



## February 2017 California Bar Exam Issue Analysis Question 6: Criminal Procedure and Criminal Law

### Main Issues (see page 2 for detailed issue analysis):

- 4<sup>th</sup> Amendment
- 5<sup>th</sup> Amendment
- Entrapment

### Relevant Facts:

- Ivan (proven unreliable informant), told Alan (detective) that Debbie had offered Ivan \$2,000 to find a hit man to kill her husband, Carl.
- Alan (based on info from Ivan) obtained a warrant for Debbie's arrest. In the affidavit in support for the warrant, Alan described Ivan as a reliable informant even though Alan knew that Ivan was unreliable.
- Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.
- Bob called Debbie, told her he was a friend of Ivan and could do the killing and arranged a meet with her at a neighborhood bar. The following conversation took place:
  - B: I understand you are looking for someone to kill your husband.
  - D: I was, but now I think it is too risky. I have changed my mind.
  - B: That is silly. It's not risky at all. I'll do it for \$5,000 and you can set up an airtight alibi.
  - D: That's not a bad price. Let me think about it.
  - B: It's now or never.
  - D: I'll tell you what. I'll give you a \$200 down payment, but I want to think some more about it. I am still not sure about it.
- When Debbie handed Bob the \$200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I am in real trouble now."
- Debbie has been charged with solicitation of murder and possession of cocaine.

### Calls of the Question:

1. How should the trial court rule on the following motions:
  - a. To suppress the cocaine under the 4<sup>th</sup> Amendment? Discuss.



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- b. To suppress Debbie's post-arrest statement under Miranda? Discuss.
2. Is Debbie likely to prevail on a defense of entrapment at trial?

**Issue Analysis (Caveat: this is one interpretation of this essay. The California bar examiners release two answers for each essay and often each answer differs):**

- 4<sup>th</sup> Amendment – Suppressing the cocaine
  - The 4<sup>th</sup> Amendment protects the public from unreasonable searches and seizures conducted by the government. This is incorporated to the states via the 14<sup>th</sup> Amendment. (Note, failure to mention that the 4<sup>th</sup> Amendment is incorporated to the states via the 14<sup>th</sup> Amendment results in lost points).
  - Search and Seizure: Here, Bob searched Debbie's pockets, found cocaine and seized the property. Thus, there was a search and seizure.
  - Government: To be unlawful, the defendant must show that the government conducted the search or seizure. Here, Bob, a police officer, conducted the search and seizure. A police officer is a government employee. Thus, the government conducted this search and seizure.
  - Standing: To assert one's 4<sup>th</sup> Amendment rights, the accused must have a reasonable expectation of privacy or substantial ownership interest in the item searched or seized. Here, Debbie had substantial ownership of the item seized (it was in her pocket) and her pocket belongs to her. Thus, she has standing.
  - Warrant Requirement: Observations and subsequent seizure of the item by the police are illegal unless accompanied by a valid warrant, or supported by an exception to the warrant requirement. Here, although Bob had an arrest warrant (independent of whether the warrant was valid or not), he did not have a warrant to search or seize her property (cocaine). Thus, this search and seizure is illegal unless a valid exception applies.
  - Warrant Exceptions:
    - Search Incident to Arrest: The search incident to arrest exception allows a limited search of the defendant's person and areas within the immediate reach from where the defendant was lawfully arrested. Here, Debbie's pocket was searched after Bob



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- identified himself and arrested her for solicitation of murder (which he likely had enough probable cause to do so). Debbie's pocket is an extension of her person and thus, this was a valid search under the search incident to arrest warrant exception.
- Moving Wing Span and Protective Sweep: Although these are not at issue based on the facts presented, they should always briefly be discussed and dismissed when discussing search incident to arrest.
  - Exclusionary Rule: Evidence seized in violation of the 4<sup>th</sup> Amendment will be excluded at trial only if the defendant can show the search was unlawful. Here, it is not likely Debbie will be able to prove the search was unlawful.
  - **Conclusion**: Based on the above analysis, the trial court should deny Debbie's motion to suppress the cocaine under the 4<sup>th</sup> Amendment.
  - 5<sup>th</sup> Amendment: Suppressing Debbie's post-arrest statement under Miranda:
    - The 5<sup>th</sup> Amendment protects a defendant from being compelled to make incriminating statements. This is incorporated to the states via the 14<sup>th</sup> Amendment.
    - Exclusionary Rule: For a defendant's statement to be admissible at trial, the defendant must have made the statement voluntarily, and without a violation of the Miranda requirements.
    - Voluntariness: A statement is voluntary when the statement is a product of rational intellect and freewill as determined by the totality of circumstances. Here, there are no facts to suggest Debbie was not of sound mind or under duress when making her statement. Thus, this statement was voluntary.
    - Miranda: Miranda requires police officers to advise the accused of their constitutional rights when that person is subject to custodial interrogation. Custodial interrogation has two parts (custody and interrogation)
      - Custody: A person is in custody when the person is subjected to physical restraint or when the person's freedom is denied in a significant way. Here, the facts state Debbie was arrested, thus she was in custody.



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- **Interrogation:** A person is subject to interrogation when police words or actions are reasonably likely to elicit an incriminating response. Here, it is reasonable that a police officer asking a question such as “what have we got here” could elicit a response. The response could simply have been “I don’t know.” Instead, the response was “cocaine.” Thus, Debbie was likely being interrogated, even though it was not in a formal setting.
- **Conclusion:** Since Debbie was subject to custodial interrogation and Bob did not advise her of her constitutional rights, according to the exclusionary rule, the court should grant Debbie’s motion to suppress her post-arrest statement under Miranda.
- **Entrapment:** A defendant can successfully raise the defense of entrapment if the criminal design originated with law enforcement officers and the defendant was not otherwise inclined to commit the criminal act.
  - Here, Debbie is being charged with solicitation. The criminal design of her solicitation did not originate with Bob. It originated with her inciting Ivan. Ivan is what brought Bob to call and meet with Debbie. The fact that Debbie was not sure whether or not she still wanted to go through with the act or not is irrelevant due to the solicitation taking place with Ivan. The fact that Ivan is an unreliable informant does not invalidate the solicitation. (It will be up to the jury to decide if he was a reliable source.)
  - **Conclusion:** Since the criminal design did not originate with Bob, Debbie will not likely prevail on a defense of entrapment at trial.

### In Conclusion:

1. The court should:
  - a. Deny Debbie’s motion to suppress the cocaine under the Fourth Amendment.
  - b. Grant Debbie’s motion to suppress Debbie’s post-arrest statement under Miranda.
2. Debbie will not likely prevail on a defense of entrapment at trial.