

## **Narrative Answer Questions [total weight is two-thirds of the examination]**

This section contains three (3) questions. The weight of each is stated below.

For all questions, you should presume that no officer has any warrant (of any kind) unless the warrant is mentioned in the question.

### **Question 1 [two-fifths (40 percent) of the narrative answer portion of the examination]**

You have been hired as an “on-call lawyer” for a city police department. In an effort to increase compliance with the rules governing law enforcement officers, the department has hired a few lawyers to answer questions that officers might have about the Constitution of the United States. (The state constitution is handled by a different group of lawyers, and you need not worry about it for purposes of this question.)

Your phone rings, and an officer says the following:

I responded to a domestic violence call (in which a woman called 911 to say her boyfriend had just shoved her into a wall). When I arrived, I found a dorm-style off-campus apartment that was home to four college students. In this building, each apartment has a common room (*i.e.*, a living room) that you enter from the hallway. From the common room, you can reach a shared kitchen, a bathroom, and four small bedrooms. The complainant and her boyfriend each rent one of the bedrooms, and two of their friends had the other rooms. When I arrived, only the complainant and boyfriend were there.

As soon as I got there, the complainant tried to welcome me in, but the boyfriend said, “There is no way you’re coming into my apartment. I know my rights.”

He became increasingly agitated and started waving his arms around. Then he slipped, hit his head on the floor, and was knocked out cold. I called an ambulance, and just now he was taken to the hospital.

The complainant has invited me in again. She says that I am free to look around and that if I examine the table next to her boyfriend’s bed, I will find a TASER weapon with which the boyfriend once threatened her.

She also pointed to a backpack on the kitchen table, which I can easily see from where I am standing in the hallway. She says it’s her boyfriend’s backpack and that he let her borrow it earlier today to take her laptop to chemistry class. She says that when she took her laptop out, she found a plastic bag containing what she believes (but is not sure) to be marijuana. She says the baggie is not hers and that I am free to take it.

**[This question continues on the next page.]**

What I allowed to do here? I want to go in, chat with the complainant in her home (where she is likely to feel much more comfortable chatting than at the police station), and get the evidence she mentioned (along with whatever else I can find). Is that okay?

As you are thinking of the answer, you get another call. Putting the first officer on hold, you answer the second call, which is from a different officer. The second officer says the following:

Hello. I'm the lead detective investigating a string of armed robberies, in which three suspects wearing masks have pointed guns and demanded money from several gas station attendants in town, as well as from the proprietors of a few liquor stores.

At one robbery scene, an officer found a piece of paper that seemingly fell from the pocket of one of the robbers. Using the FBI fingerprint database, we traced the paper to someone in town (named Laertes). We went to his house to question him, and he confessed. He also identified his two confederates (who are named Gertrude and Claudius). We arrested him, and he's in the county jail.

Gertrude is a teacher at a public high school in town, and Claudius is a student there. Laertes tells me that he's pretty sure that Claudius stole a bottle of whiskey at the most recent liquor store robbery and that he brings it to school each day in his backpack.

I have a few questions:

First, my partner says I messed up by not Mirandizing Laertes at his house before questioning him. Did I?

Second, if I see Claudius waiting for the school bus, may I take his backpack and open it to look for the stolen whiskey bottle?

Third, if I can't find Claudius before he goes to school, and I call the high school principal and tell her what I know about the backpack, may the principal search it?

Fourth, if I see Gertrude walking out of her favorite coffee shop (which I observed her leaving yesterday morning), may I arrest her?

How do you reply to the two officers?

**Question 2 [two-fifths (40 percent) of the narrative answer portion of the examination]**

Police are investigating a state senator who is suspected of using his political power to force businesses to provide phony (“no-show”) jobs for the senator’s lazy son, Hermes. Hermes is a college graduate and appears to make his living through consulting jobs that don’t require him to go to work or to produce any work product. You are the prosecutor in charge of your office’s work on this case. Accordingly, you wish to help police obtain valuable evidence that you can eventually use at trial. Please address the following questions concerning potential investigatory tactics the police are considering using:

**Tactic A:**

Police would like to give a recording device to a local business person who says that the senator is “shaking her down” (*i.e.*, demanding that she give Hermes a fake job). The idea would be for the business person to record the senator making incriminating statements. Is this permissible?

**Tactic B:**

Police believe that the senator has been using his senate-supplied mobile phone to send text messages concerning jobs for Hermes. Police intend (without informing the senator) to obtain the records of the text messages (including to whom messages were sent, as well as the content of the messages). Is this permissible?

**Tactic C:**

Police believe that Hermes has left incriminating documents on his desk, which is adjacent to a second-floor window of his house. Officers would like to use a remote-controlled helicopter (with a camera attached to it) to hover a few feet away from Hermes’s window and thereby to take photos of the documents on the desk. Is this permissible?

**Tactic D:**

Assume for this subpart only that Hermes has been lawfully arrested and is in a holding cell at the police station. Officers read Hermes his *Miranda* warnings, and Hermes then answers a few questions. After a few minutes, however, Hermes says, “I want to talk to my dad.” May officers continue the interrogation?

**Tactic E:**

Assume for this subpart that the senator has been arrested, arraigned, and released on bail. Police would like to give a recording device to another local business person who says that the senator is “shaking her down” (*i.e.*, demanding that she give Hermes a fake job). The idea would be for the business person to record the senator making incriminating statements. Is this permissible?

**[This question continues on the next page.]**

**Tactic F:**

Assume for this subpart that the senator has been arrested, arraigneded, and released on bail. While the senator is out on bail, police become suspicious that the senator has been filing fraudulent expense reports (*i.e.*, getting reimbursed by the state for phony expenses). May police (without contacting the senator's lawyer) visit the senator's house and ask him about the expense reports? If so, what if any warnings or waivers are required?

**Question 3 [one-fifth (20 percent) of the narrative answer portion of the examination]**

You are a prosecutor. One of the police officers in your jurisdiction has recently caught someone cultivating marijuana in his house. Apparently, the suspect was using high-intensity lights in his attic, where he grew hundreds of marijuana plants. On a hunch, the officer used an infrared camera to observe the suspect's home while standing on a public sidewalk. After viewing images consistent with a home marijuana operation, the officer described the images to a magistrate, obtained a search warrant, entered the suspect's home, and found the lights and marijuana. The officer then arrested the suspect, whom your office has charged with marijuana possession with intent to distribute.

The suspect's defense lawyer has moved to suppress all evidence found during the search of the suspect's home as the fruit of an unlawful search. The lawyer just called you up and said, "See *Kyllo v. United States*, 533 U.S. 27 (2001), in your old Crim Pro casebook at page 70. Checkmate."

The brief supporting the suspect's suppression motion says essentially the same thing as you heard during the phone call, but with greater detail.

You review the case, and it indeed looks bad for you. Your boss demands that you oppose the motion, as long as there is a colorable argument. (Asserting a frivolous argument would of course be beneath the dignity of your office, not to mention a probable violation of the Rules of Professional Conduct.)

Please state whether you have a non-frivolous argument. If not, why not? If so, describe the best argument you have.

**[END OF NARRATIVE ANSWER SECTION.]**

**[END OF EXAMINATION.]**