CONNECTICUT BAR EXAMINATION

24 July 2018

PERFORMANCE TEST #1

From the Multistate Performance Test

State of Franklin v. Hale

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Relevant Franklin statutes and rules

Haddon v. State, Franklin Supreme Court (2012)

State v. Capp, Franklin Court of Appeal (2014)

State v. Preston, Franklin Court of Appeal (2011)

OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Examinee
From: Juliet Packard, District Attorney
Date: July 24, 2018
Re: Motion for new trial in *State v. Hale*, Case No. 17 CF 1204

In April, our office prosecuted Henry Hale for attempted murder. The jury convicted him. The evidence at trial demonstrated that Hale shot Bobby Trumbull during an argument in the courtyard of Trumbull's apartment complex. Our only substantive trial witnesses were the investigating detective and Trumbull. The defense did not call any witnesses.

Hale timely filed a motion for a new trial, and the judge recently held a brief evidentiary hearing. I need you to prepare the "Legal Argument" portion of our brief in response to Hale's motion for a new trial, following the office guidelines for drafting persuasive briefs.

Hale's motion raises three issues, two regarding our purported failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and one arising under Franklin Rule of Evidence 804. With each of these issues, you need to discuss not only whether there was a violation of law, but also whether any violation entitles Hale to a new trial under Franklin Rule of Criminal Procedure 33. I have attached a copy of the relevant portions of Hale's brief, as well as pertinent pages from the trial transcript and the transcript of the hearing on the motion for a new trial.

OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Office staff
From: Juliet Packard, District Attorney
Date: September 5, 2016
Re: Guidelines for drafting persuasive briefs

…

III. Legal Argument

Your legal argument should be brief and to the point. Make your points clearly and succinctly, citing relevant authority when appropriate for each legal proposition.

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case. The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support the state's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument.

Use headings to separate the sections of your argument. When drafting your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them persuasive. An ineffective heading states only: "The motion to suppress should be denied." An effective heading states: "The motion to suppress should be denied because the officer read the defendant his rights under *Miranda v. Arizona* and the defendant signed a statement waiving those rights."

* * *

STATE OF FRANKLIN
DISTRICT COURT OF JUNEAU COUNTY

STATE OF FRANKLIN, **Plaintiff,** **v.** **HENRY HALE,** **Defendant.**	**Case No. 17 CF 1204**

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

FACTS

On June 20, 2017, an anonymous male called 911 to report the shooting of Bobby Trumbull at the Starwood Apartments. Later that day, Denise Lee, the investigating detective, interviewed Sarah Reed, a resident of the apartment complex. During discovery, the prosecution provided the defense with a video recording of the detective's interview with Reed. In that interview, Reed said that she had been on her balcony watching a video when she looked up and saw defendant Hale arguing with another man in the courtyard. She resumed watching the video and then heard a gunshot. She looked up and saw Hale running from the courtyard. The other man had fallen to the ground.

After trial, defense counsel learned that Reed had made a subsequent statement to police, specifically Detective Mark Jones, that recanted her initial statement. The prosecution never provided information to the defense about the second statement.

In addition, *after trial*, defense counsel learned that the victim, Bobby Trumbull, told the emergency medical technician (EMT) immediately after the incident that he was not certain who had shot him. Trumbull also called Hale a "rat," said that Hale thought that Trumbull owed him money, and said that the shooting was "all [Hale's] fault." This evidence contradicted Trumbull's trial testimony that identified Hale as the shooter. The prosecution, however, failed to disclose this evidence to the defendant.

Reed and Hale were married on August 25, 2017, after the shooting and well before the trial. At trial, Hale asserted the spousal testimonial privilege, preventing Reed from testifying against her husband. The prosecution then sought to admit Reed's initial out-of-court statement given to Detective Lee during her interview, under Franklin Rule of Evidence 804(b)(6), arguing that Hale had wrongfully caused Reed to become unavailable to testify. Hale objected. This court overruled the objection and admitted Reed's highly prejudicial out-of-court statement to Detective Lee, in which Reed identified Hale as the individual in the courtyard with Trumbull. The jury convicted Hale of attempted murder.

ARGUMENT

I. The Prosecution Violated *Brady v. Maryland* by Failing to Disclose the Sole Eyewitness's Recantation and the Victim's Exculpatory Statements.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the government cannot suppress evidence that is favorable to the defendant and that is material to either guilt or sentencing. In analyzing whether *Brady* has been violated, this court must make three determinations: (1) whether the evidence in question was favorable to the defendant, (2) whether it was suppressed by the government, and (3) whether it was material. *Strickler v. Greene*, 527 U.S. 263 (1999). A prosecutor's good faith is irrelevant. *Brady*.

Reed's recantation of her prior identification of Hale as the shooter is favorable to the defense. In *Brady*, the Supreme Court defined evidence favorable to the defendant as evidence that would make a neutral fact-finder less likely to believe that the defendant committed the crime with which s/he was charged. Knowing that Reed, the only known eyewitness, had recanted her statement would make a fact-finder less likely to believe that Hale committed the crime. Similarly, Trumbull's statements to the EMT, in which he admitted that he was not certain who had shot him and expressed ill feelings toward Hale, were favorable to the defendant and directly contradicted Trumbull's trial testimony. A neutral fact-finder would be less likely to believe Trumbull's trial testimony if it heard that Trumbull had made these contradictory statements to the EMT.

Information about Reed's recantation was suppressed by the prosecution. The evidence was in the possession of the prosecution because it was held by Detective Jones. Evidence that is in the physical possession of an investigating officer is considered to be in the possession of the government, even if the investigating officer does not disclose the evidence to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419 (1995). Likewise, the information about Trumbull's statements to the EMT was in the government's possession. The ambulance service is an agency of the government of Franklin City. Both pieces of evidence were suppressed because the government did not provide this evidence to the defendant.

The prosecutor's office provided discovery to the defendant through an "open file" policy. The prosecutor gave everything in her file to the defense. Neither of these pieces of evidence was in the prosecutor's file. In *State v. Haddon* (Fr. Sup. Ct. 2012), the court held that the "open file" policy could actually deter a defendant from investigating whether other information might be available. It would be reasonable for a defendant who was the beneficiary of an "open file" policy to assume that all relevant and exculpatory information was in the file and was thus disclosed.

Finally, the evidence at issue is material. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Id. Where the state has suppressed multiple pieces of evidence, the determination of materiality should be made on a cumulative basis. *Id.* Here, if the defendant had been given all of the suppressed evidence, there is more than a reasonable probability that the result of the trial would have been different.

A determination that suppressed evidence is material necessitates a finding that the defendant has been prejudiced. *Kyles*. Therefore, under Franklin Rule of Criminal Procedure 33, the defendant is entitled to a new trial.

II. Hale was Prejudiced by the Admission of Reed's Hearsay Statements; He Did Not Marry Her with the Intention of Causing Her Unavailability for Trial.

Hale's conduct in marrying Reed did not satisfy the requirements of Franklin Rule of Evidence 804(b)(6) for admission of Reed's hearsay statements. To satisfy that Rule, a significant motivation behind the defendant's conduct must have been to cause the unavailability of the declarant. Hale did not marry Reed with the intent of making her unavailable for trial. The facts of this case are much like *State v. Preston* (Fr. Ct. App. 2011), in which the defendant married the witness after the alleged crime. In *Preston*, the court held that the mere act of marriage did not constitute an intention to wrongfully cause the declarant's unavailability. And, as a policy matter, it is inconsistent for the court to uphold a particular marriage through the spousal privilege, thereby preventing a spouse from testifying, and then to undermine this same marriage by finding that the marriage itself served to wrongfully cause the spouse's unavailability in the court proceeding.

An evidentiary rule violation, unlike a *Brady* violation, requires a separate determination of prejudice under Franklin Rule 33 to warrant a new trial. Here Hale was prejudiced by the erroneous introduction of Reed's out-of-court statements. Reed was the only known eyewitness to the events, and the prosecution was allowed to present hearsay that was never subject to cross-examination. But for this error, there is a strong probability that the result of the trial would have been different. *Preston*. This error was made even more prejudicial by the state's *Brady* violation, which hid from the defense those inconsistent statements that could have been used to impeach Reed and Trumbull. The state was in possession of believable statements by Reed and Trumbull that contradicted their statements admitted at trial.

* * *

Excerpts from *State v. Hale* Trial Transcript, April 26, 2018

TESTIMONY OF SARAH REED

Prosecutor: Please state your name for the record.

Defense Att'y: Your Honor, could you please excuse the jury for a few moments? [Whereupon the jury was excused.]

Defense Att'y: The defendant asserts spousal privilege under § 9-707 of the Franklin Statutes.

Court: Ms. Reed, when did you marry the defendant?

Reed: August 25, 2017.

Court: When did he propose?

Reed: July 25, 2017.

Court: When did you start dating?

Reed: We dated four years ago for about seven months, but then we broke up. We got back together in March 2017.

Court: Ms. Reed, did Mr. Hale ever indicate to you that he married you so that you couldn't testify at his trial?

Reed: Henry married me because he loves me. He did say that he wanted to marry me quickly, before the trial started.

Court: Did he ever threaten you or tell you that bad things would happen if you did testify against him?

Reed: He did say that it would be hard for us to stay together if I testified against him. I'm not sure if he'd really leave me because of this, but I hope I don't have to find out. I do know that we love each other.

Court: Thank you. The witness will be excused based upon the defendant's exercise of spousal privilege. Bailiff, please ask the jury to come back now.

DIRECT TESTIMONY OF DETECTIVE DENISE LEE

Prosecutor: Please state your name for the record.

Lee: I am Detective Denise Lee of the Franklin City Police Department.

Prosecutor: Did you have occasion to investigate the shooting of Bobby Trumbull at the Starwood Apartments on June 20, 2017?

Lee: Yes. We received an anonymous call stating that a man had been shot in the courtyard of the Starwood Apartments. I arrived after the victim, Mr. Trumbull, had been taken

to the hospital. We could locate only one witness to the shooting, and that was Sarah Reed.

Prosecutor: And what did Ms. Reed tell you?

Defense Att'y: Objection. Hearsay.

Court: I am going to excuse the jury and hear your argument for why this is or is not admissible evidence. [Whereupon the jury was excused from the courtroom.]

Defense Att'y: Your Honor, this is blatant hearsay. The state is attempting to introduce Ms. Reed's out-of-court statements for the truth of the matter asserted.

Prosecutor: Your Honor, Mr. Hale married Ms. Reed after the shooting but before this trial. A significant motivation for the marriage was to prevent Ms. Reed from testifying in this case. We have also heard that he threatened to leave her if she testified. Consequently, the hearsay is admissible because the defendant wrongfully caused the witness's unavailability under Franklin Rule of Evidence 804(b)(6).

Defense Att'y: Your Honor, Ms. Reed and Mr. Hale were married on August 25, 2017. There is no evidence in the record that the marriage was intended to wrongfully cause the unavailability of Ms. Reed. And Ms. Reed herself said that she wasn't sure what the defendant meant when he said that it would be difficult for them to stay together if she testified. She also made clear that she and Mr. Hale loved each other.

Court: The court finds itself bound to respect the marriage as being valid under Franklin law. Thus this court allowed Mr. Hale to assert the spousal testimonial privilege and ruled that Ms. Reed could not be compelled to testify. But the question before this court is a much more nuanced one: whether by virtue of that valid marriage, along with his statements to Ms. Reed, Mr. Hale intended to wrongfully cause, and in fact did wrongfully cause, Ms. Reed to be unavailable as a witness. Based upon the evidence before this court, I am going to overrule the defense's objection and admit the statement. Bailiff, please bring the jury back in. [Whereupon the jury was reseated.]

Prosecutor: Detective Lee, could you tell us what Ms. Reed told you later in the afternoon on June 20, 2017, immediately after the incident?

Lee: She told me that she had been sitting on her balcony above the courtyard in the apartment complex watching a video on her computer. She saw two men yelling at each other in the courtyard. She recognized one of them as her boyfriend, Henry Hale. She couldn't make out what they were saying, but she knew that the two men were arguing.

She went back to watching the video and then heard a shot. She looked up and saw Mr. Hale running out of the courtyard and saw Mr. Trumbull collapsed on the ground.

CROSS-EXAMINATION

Defense Att'y: Did you ever find any forensic evidence linking Mr. Hale to the crime?

Lee: No.

* * *

DIRECT TESTIMONY OF BOBBY TRUMBULL

Prosecutor: Please state your name for the record.

Trumbull: Bobby Trumbull.

Prosecutor: What happened on June 20, 2017, in the courtyard of the Starwood Apartments?

Trumbull: Well, I was arguing with Mr. Hale [witness points to the defendant], and he pulled out a gun and shot me in the shoulder.

Prosecutor: What were you arguing about?

Trumbull: I guess I owed him some money and he wanted it back.

Prosecutor: Did you owe him the money?

Trumbull: Yes.

Prosecutor: Did you in any way provoke him before he shot you?

Trumbull: No.

CROSS-EXAMINATION

Defense Att'y: You did owe Mr. Hale money, didn't you?

Trumbull: Yes.

Defense Att'y: And have you ever paid him back?

Trumbull: No.

Defense Att'y: And, in 2014, you were convicted in Franklin of the felony of fraudulently obtaining money, weren't you?

Trumbull: Yes.

* * *

Excerpts from Hearing on Defendant's Motion for a New Trial, July 17, 2018

DIRECT TESTIMONY OF DETECTIVE MARK JONES

Defense Att'y: Detective, does your file contain notes about Ms. Reed's recantation in this case?

Jones: I'm not sure I would characterize it as a recantation. But as my notes indicate, she did come to the police station on August 26, 2017, about two months after the incident. I met with her, and she told me that Mr. Hale was not the shooter at the Starwood Apartments on June 20, 2017. I asked her who was in the courtyard with the victim and she said she didn't know. I asked her why she lied to Detective Lee on the day of the crime and she just shrugged. I asked for more details and she shrugged and said, "He just told me to tell you that he didn't do it." I asked her who the "he" was who told her to recant her statement and she just shrugged. She never made eye contact with me, and she appeared to be nervous. I asked her if she was afraid of her husband and she shrugged.

CROSS-EXAMINATION

Prosecutor: Detective Jones, were you involved in the investigation of the shooting of Bobby Trumbull?

Jones: Yes, I was part of the team that worked on this case.

Prosecutor: Do you happen to know whether Ms. Reed was married to the defendant at the time she came to your precinct?

Jones: Yes, she told me that they had just been married the day before. She also told me that her husband had told her that she would not have to testify in court because they were now married and that he was going to tell the court to keep out her testimony.

Prosecutor: Did you place notes about Ms. Reed's August 26, 2017, statement in the case file?

Jones: Yes, I did.

Prosecutor: Did you provide information about this second statement to the prosecutor's office?

Jones: I was out on medical leave when the prosecutor's office requested information from our file. I don't know who processed the request. I assumed that all information was given to the prosecutor.

DIRECT TESTIMONY OF ASSISTANT DISTRICT ATTORNEY LUCY BEALE

Defense Att'y: Ms. Beale, you were the chief prosecutor in this case, correct?

Beale: Yes.

Defense Att'y: Did you give the defense information about Ms. Reed's August 26th statement to Detective Jones?

Beale: No, I didn't. But I didn't know about it until after the trial.

Defense Att'y: Were you provided with information about the August 26th statement?

Beale: No. I asked the police department for their file. I received what I thought was a complete record, but there was no information about a statement on August 26, 2017, or any information suggesting that Ms. Reed had made a second statement.

Defense Att'y: Before trial, did you give the defendant access to everything in your office's file?

Beale: Yes, our office follows an "open file" policy.

DIRECT TESTIMONY OF GIL WOMACK

Defense Att'y: You are an emergency medical technician for the Franklin City ambulance service?

Womack: Yes.

Defense Att'y: Is the ambulance service part of the City government?

Womack: Yes.

Defense Att'y: Did you help transport Mr. Trumbull to Franklin City Hospital on June 20, 2017?

Womack: Yes.

Defense Att'y: Did Mr. Trumbull say anything to you?

Womack: He blurted out, "I don't know exactly what happened or who shot me, but that rat Henry Hale thinks I owe him money. This is all his fault."

Defense Att'y: And what happened?

Womack: After that he went to sleep—we were giving him heavy narcotics intravenously….

CROSS-EXAMINATION

Prosecutor: Mr. Womack, other than transporting Mr. Trumbull, were you in any way involved in the prosecution or investigation of the attempted murder of Mr. Trumbull?

Womack: No, I wasn't even called as a witness.

Prosecutor: If Mr. Hale's attorney had asked to speak to you before trial, would you have voluntarily spoken to him?

Womack: Yes.

Prosecutor: And would you have told him everything you just testified to today?

Womack: Yes, I would have told him exactly what I just testified to.

Relevant Franklin Statutes and Rules

Franklin Rule of Evidence 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

> (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Franklin Criminal Statute § 9-707. Spouse's Privilege Not to Testify Against Spouse

One spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial. Only the accused may claim the privilege. The spouses must be married at the time that the privilege is asserted; so an ex-spouse can be compelled to give testimony about a defendant to whom he or she was previously, but is no longer, married.

Franklin Rule of Criminal Procedure 33

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error. In appropriate circumstances, the court may take additional testimony on the issues raised in the motion. No issue may be raised on appeal unless it has first been raised in a motion for new trial.

Haddon v. State

Franklin Supreme Court (2012)

Defendant Miriam Haddon appeals her conviction of robbery on the ground that the prosecution failed to satisfy its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The Franklin Court of Appeal affirmed the conviction. We reverse and remand.

Haddon was working as a prostitute, and she was accused of taking money from one of her customers while threatening to harm him. At trial, the customer, Tim Morgan, testified that Haddon

took $1,000 from his wallet and threatened to "cut him in little pieces" if he tried to stop her. The robbery occurred while they were in a motel room; there were no other witnesses to the incident. The motel owner testified that he had seen Morgan and Haddon when they checked in and that Morgan's wallet "was full of money—all sorts of bills." In addition, a clerk from a nearby convenience store testified that Haddon entered the store shortly after the time of the alleged robbery and had "a purse full of money."

Haddon argues that the prosecution suppressed two pieces of evidence: (1) inconsistent statements Morgan made to police on various occasions and (2) forensic tests that found none of Haddon's fingerprints on Morgan's wallet. Defense counsel learned of this evidence after trial from the investigating detective. The evidence was not given to the defense before trial.

Brady established the requirement, under the due process clause of the Fifth and Fourteenth Amendments, that the prosecution not suppress any exculpatory evidence. Later opinions established that the government's burden is to provide the defendant with all material exculpatory evidence, regardless of whether the defendant requests it. There are three components of a *Brady* violation: (1) The evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material. *Strickler v. Greene*, 527 U.S. 263 (1999).

Thus, first, we must determine whether the evidence was favorable to the defendant. Evidence which will serve to impeach a prosecution witness is "favorable" evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Here, the evidence consisted of police interviews with Morgan in which he gave conflicting accounts of the alleged robbery. In one account, he claimed that nothing happened. In another, he claimed that he voluntarily gave Haddon the money. This evidence would serve to impeach Morgan and is therefore favorable to Haddon. It would have benefitted her case had the defense been able to cross-examine Morgan about the conflicting statements that he made to police officers. Likewise, the forensic evidence is favorable. A neutral fact-finder who learned that Haddon's fingerprints were not found on Morgan's wallet would be less likely to believe that Haddon had committed the crime.

Next, we must determine whether the government suppressed the evidence. The government claims that it did not intentionally suppress evidence. Indeed, this prosecutor's office has an "open file" policy—it provides everything in its file to defense counsel, even if providing such information is not required by the Rules of Criminal Procedure. But under *Brady*, it does not matter whether the suppression was intentional. The investigating officers possessed exculpatory information that the

government failed to provide to the defense before trial. *Brady* violations occur whether the suppression was intentional or inadvertent. When the prosecution has adopted an open-file policy, "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Strickler*. Because the prosecution here had an open-file policy, the defense would have had no reason to believe that there were conflicting statements to police that were not in the prosecution's file.

Finally, we must determine whether the evidence was material—that is, whether, had the jury been provided with the evidence, there is a reasonable probability that the result would have been different. When the state suppresses evidence favorable to the defendant, the only fair determination of materiality is a collective one. The state's obligation is not a piece-by-piece obligation. Rather, it is a cumulative obligation to divulge all favorable evidence. Any other result would tempt the state to withhold evidence, in the hope that, individually, each piece of evidence would not make a difference.

We have concluded that the evidence in question was favorable to Haddon and was suppressed by the state. We further conclude that, had the state timely disclosed the evidence to the defendant, there is a reasonable probability that the result of the trial would have been different. There is a paucity of evidence of Haddon's guilt. Morgan's testimony is critical to establishing that Haddon committed robbery. Morgan's prior inconsistent statements to the police were believable. Had the jury heard those statements, it would likely have been more hesitant to convict Haddon. Disclosure of the evidence would probably have affected the outcome of the case. Having found that the evidence was material, we necessarily find that Haddon was prejudiced by its suppression.

Reversed and remanded to the trial court for further proceedings consistent with this ruling.

State v. Capp
Franklin Court of Appeal (2014)

In this interlocutory appeal, defendant Vincent Capp challenges the trial court's decision denying his motion to dismiss a pending murder charge. We affirm.

Capp is charged with murdering his wife. The state's theory is that Capp injected her with a lethal dose of narcotics. The defense claims that the cause of death was suicide. The couple had a history of domestic violence: Capp was charged four times for assaulting his wife.

Capp claims that the state failed to comply with its responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963). The basis of this claim is that the state suppressed his deceased wife's medical records, made many months prior to her death, that show that she was at risk of harming herself. The records are in the possession of a county hospital.

We first determine whether the government "suppressed" the evidence. The first question raised by "suppression" is whether the evidence at issue was in the "possession" of the government. Evidence can be in the "possession" of the government even if the evidence is unknown to the prosecutor. If the evidence is in the possession of the investigating police department or another government entity involved in the investigation or prosecution, the evidence will be deemed to be in the possession of the government. *Kyles v. Whitley,* 514 U.S. 419 (1995). However, it would stretch the law too far to charge the government with possession of all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case. If a government agency was not involved in the investigation or prosecution of the defendant, its records are not subject to disclosure under *Brady*. The role of a hospital is to treat patients, not to investigate crime. Thus we hold that, here, the government did not "possess" the records housed at the county hospital and therefore did not suppress them.

Although not essential to the determination of this case, we further hold that a prosecutor is not required to furnish a defendant with *Brady* material if that material is fully available to the defense through the exercise of due diligence. Capp's defense and the prosecution had equal access to the wife's medical records. Defense counsel could have subpoenaed the records as easily as the government might have. The records were not solely within the control of the prosecution and thus were not subject to *Brady* disclosure.

Affirmed.

State v. Preston
Franklin Court of Appeal (2011)

Defendant Reginald Preston appeals his conviction for theft over $1,000. He alleges that the trial court erroneously allowed the government to introduce the out-of-court statements of his wife. We reverse and remand.

Preston was convicted of having stolen artwork from the local library. There was no forensic or other physical evidence linking him to the crime. The only witness who could connect Preston to the theft was his wife, Felicity Carr. At the time of the theft, Preston and Carr were not married. Carr was questioned by police and stated that she saw Preston steal the artwork.

Preston and Carr were engaged, with a wedding date arranged, at the time of the theft and the time she made her statement to the police. They were married before the date of the trial. At the trial, Preston successfully asserted spousal privilege to prevent Carr from testifying.

When Carr did not testify due to the spousal privilege, the government sought to introduce her pretrial statement to the police in lieu of her in-court testimony. Preston objected that Carr's out-of-court statement was inadmissible hearsay. The government successfully countered that, by making Carr unavailable as a witness through marriage, Preston had forfeited the right to challenge admission of her hearsay statements.

Rule 804 of the Franklin Rules of Evidence provides that certain hearsay evidence may be admissible if the witness is unavailable. A witness who claims spousal privilege is considered to be unavailable. FRANKLIN RULE OF EVIDENCE 804(a)(1). The issue, then, is whether the hearsay statements meet any of the exceptions defined in Rule 804(b). Franklin Rule of Evidence 804(b)(6) allows for the admission of a hearsay statement which is "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." Importantly, the Rule requires that the conduct causing the unavailability be wrongful; it does not require that the conduct be criminal.

Under Rule 804, then, the question is whether Preston engaged in conduct designed to prevent the witness from testifying. The trial judge found that the defendant married the witness with the intent to enable him to claim spousal privilege and thereby prevent his wife from testifying against him. *See* FRANKLIN CRIMINAL STATUTE § 9-707. We conclude that this finding was erroneous. The defendant and his wife were engaged to be married when the theft occurred and had set a date for the wedding. Their marriage appears to have occurred in the normal course of events. A court's finding of wrongful causation must be rooted in facts establishing that a significant motivation for the

defendant's entering into the marriage was to prevent his or her spouse from testifying. In this case, there is no evidence that the defendant's purpose in marrying was to prevent his wife from testifying. All of the proof establishes that the couple had intended to marry even before the crime occurred.

The trial court erred in admitting Carr's out-of-court statement. We also find that Preston was prejudiced by the introduction of the hearsay testimony. But for the error, there is a strong probability that the result of the trial would have been different. Felicity Carr was the only witness who connected Preston to the theft. By erroneously admitting Carr's statement, the trial court allowed the prosecution to convict the defendant with blatant hearsay that was never subject to cross-examination. Preston was clearly prejudiced by that error. *See* FRANKLIN RULE OF CRIMINAL PROCEDURE 33.

The defendant's conviction is hereby reversed, and the case is remanded to the trial court for a new trial.

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CONNECTICUT BAR EXAMINATION

24 July 2018

PERFORMANCE TEST #2

From the Multistate Performance Test

Rugby Owners & Players Association

FILE

Memorandum to Examinee

Transcript of client interview

Initial Draft of Articles of Association of ROPA

LIBRARY

Excerpts from Walker's Treatise on Corporations and Other Business Entities

Schraeder v. Recording Arts Guild, Franklin Court of Appeal (1999)

Sorborg, Kaminstein & Ringer LLP
Counselors-at-Law
One Madison Plaza
Franklin City, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Abraham Ringer
DATE: July 24, 2018
RE: Rugby Owners & Players Association

The Rugby League of America ("the League") and the Professional Rugby Players Association ("the Players") have retained our firm to form an unincorporated membership association under the Franklin General Associations Law. The Rugby League of America consists of the owners of all eight teams in the professional rugby league, and the Professional Rugby Players Association is the labor union representing all 176 players on those teams.

The Rugby Owners & Players Association (ROPA) will be a joint venture of both the League and the Players, formed for the purpose of holding and exploiting certain properties (both tangible and intangible) on behalf of the League and the Players. While ROPA will not itself operate on a profit-making basis, the revenues it earns (after the deduction of expenses) will be distributed to the League and the Players.

The principal governing document of ROPA will be its Articles of Association. Formation of ROPA presents an interesting legal challenge, in that the League and the Players are normally on opposite sides of the bargaining table in many respects. Hence, neither side will allow the other to control the governance of ROPA.

I have communicated separately with both parties, and they have consented to our joint representation. We have received informed written consent from both parties in conformity with the Rules of Professional Conduct.

Given the many legal issues to be dealt with in forming ROPA, others in the firm will deal with the liability, tax, intellectual property, real property, and antitrust aspects of the task.

Please draft the relevant portions of the Articles of Association that deal with ROPA's governance, as set forth in more detail in the attached materials. I have included an initial draft of those governance provisions of the Articles, indicating the issues that you should address in your draft. The initial draft will also provide an example of the type of language used in such documents.

In drafting the relevant portions, please use the following format, as illustrated below:

- State the article number.
- Draft the recommended language.
- Provide an explanation for why you drafted each the way you did (including, if appropriate, brief citations). In each of your explanations, you should take into account the clients' goals, the governing law, and the advantages and disadvantages of your recommendations.

Your explanations are important, as I will use them as a basis for advising the clients as to the choices made. Address only those articles that indicate that the language and explanation are to be completed. Do not restate or address any articles that have already been completed.

EXAMPLE

ARTICLE II – DURATION OF THE ASSOCIATION

Language: The Association shall exist for a renewable duration of 99 years.

Explanation: As set forth in the client interview, the two entities plan for a long-term, mutually profitable project. Because the parties want the duration to be as long as possible and because Franklin law limits unincorporated associations to a renewable duration of 99 years (*see Walker on Corporations and Other Business Entities* § 10.2), I recommend the maximum duration.

Transcript of Attorney Ringer's Client Interview with
Marybeth Fischer, Representative of the League, and
Ralph Peters, Representative of the Players
July 16, 2018

Abraham Ringer (Attorney): It's a pleasure to see you both. Thanks for retaining us to form your new venture. Tell me about it.

Marybeth Fischer: As you probably know, we operate the Rugby League of America—a professional rugby league. Our hope is that we can transform rugby into a significant sport in this country—it has all the attractions of football and soccer, and we think our players are much more accessible to the public. From the team owners' standpoint, we think we can create sufficient fan interest to turn our league into a highly profitable, long-term venture for the benefit of current and future owners and players.

Ralph Peters: Our players see this as a great opportunity. All have played rugby in college or at an amateur level, and many have played professionally in other sports like soccer. We've negotiated a collective bargaining agreement with the owners—not without a lot of give and take, some of it pretty hard-fought—and we're ready to move forward now.

Attorney: Tell me about the structure of the league.

Fischer: The league itself is an association of the owners of the eight teams. And who knows, maybe in the future, if we really catch on, we can expand to more teams. We've modeled ourselves on the existing professional sports leagues. There are 22 players on a rugby team, and, as Ralph noted, we've got a collective bargaining agreement with the Professional Rugby Players Association, which is their union.

But we know that, as we try to get the league going and interest sparked in the game, we as owners are going to have to bear considerable start-up expense until the sport turns profitable for us. So we want to maximize every revenue opportunity we can. Obviously, we will have revenues from attendance at the games, concessions, and broadcast and cable rights. But there are other sources of income we want to mine.

Attorney: Such as?

Fischer: For example, we see merchandising as a major possible income source. Each team has a logo that it owns, as does the league. Fans want merchandise with those logos.

Peters: And fans want items with the names and images of their favorite players, which only the players have rights to. And there are physical items like game-worn jerseys that can fetch considerable income. Then there are endorsement deals . . . .

Fischer: Yes, like the "official luxury car of the League." We've all agreed to pool all the properties of this sort that we own and market them for our mutual benefit.

Attorney: By "we all," you mean the owners and the players?

Fischer: Yes indeed. To speak candidly, in our negotiations with the players over the collective bargaining agreement, our owners wanted to get all the necessary property rights and control this marketing, but the players refused.

Peters: That's right—the owners aren't exactly paying our players huge sums of money, and we weren't about to give them even more without our fair share. Because of our distrust, equal voting power is what both sides want, but we'd like to know from you what the pros and cons are of that choice.

Fischer: Well, the owners think they're paying a fair price for the players' services. The fact is that it is better if we are in the lifeboat together. But be that as it may, we agreed to form a new entity, an association of both the owners and the players, which would exploit all these tangible and intangible properties and market them for our mutual benefit. We're calling it the Rugby Owners & Players Association, or ROPA.

Peters: We figured that the owners' properties, such as the team logos and trademarks, and the players' properties, such as their likenesses, were about equal in value, and by sharing the revenue from all the properties in a unified marketing scheme, we'd all do better.

Attorney: Is each side sure that it wants to share revenue from all these sources equally?

Fischer: Yes, we've been over that. We're just starting out, and we need any source of income that we can get. We know that we need to cooperate to make this profitable.

Attorney: How is it going to work?

Peters: That's what we need you for. We would never agree to allow the league's counsel to set this up, and the owners would never agree to allow the players' counsel to do so, so we've come to you to represent us both in forming this venture.

Attorney: Now I understand. Just off the top of my head, I can see many legal aspects to getting this done, involving questions of governance, liability, tax, and more. Let's start with governance. As a general matter, how did you envision ROPA to be structured?

Fischer: Well, we agreed that, like the league, it would be a membership association.

Attorney: The governing document of an unincorporated membership association in Franklin is its Articles of Association, so our first task is to draft that document for you. Let me ask you some questions that will help us draft it. As this will be a membership association, who would be the members?

Fischer: From the owners' side, the members of ROPA would be each of the eight teams.

Peters: And from the players' side, it would be each of the 176 players.

Attorney: So the owners—that is, the teams—and the players would be separate classes of members. And the governance of ROPA? How would the board of directors work?

Peters: Let's get something clear at the outset. Marybeth and I are friends. But professionally, they are management and we are labor: we don't trust each other. So however ROPA is structured, we can't have a leg up on them, or they on us. Simply put, neither side can control the organization. We have to structure ROPA so that we're required to cooperate, or it won't work. We both will need guarantees, for example, that neither side can force something through the board of directors without the other side's consent. So you have to keep that in mind, however ROPA is set up.

Fischer: I think that Ralph is right. I mean, we can never require unanimity, because then just one team or one team's players could veto something that everybody else on both sides wants. Certainly, there are some items that will come to the board's attention that are just pro forma. But for serious matters, we'd have to protect each side against unilateral action by the other. So I'll answer your questions from the owners' perspective, and he can do so from the players'. We figured that each of the teams would have a seat on the board. Each team would name its own person to sit on the board.

Peters: And that would mean that the players would need to have the same number of seats on the board as the owners. Each team's players already elect a representative to act as a liaison with the union, and that representative would sit on ROPA's board as that team's players' representative.

Attorney: I see. To protect each side against unilateral action, you probably want to require some minimum number of directors from each side as a quorum, and perhaps specify that board actions require the support of both sides. How long will directors serve, and how will any vacancies on the board be filled?

Fischer: We thought that each team's owner would name its director. We figured that the director filling each owner's seat would continue in office until the ownership of the team changed or the individual named was no longer named to that position by the team.

Peters: And basically it would be the same for the players if the specific team's players' representative to the union changed.

Attorney: The sort of structure you're suggesting poses interesting points about deadlock, presiding officers, and the like. We'll look into possible solutions for you. We'll need to provide you a caution about the implications of a 50–50 arrangement when we explain our draft proposal. To avoid deadlock, you could appoint a disinterested director.

Fischer: I see your point, but it's much more important for us to have equal representation.

Attorney: I understand. Many organizations that choose equal representation find a way to work together because they want to take advantage of opportunities for profit.

Peters: We do have a significant disagreement on one of the points you mentioned, and we're looking to you for guidance. We know there must be a chair of the board of directors to preside at board meetings. To avoid any favoritism to one side or the other, we think the chair should be the CEO as a nonvoting director.

Fischer: We, on the other hand, don't want any other directors sitting in the board meeting, whether voting or not, so we think the chair should rotate between both sides. And you should know that neither of us wants an independent director in any capacity, including as a chair.

Attorney: We'll look at that, give you the advantages and disadvantages of each approach, and make a recommendation. Now, how would the rights and properties be transferred to and owned by ROPA?

Fischer: We'd need your advice.

Attorney: I would suggest a membership agreement that each member would have to sign.

Peters: Sure, but it's important to us that the owners and players be equal, that each would have the same rights and obligations in ROPA under that sort of membership agreement.

Attorney: Okay, we can deal with that. Now let's get to the money. How do you envision any income being handled?

Fischer: We are expecting that the costs of running ROPA will be covered by the income it receives. So the question is what to do with the amount remaining after expenses are paid. We've agreed that it will be divided 50–50 between, and paid to, the league and the players' association. Then each side will, on its own and outside of ROPA, figure out how to apportion the amount paid among its constituents.

Peters: But we want to make sure that our 50–50 arrangement can't be changed by a simple majority.

Attorney: Who is going to run ROPA? I mean, you can't expect the board of directors to take charge of the day-to-day running of the organization, with all that would entail.

Peters: Certainly. We expect to hire a chief executive officer, who will then hire employees and run the place. The CEO would be named by and report to the board. And of course, it's important that he or she wouldn't be beholden to either the league or the players alone—he or she would have to be entirely neutral between us.

Attorney: I really want to thank you for bringing this matter to us. I'll get back to you after we've written a draft of the Articles of Association and analyses of all the other issues that can serve as the basis for further discussions.

INITIAL DRAFT OF
ARTICLES OF ASSOCIATION
OF THE
RUGBY OWNERS & PLAYERS ASSOCIATION

ARTICLE I — OBJECTIVES

SECTION 1. We constitute ourselves a voluntary membership association under the name "Rugby Owners & Players Association" (the Association) for the following purposes, to wit:

a. To exploit certain properties and rights, both tangible and intangible, which the Association's members may from time to time grant to the Association

b. To acquire, own, and sell real, personal, and intellectual property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objectives of the Association

c. To distribute all revenues earned by the Association, after deduction of expenses and reserves, as further set forth in these Articles

d. To do any and all other acts which may be found necessary or convenient in carrying out any of the objectives of the Association or in protecting or furthering its interests or the interests of its members

SECTION 2. The principal office of the Association is to be located in Franklin City, Franklin.

ARTICLE II — DURATION OF THE ASSOCIATION

The Association shall exist for a renewable duration of 99 years.

ARTICLE III — MEMBERSHIP

SECTION 1. CLASSES OF MEMBERSHIP. There shall be two classes of members: (1) each of the teams in the League and (2) each of the players on each of the teams in the League.

SECTION 2. MEMBERSHIP AGREEMENT. Each member shall execute a membership agreement, which shall be uniform in form for all members, as shall be prescribed by the Board of Directors.

ARTICLE IV — BOARD OF DIRECTORS

SECTION 1. GOVERNMENT. The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of **[number of directors or other language to be inserted],** who shall represent each class of members as follows: **[Language to be completed]**.

[Explanation]

SECTION 2. ENUMERATED POWERS OF THE BOARD. The Board shall have power to manage the affairs of the Association for the common benefit of the members, and to do and take all actions that are lawful.

SECTION 3. ELECTION OF DIRECTORS. Each of the Directors representing each team in the Rugby League of America shall be elected by the owner of that team; each of the Directors representing the roster of players of each such team shall be that team's players' representative to the Professional Rugby Players Association.

SECTION 4. TERM IN OFFICE OF DIRECTORS. Each Director representing a team in the Rugby League of America shall serve until replaced by the owner of such team; each Director representing the roster of players of a team shall serve until replaced as the players' representative of that team to the Professional Rugby Players Association.

SECTION 5. VACANCY IN BOARD OF DIRECTORS. **[Language to be completed]**

[Explanation]

SECTION 6. MEETINGS OF THE BOARD.

a. Frequency of meetings: The Board shall meet at least twice each calendar year.

b. Quorum: **[Language to be completed]**
[Explanation]

c. Voting: **[Language to be completed]**
[Explanation]

ARTICLE V — OFFICERS

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be **[Language to be completed]**
[Explanation]

ARTICLE VI — MANAGEMENT OF THE ASSOCIATION

The management of the Association shall be conducted by a Chief Executive Officer, who shall be named by the Board of Directors. The Chief Executive Officer shall report solely to the Board of Directors.

ARTICLE VII — APPORTIONMENT & DISTRIBUTION OF REVENUES

[Language to be completed]
[Explanation]

ARTICLE VIII—AMENDMENT OF ARTICLES

These Articles may be amended by **[Language to be completed]**
[Explanation]

Excerpts from Walker's Treatise on Corporations and Other Business Entities

Section 10.0 – Unincorporated Membership Associations Generally

10.1 Franklin Membership Associations Generally: Franklin law allows for the formation of unincorporated membership associations—a form of legal entity that is not a corporation, but rather allows individuals and other juridical entities to join together for common purposes. Examples are veterans and fraternal organizations, musical performing rights organizations, and sports leagues. Franklin law requires such organizations to adopt Articles of Association, which may include the items one would find in a certificate of incorporation, but also contain far more detail as to the governance and functioning of the association (e.g., dealing with matters of structure and the election of the board of directors, obligations of members, and the classes of members). That said, matters of corporate governance for membership associations are generally comparable to those for corporations. This portion of the treatise will analyze issues for such associations as compared to those for corporations, and will highlight differences only where they exist.

10.2 Duration: Under Franklin law, unincorporated membership associations are limited to a renewable duration of 99 years.

10.3 Classes of Members: Membership associations frequently have more than one class of members (e.g., musical performing rights organizations have classes of composers, lyricists, and music publishers). Whether those classes have differing rights and obligations is a matter for the association to determine. The issue is invariably dealt with in the Articles of Association of the organization. What those rights and obligations are can be dealt with either in the Articles or in a membership agreement.

10.4 Number of Directors: Franklin law requires a minimum of three directors for the association's board of directors. Boards usually have an odd number of directors, to prevent a voting deadlock. However, when more than one class of members is represented on a board, an even number of directors for each class may be named. Although this might lead to a deadlock in voting, it also may encourage cooperation among the various classes, as the board would not otherwise be able to take action. *See also* section 10.10.

. . .

10.8 Vacancy in Board: Vacancies in the board of directors (e.g., by resignation or death) may be filled in a variety of ways (e.g., by holding a special election of members; allowing the remaining directors to fill the vacancy for the remainder of the term of the resigned/departed director; or specifying in the Articles of Association an alternative method, such as allowing each class of members or directors to fill vacancies in that class).

10.9 Conduct of Board Meetings: Franklin law provides that a quorum of a majority of board members is necessary to take any action. In the case of boards that have members from different classes, there may be additional requirements of attendance to ensure class representation in the quorum. Boards may, by resolution or provisions in their Articles of Association, require that certain matters of great importance (e.g., amendment of their articles, hiring key employees, or allocation of revenues and expenses) be passed by a supermajority of two-thirds of those present and voting, or even of the entire board.

10.10 Officers: Franklin law requires that boards name, at the very least, a chair, a secretary, and a treasurer. In cases where the board is made of different classes of members, a disinterested, independent, nonvoting chair (e.g., an outside director or the corporation's chief executive officer) may be named to preside instead of naming a chair from one of the classes. In such a case, that person would constitute his or her own class of directors. Typically, an independent director will be elected by a supermajority of the entire board. Even though the chair might be seen as a merely administrative office, simply presiding at meetings, the chair's rulings could run counter to the position of a particular class. This could pose a problem for a chief executive officer named to be chair, for the chief executive officer, as an employee of the board, would be expected to be neutral as between such positions. As an alternative, when there are different classes of members, the chair may rotate among directors from the different classes.

10.11 Operations: The chair has the power to preside at board meetings. The day-to-day running of the association is usually delegated to an employee such as a chief executive officer.

Schraeder v. Recording Arts Guild
Franklin Court of Appeal (1999)

Dorothy Schraeder and 11 other members of the board of directors (collectively, "Schraeder") of the Franklin Recording Arts Guild ("the Guild") sued to enjoin the Guild from effectuating a resolution allegedly adopted by the Guild's board of directors. The trial court granted the injunction, and the Guild has appealed.

The Guild is an unincorporated membership association, formed under the laws of Franklin. The Guild's purpose is to market and license various properties created by musical performing artists and owned by record companies, for their mutual benefit. The Guild is controlled by a board of directors of 12 performing artists and 12 record company representatives. The position of chair alternates every six months between a performing artist director and a record company director. Although they have joined together for a common purpose in creating and operating the Guild, it is fair to say that the two sides do not have the highest degree of trust in each other. The governance structure of the Guild therefore contains various safeguards against one side or the other gaining an unfair advantage in the operation of the Guild.

The Articles of Association of the Guild provide that a quorum of 13 of the total 24 directors must be present for the conduct of business (a majority, as Franklin law requires), but in addition (1) that at least two representatives of each class of members be present for that quorum, and (2) that a majority of directors present and voting from each class vote in favor of any proposed resolution for it to be adopted.

In December 1998, the Guild's board met to conduct a regular meeting. The meeting was attended by all 12 record company directors and 9 performing artist directors. Quoting verbatim from the minutes of the meeting best conveys what occurred at the meeting:

> Mr. Carson [a record company director] proposed that the allocation of revenues of the Guild be changed from the present even division between record company members and performing artist members to a 60%–40% division in favor of record company members. His proposed resolution was seconded by Ms. Aguero [a record company director]. After discussion, [eight performing artist directors] left the meeting [in protest]. Ms. Schraeder, the sole remaining performing artist director present, raised a Point of Order and demanded a quorum call. Mr. Ray [a record company director], Chairman, ruled the demand out of order. The board then voted, 12–1, in favor of the resolution. [The minutes then identify how each director cast his or her vote: the 12 affirmative votes were cast by record company directors,

while the sole negative vote was cast by Ms. Schraeder, the only performing artist director present and voting.]

Ms. Schraeder and her fellow performing artist directors have brought this action to enjoin the Guild from putting the proposed resolution into effect. The trial court granted the injunction, and we affirm, for the following reasons:

The voting provisions of the Guild's Articles of Association were designed to prevent either side from gaining a material advantage over the other in the conduct of the Guild's operations, such as by changing the allocation of revenues to advantage one side, as was attempted here. By requiring that a quorum include at least two directors from each side, the Articles effectively prevent either side from gaining such an advantage should the other side not be present to vote. Further, once a quorum is present, the Articles require that a majority of directors from each side who are present and voting vote in favor of any action.

That there was only one performing artist director present when the vote was taken does not invalidate the vote for lack of a quorum. Franklin law provides that, once a quorum (in this case, 13 directors, including 2 directors from each class) is present for a board meeting, it continues to exist for the duration of the meeting.

However, Schraeder argues that the board action was ineffective because a majority of one class of directors—Ms. Schraeder, the sole performing artist director present and voting—voted against the resolution.

To adopt any resolution, the Guild's Articles of Association require that a majority of each class of directors present and voting vote in favor of that resolution. That requirement was not met. Hence, the disputed resolution could not take effect.

Judgment affirmed.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #1

From the Multistate Essay Examination

In *Gonzales v. Raich,* 545 U.S. 1 (2005), the Supreme Court held that Congress has the power under the Commerce Clause of Article I, Section 8, of the Constitution "to prohibit the local cultivation and use of marijuana," even when applicable state law permits such cultivation and even when the cultivation and use are entirely within state borders. At the time of that decision, at least nine states authorized the use of marijuana for medicinal reasons. Since the decision, medicinal use of marijuana has been approved in numerous other states, and some states have also begun to allow the recreational use of marijuana.

Concerned with the widespread disregard of federal law in states that have "legalized" marijuana use, Congress recently passed the Federal Drug Abuse Prevention Act. Sections 11 and 15 of that Act provide as follows:

> *Section 11.* Any state law enforcement officer or agency that takes any individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense.
>
> *Section 15.* No state government, state agency, or unit of local government within a state shall be eligible to receive any funding through the federal Justice Assistance Grant program unless use of marijuana is a criminal act in that state.

The Justice Assistance Grant program has been in existence for many years. It is the primary program through which the federal government provides financial assistance for state law enforcement agencies. Last year, the federal government made approximately $300 million in grants to state and local law enforcement agencies through this program. Congress has appropriated another $300 million for such grants in the upcoming fiscal year.

State A has a population of about 4 million people. Its crime rate is below average. Last year, total spending by law enforcement agencies in State A was $600 million, of which $10 million came from federal grants under the Justice Assistance Grant program.

State A recently adopted legislation decriminalizing the use of marijuana for all purposes by persons over the age of 21.

As applied to State A,

1. Is Section 11 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.

2. Is Section 15 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #2

From the Multistate Essay Examination

A homeowner, who knew that his neighbor wanted to buy a lawn mower, called the neighbor and offered to sell his lawn mower to her for $350. The neighbor replied, "No way! That price is too high." The homeowner responded, "The price is a good one. See if you can find another lawn mower as good as mine for as little as $350. I'm confident that you'll come to your senses. In fact, I'm so confident that not only am I still willing to sell you the lawn mower for $350, but I promise to keep this offer open for a week so that you have time to do some comparison shopping. If you don't get back to me within a week, I'll sell the lawn mower to someone who knows what a good value it is."

Four days later, the neighbor concluded that $350 was, indeed, a very good price for the homeowner's lawn mower. Accordingly, she decided that she would go see the homeowner the next morning and accept the offer to buy the lawn mower from him for $350. That evening, the neighbor got a telephone call from an acquaintance who lived on the same block as the homeowner and the neighbor. The acquaintance said, "Congratulate me! I just got a great deal on a used lawn mower. [The homeowner] agreed to sell me his lawn mower for $375. At that price, it's a steal. I'm picking it up tomorrow afternoon." The neighbor replied, "This must be a mistake; he offered to sell that lawn mower to me." The acquaintance said, "There's no mistake; we wrote up the deal and everything. I'll come by your place right now and show you the signed contract." A few minutes later, the acquaintance went to the neighbor's house and showed her a signed document pursuant to which the homeowner had agreed to sell his used lawn mower to the acquaintance for $375.

The neighbor went to the homeowner's house the first thing the next morning, rang his doorbell, and as soon as the homeowner came to the door, said, "I accept your offer." The homeowner replied, "Too late. I've agreed to sell the mower to someone else for $375. Next time, act quickly when you are presented with such a great bargain."

The neighbor is furious about the homeowner's refusal to sell her the lawn mower for $350. In her view, the homeowner was bound to keep his offer open for a week and, in any event, her statement "I accept your offer" created a contract that bound the homeowner to the deal.

1. Was the homeowner bound by his promise to keep his offer open for a week? Explain.

2. Assuming that the homeowner was not bound by his promise to keep the offer open, did the neighbor's statement "I accept your offer" create a contract with the homeowner for the sale of the lawn mower? Explain.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #3

From the Multistate Essay Examination

In 2015, a man purchased a convenience store that sells gasoline and snack-type grocery items. The man's store is located within two miles of three other convenience stores that are larger and contain small dining areas. When he bought the store, the man planned to expand it as soon as he could in order to offer the same services and products as the other three stores in the area.

In 2017, the local zoning board passed an ordinance that rezoned the district in which all four stores are located from "light commercial" to "residential." Convenience stores are not "residential" uses. The zoning ordinance contained typical language protecting existing nonconforming uses.

In early 2018, the man decided to expand his store by 1,100 square feet to add a small dining area. To finance this expansion, he obtained a $200,000 loan commitment from a local bank, with the funds to be disbursed at such times and in such amounts as the bank determined to be appropriate if, in the bank's good-faith judgment, there was "satisfactory progress" being made on the project. Documents reflecting this commitment were signed by the man and the bank, and a mortgage to secure the repayment of the loan was promptly and properly filed in the local land records office.

Two weeks after obtaining the loan commitment, the man signed a contract with a general contractor for construction of the store expansion. In compliance with its loan commitment, the bank disbursed $50,000 to the man, who, in turn, paid that sum to the general contractor. Construction began immediately thereafter.

Four weeks into the project, a plumbing subcontractor installed all the plumbing fixtures. After the general contractor failed to pay the $20,000 agreed price to the subcontractor, the subcontractor immediately filed a mechanic's lien against the man's property in the local land records office to secure its claim for $20,000.

Eight weeks into the project, the bank disbursed an additional $40,000 to the man, who, in turn, paid $40,000 to the general contractor. The general contractor used these funds to pay various creditors, but not the plumbing subcontractor.

Two weeks ago, a bank loan officer learned for the first time about the mechanic's lien. The next day, when the man approached the bank about making another disbursement, the loan officer refused. The man asserts that, under the loan agreement, the bank is obligated to disburse further funds.

1. Is the expansion project a nonconforming use? Explain.

2. Assuming that the expansion project does not violate the zoning classification, is the bank obligated to disburse further funds? Explain.

3. Does the mechanic's lien have priority, in whole or in part, over the bank's mortgage? Explain.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #4

From the Multistate Essay Examination

By his will, a testator created a trust of a small house and an apartment building containing six three-bedroom apartments. The will directed the trustee to sell the house within six months of the testator's death. The will also provided, in relevant part, that "all trust income will be paid to my cousin, Albert, during his lifetime" and that "upon Albert's death, all trust principal will be distributed to my granddaughter, Betty." Neither the will nor the trust made any provision for the testator's son, who was living at the time the will was executed. Shortly after making this will in 2006, the testator died.

After the trust was created, the trustee sold the house for $100,000 and properly invested the sale proceeds. All six apartments in the apartment building were rented at market rates ranging from $1,200 to $1,400 per month.

In 2010, one apartment, which had been rented for $1,300 per month, was vacated. The trustee thereafter rented this apartment to himself for $1,300 per month. The other five apartments continued to be rented throughout the term of the trust at market rates of between $1,200 and $1,400 per month.

In 2012, a portion of the apartment building's roof was destroyed by fire. Because the trustee had not purchased a fire insurance policy, he spent $50,000 to repair the roof. The trustee charged this expense to trust income even though the trust had liquid assets of more than $120,000 that could have been used to pay for the repair. Because the roof repair was charged to trust income, Albert received $50,000 less income from the trust in 2012 than he had received in prior years.

In 2013, Betty died. Betty was survived by her husband and a daughter. Under Betty's duly probated will, she left her entire estate to her husband. If Betty had died intestate, her estate would have been distributed equally between her husband and her daughter.

There is no applicable statute relevant to the disposition of Betty's interest in the trust.

In 2018, Albert died. Albert was survived by Betty's husband and Betty's daughter. Albert was also survived by the testator's son.

1. What fiduciary duties, if any, did the trustee violate in administering the trust? Explain.

2. Upon Albert's death, how should the trust principal be distributed? Explain.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #5

From the Multistate Essay Examination

A woman has sued a man for injuries she received in an automobile collision at a suburban traffic circle in State A on January 1. Both drivers were driving alone, there were no other witnesses, and a forensic accident investigation failed to determine which of the two drivers was at fault.

Among other things, the woman's complaint alleges the following:

1. The woman was driving her pickup truck in the traffic circle at or below the speed limit when the man suddenly pulled his car into the traffic circle immediately in front of her.

2. The man's action left the woman no opportunity to slow down, stop, or avoid colliding with his car.

3. The woman observed that the man was texting on his phone when he entered the traffic circle and did not see him look up to check for traffic before entering the circle.

4. The accident caused the onset of significant neck pain for the woman requiring extensive medical treatment and resulting in lost wages.

The man has denied that he was texting at the time of the accident and alleges that the accident was the woman's fault. According to the man, the woman was driving her truck substantially over the speed limit, her brakes were defective, and despite the fact that the man's car was far ahead of the woman's truck when he entered the traffic circle, the woman failed to slow down to avoid a collision.

A jury trial has been scheduled.

The man's attorney plans to offer the following evidence:

(a) Testimony by a mechanic to the effect that "I inspected [the woman's] truck a week before the accident. The brakes on the truck were worn and in need of repair. I ordered new parts."

(b) A written invoice signed by the mechanic stating: "New parts for [the woman's] truck brakes ordered on December 23 and received on January 2," found in the mechanic's file cabinet among similar invoices for other customers.

(c) Testimony by the woman's doctor, who treated the woman for neck pain after the accident, that the woman told the doctor, "I have suffered from painful arthritis in my neck for the past five years."

The woman's attorney plans to call the man's roommate to testify that "[the man] is addicted to texting and never puts his phone down. He even texts while driving."
State A has adopted evidence rules identical to the Federal Rules of Evidence.

1. Is the mechanic's testimony admissible? Explain.

2. Is the invoice for the new parts for the woman's truck brakes admissible? Explain.

3. Is the doctor's testimony admissible? Explain.

4. Is the roommate's testimony admissible? Explain.

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CONNECTICUT BAR EXAMINATION

24 July 2018

ESSAY QUESTION #6

From the Multistate Essay Examination

A woman and a man decided to start a solar-panel installation business in State X. They agreed to incorporate the business and to be equal shareholders. They also agreed that the woman would be solely responsible for managing the business.

On November 10, the woman mailed to the Secretary of State of State X a document titled "Articles of Incorporation." The document included the name of the corporation (Solar Inc.), the name and address of the corporation's registered agent, and the woman's name and address (as incorporator). The woman, however, inadvertently failed to include in the document the number of authorized shares, as required by the business corporation act of State X, which in all respects comports with the Model Business Corporation Act (1984, as revised). The woman signed the document and included a check to cover the filing fee.

On November 20, the woman, assuming that the articles of incorporation had been filed and purporting to act on behalf of the corporation, entered into a one-year employment contract with a solar-panel installer. The woman signed the employment contract as "President, Solar Inc." and the installer signed immediately below.

On November 30, the woman received a letter from the Secretary of State's office returning the articles of incorporation and her check. The letter stated that the articles, although received on November 15, had not been filed because they failed to include the number of authorized shares, as required by state law.

On receiving this letter, the woman immediately revised the articles by adding the number of authorized shares. On December 5, the woman mailed back the revised articles to the Secretary of State's office, along with another check to cover the filing fee. The revised articles of incorporation were received and filed by the Secretary of State's office on December 10.

Six months later, Solar Inc. went out of business and the installer's employment was terminated.

1. When did Solar Inc. come into existence? Explain.

2. Is the woman personally liable to the installer on the employment contract that she signed? Explain.

3. Is the man personally liable to the installer on the employment contract? Explain.

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