Defendant arrived at the station house should have indicated to him that he was not under arrest. He rode with the officers in an unmarked car, while they weren't wearing uniforms. Most significantly, he did not sit in the back seat. He sat in front. A person under arrest does not usually sit in the front seat of a police car. Furthermore, James informed him on the way to the station house that he was voluntarily coming in for questioning, and was free to leave at any time.

This situation is extremely similar to that in Mathiason. In that case, officers tried to contact the defendant with no success, left a card at his apartment with a note to call them. The defendant did. In that case, the defendant also accompanied the officers to the station house, where he gave a confession. This was not considered to be a custodial interrogation. Though the interview in that case was extremely short, the Mathiason Court did not give that fact much weight. It focused its attention on how his freedom to depart was restricted in any way. Therefore, the length of this interview should not take away from the fact that the Defendant volunteered to answer police questioning, indicating it was not a custodial interrogation.

Strong-Arm Tactics

According to the Jones factors, strong-arm tactics could include that the police manifested a belief that the person was culpable and they had evidence to prove it, as well as aggressive, confrontational and threatening behavior on the part of the police.

In this case, the police did indicate to the Defendant that they thought he had committed the crime. However, they were not being aggressive or threatening about it. Rather, they told the Defendant he should get the murder off his chest so it wouldn't "bug" him. They tried to appeal to his sense of compassion for the victim's family, as well as his sense of religious obligation. The Defendant even specifically discussed police tactics with Detective James, who assured the Defendant that police questioning was very different than in the past, and they would not yell at the Defendant.

This conduct is markedly different from the tactics used in the Adams case, where the police were found to have created a custodial interrogation in part by their use of strong-arm tactics. The tag-team environment contributed to the finding. While there may have been two officers in this case, in Adams, the officers were “intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating.” As noted above, this description [does] not comport with the officers’ actions in this case. Furthermore, and as previously noted, the defendant in Adams was in high school, and would be more likely to be pressured by threatening and aggressive questioning.

A better comparison to this case is with the defendant in Cray, in which two government agents were dealing with an adult man. In Cray, the FBI agents interviewed that defendant for seven hours and threatened to "light up his world," and put financial pressure on him if he did not cooperate. This was not found to create a custodial interrogation. The police behavior in this case fell far short of the conduct of the police in both of those cases, and is thus noncustodial.

As to fabricated evidence, the Supreme Court in Mathiason rejected this as a factor creating a custodial interrogation. In that case, the suspect was confronted with fabricated evidence. While the interrogation was much shorter than the Defendant's in this case, the court explicitly stated that "whatever relevance this fact may have to other issues in the case, it has nothing to do with whether Mathiason was in custody for purposes of the Miranda rule." Therefore, this should not be considered as supporting Defendant’s belief that he was in custody.

Notably, the officers in this case subjected others to similar questioning, and those persons knew that they could leave. In fact, those other persons did leave police custody. This indicates that the police tactics would not indicate to a reasonable person that their freedom of movement was restricted to the extent of someone who was under formal arrest.

Police-Dominated Atmosphere

According to the Jones factors, this could include such factors as where the interview took place or how many police officers participated. In this case, although Defendant claims the police did not try to question him at his home, this was not the case. They tried several times to contact him at his home, and when they finally met up with Defendant they gave him the option of staying at home for questioning.

The claim that the police never attempted to interview him at his home is belied by the many times the police tried to contact him there, as well as their offer to question him at his home on the day of confession. While the questioning did take place at the police

station rather than at the Defendant's home, this was only the case because Defendant requested it. Finally, as the Supreme Court noted in Mathiason, the police are "not required to give Miranda warnings… simply because the questioning takes place in the station house." Just because the Defendant was questioned at the police station does not mean he was under arrest. A reasonable person who requested to be interviewed at the police station would not take that as an indication that they were in custody.

Suspect Placed Under Arrest at Termination of Questioning

The Defendant was placed under arrest at the termination of questioning. However, it was only after he confessed to the murder. This does not indicate anything about the nature of the rest of the interrogation.

Express Purpose of Interview

The Defendant was not a suspect at the time of his interview. They just wanted to see if he had any helpful information about the case. In fact, Defendant knew this when he accompanied the officers to the police station. They informed him that they just wanted to talk to him because he had spoken with the victim on the day she died. This is a rational reason that the police would want to interview someone, and would not indicate to a reasonable person that the police were taking them into custody just based on that fact. This is more in line with the police interviewing the Defendant as a potential witness than as a suspect. They never indicated to the Defendant that they thought he might have committed the murder until well into the interview.

Length of Interview

The length of the interview goes to whether a reasonable person would believe they were in custody. Defendant in this case was interviewed by the police for a little over five hours. However, this is not dispositive of the issue. The defendant in Cray was questioned for seven hours, but was found to have not been subject to a custodial interrogation. And while he was in his own home, he was not allowed to contact anyone and he was always in the presence of the FBI agents. Here, Defendant was being interviewed by police for less time. Significantly, the questioning, though long, was not continuous. The Defendant was allowed to take cigarette breaks, and received water when he asked for it. The detectives gave Defendant the space he needed by telling [him] things like "take a deep breath," and "sit and relax and give it some thought." The interview was not of an intense and continuous nature as in Adams, and thus would not indicate to a reasonable person that they were unable to leave.

Conclusion

As the Cray court noted, there is no requirement that these factors be followed ritualistically in every Miranda case. The issue of custody cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Cray. The ultimate inquiry must always be whether the Defendant was restrained as though he were under formal arrest. In this case, the court must be careful not to "lose sight of the forest for the trees," as the Cray court cautioned. Though the other factors also suggest there was no custody, great weight must be given to the fact that Defendant was informed on several occasions that he was free to terminate the questioning and leave at any point. The court must find that the Defendant was not subject to a custodial interrogation.