FEBRUARY 2023
Annotated California Bar Questions

Study edition | Original question pages with added highlights and reading pointers.

Practice first: attempt the clean question, then use the numbered notes and online sample responses to compare your reasoning. The full source packet is preserved, including its instructions and library.

Original, ungraded instructional commentary. Not official selected answers, scored student work, or a claim of attorney review.

Source: State Bar of California | 30 original pages, all retained.

Bar Exam Doctor | Published November 4, 2026

FEBRUARY 2023
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 1

4 DuraTires manufactures and installs specially coated tires. DuraTires advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DuraTires' scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DuraTires.

1 Pam purchased four new tires from DuraTires and had them installed by Maurice, a mechanic. Pam drove 100 miles and one tire went flat, causing Pam to swerve and
3 crash into another car. Pam was not physically injured in the accident. Pam gathered a written statement from the other driver, Wynne, who suffered a minor injury. Wynne's statement was favorable to Pam's case.

Pam filed and properly served a complaint in federal court against DuraTires for breach of warranty and negligent installation and manufacture of the tires. The federal court had proper jurisdiction over Pam's complaint. Pam alleged that she suffered property damage and emotional distress as a result of the accident.

DuraTires filed a motion to dismiss for failure to join Maurice as a defendant. The court denied DuraTires' motion. DuraTires filed and properly served an answer to Pam's complaint.

Pam served her initial disclosures on DuraTires, but did not produce Wynne's statement. DuraTires filed and served motions to compel Pam to produce Wynne's statement and for Pam to submit to a physical examination. The court granted both of DuraTires' motions.

DuraTires served its initial disclosures, but did not include the advertised scientific report. Pam met and conferred with DuraTires, which refused to produce its scientific report. Pam filed a motion to compel DuraTires to produce its scientific report. The court granted Pam's motion and ordered DuraTires to produce its scientific report.

1. Did the court properly deny DuraTires' motion to dismiss? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Joint tortfeasors are usually optional

Potential shared fault does not itself make a mechanic a required Rule 19 party.

2 Ask why it was prepared

A party can create work product without an attorney; anticipation of litigation still must be established.

3 Match the requested examination

An emotional-distress claim does not automatically supply good cause for a physical examination.

4 Test purpose and waiver

A report used for a public commercial claim is not protected merely because counsel directed its preparation.

2. Did the court properly grant DuraTires' motions:

   A. To compel production of the statement from Wynne? Discuss.

   B. To compel a physical examination of Pam? Discuss.

3. Did the court properly order DuraTires to produce its scientific report? Discuss.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 2

In response to a significant rise in diabetes among school-age children, and based upon links between diabetes, exercise and diet, Congress has passed, and the President has signed, the Childhood Physical Education Act (the Act). The Act, administered by the Federal Department of Education, provides significant additional funds to states for public schools with daily physical education classes for students. These funds are to be used for the hiring of additional physical education teachers and purchase of physical education equipment.

Testimony before Congress has revealed that, on average, public schools spend only 25% of their school lunch budgets on fresh fruits and vegetables. The Act requires that states accepting the funds must enact legislation setting as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

Testimony has also revealed that rates of childhood diabetes tend to be highest in minority and low-income communities. The Act has significant additional subsidies for public schools where the majority of the student population is non-Caucasian.

Before the Act has gone into effect, State X, through its attorney general, has brought suit in federal court seeking a declaratory judgment that the Act is unconstitutional. The National Association of School Dieticians (NASD) is seeking to intervene in the attorney general's lawsuit. According to NASD's charter, it seeks to promote healthy diets for school-age children, especially through school lunch programs. The attorney general opposes NASD's intervention.

1. What constitutional challenges can the attorney general make to the Act and are they likely to succeed? Discuss.

2. Does NASD have standing to intervene? Discuss

READING POINTERS

1 Inducement is not automatically coercion

Distinguish a new funding offer from a threat to remove an existing major program.

2 Use strict scrutiny

The statute expressly classifies by race despite its protective purpose.

3 Mission is not injury

Germaneness helps associational standing but cannot substitute for an injured member.

QUESTION 3

Tuan sells antique furniture. He signed a ten-year lease for a warehouse owned by Leo at $1,000 a month, with a start date of January 1. The warehouse would be used to store Tuan's inventory. When Tuan attempted to occupy the warehouse on January 1, he discovered Annika there pursuant to her validly executed lease, which was not due to end until January 31. Tuan then immediately rented another almost identical warehouse from Bruno, on a month-to-month basis, for $1,500 a month.

1

When Tuan returned to Leo's warehouse on February 1, Annika told Tuan she was not leaving until May 31.

When Tuan visited the warehouse on June 1, he discovered that Leo had stored equipment in the warehouse that made 25% of the space unusable. Tuan refused to take possession and informed Leo that he was terminating his lease immediately.

2

The next day, Leo retook possession of the warehouse and placed "For Rent" signs in several windows. Shortly after, Leo executed a ten-year lease with Juanita for the warehouse at a monthly rent of $500, with a start date of July 1.

3

Tuan rented Bruno's warehouse from January to June. He later signed a new lease for 9 ½ years starting on July 1 with a monthly rent of $1,500.

Tuan has never paid any rent to Leo.

Tuan decided to sue for damages based on his rights under his lease with Leo.

1. What claim(s), if any, may Tuan reasonably assert against Leo? Discuss.

2. What claim(s), if any, may Tuan reasonably assert against Annika? Discuss.

3. What counterclaim(s), if any, may Leo reasonably assert against Tuan? Discuss.

READING POINTERS

1 Separate legal and actual possession

January involved a valid competing term; later months involved a wrongful holdover.

2 Identify the landlord's own eviction

Traditional partial actual eviction can suspend all rent, rather than only the unusable percentage.

3 Analyze surrender and mitigation

Reletting may mitigate a live claim or evidence acceptance of surrender; it does not establish both automatically.

FEBRUARY 2023
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 4

LawnCare Company (LawnCare) manufactured and sold a liquid weed killer for lawn care. Paula brought a personal injury suit against LawnCare when her children developed breathing problems after LawnCare's weed killer was applied on her lawn. LawnCare entered into a valid retainer agreement with Andy, an attorney, to defend LawnCare in the action.

Andy is a member and financial supporter of Citizens Concerned About Chemicals (C2AC), a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC.

1

Since Andy is convinced that his association with C2AC will not affect his representation of LawnCare, he did not tell LawnCare about his relationship with C2AC. LawnCare is impressed with Andy's reputation as a litigator, and Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. One week after Andy returned the questionnaire to C2AC, Andy received a call from the Chief Executive Officer ("CEO") of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit.

2

3

What ethical violations, if any, has Andy committed? Discuss.

Answer according to California and ABA authorities.

READING POINTERS

1 Free advice can create duties

An informal relationship can be legally significant without a retainer or payment.

2 Do not equate public with freely disclosable

Confidentiality and loyalty can restrict counsel's use of public litigation information.

3 Analyze the concealment separately

The response to the CEO raises honesty and communication issues beyond the original disclosure.

QUESTION 5

Pedro brought a fraud and breach of contract action against Gallery in federal court.

At a jury trial, Pedro testified that he purchased a painting from Gallery for $200,000 after seeing an advertisement bearing Gallery's logo stating that the painting was the only painting by a noted 17th century artist available for sale in the world. On Pedro's motion, a photocopy of the advertisement was admitted into evidence. Pedro also testified that the painting was worth only $10,000 because it was a reproduction of the original and that he based his valuation on the average of three appraisals of the painting by art dealers.

Pedro called Rex, a chemistry professor, who had been retained by four art galleries to determine the age of paintings. Rex testified that the painting had been painted within the past 50 years and was a painted reproduction of the original painting. He testified that he had used the XYZ technique on Pedro's painting to arrive at his conclusion. Rex testified that he had tested the XYZ technique on paintings of known ages and that the results corresponded with their known age. He testified that the XYZ technique was reliable and used by most experts to determine the age of paintings. After cross-examination, Rex was excused and left the courtroom.

Gallery called Marie, and both parties stipulated that she is an expert in dating works of art. She testified that a publication entitled "The Science of Dating Works of Art" is generally recognized as a reliable authority. She then quoted an excerpt from that publication that asserted the XYZ technique is not reliable for determining the age of works of art. Gallery moved, and the court received, the excerpt into evidence as an exhibit.

Gallery then offered into evidence a journal article authored by Rex that included a statement that the XYZ technique is not reliable for determining the age of works of art.

Assuming all proper objections and motions to strike were timely made, should the court have admitted:

1. The photocopy of the advertisement? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Apply the duplicate rule

The best-evidence rule does not categorically exclude a faithful photocopy.

2 Identify the source of the opinion

Ownership does not automatically permit a lay witness to relay appraisers' hearsay valuations.

3 Separate reading from receipt

Learned-treatise statements may be read with the proper foundation but are not received as exhibits.

4 Use the exam-date rule

In 2023 the impeachment opportunity was required without the later rule's usual sequencing requirement; recall remains relevant.

2. Pedro’s testimony about the value of the painting? Discuss.
3. Rex’s testimony about the age of the painting? Discuss.
4. The excerpt from “The Science of Dating Works of Art”? Discuss.
5. Rex’s journal article? Discuss.

Answer according to the Federal Rules of Evidence.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

February 2023

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

STATE v. HUGHES

Instructions .....

FILE

Memorandum to Applicant from Jan Dauss .....

Transcript of Pretrial Hearing .....

Transcript of Interview of Sebastian Hughes .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

OFFICE OF THE STATE ATTORNEY
County of Gaston
Littleton, Columbia

MEMORANDUM

TO: Applicant
FROM: Jan Dauss, State's Attorney
DATE: February 21, 2023
RE: State v. Hughes

Defendant, Sebastian Hughes, is charged with murder after he fatally stabbed his uncle, Peter Gault, during a dispute over a Corvette car engine. Defendant asserts he acted in self-defense. A centerpiece of our case against Defendant is a recorded statement Defendant made to detectives while he was in the hospital recovering from a stab wound inflicted by his uncle.

Defendant originally moved to suppress the statement based on a failure to be given *Miranda* warnings. The judge ruled in the State's favor on that motion. Defendant now argues that the statement was not voluntary and therefore should be excluded from his trial. The court decided that this new motion does not need to be briefed, but the court does want oral argument.

Please draft the oral argument I will give in opposition to suppression of the statement. Our success depends on our ability to marshal the facts. Do not start with a statement of facts as you would if you were writing a brief. Rather, weave the specific facts into your argument as they relate to each of the elements of the controlling law.

READING POINTERS

1 Use the requested work product

Argue for the prosecution and weave facts into legal points instead of opening with a factual narrative.

Attached are the transcript of the recorded statement and a portion of the transcript where the court refused to suppress the statement on *Miranda* grounds. While you are 1 not to address the *Miranda* issue, the court's characterization of the interview may be helpful to your argument.

READING POINTERS

1 Respect the issue limitation

The Miranda ruling is complete; this task addresses voluntariness.

State v. Hughes

Transcript of Pretrial Hearing

February 17, 2023

COURT: Let's first deal with defense counsel's motion to exclude Defendant's statement for failure to be given *Miranda* warnings. I have read counsels' briefs and listened to the recorded statement. I have decided that the circumstances in this case overwhelmingly demonstrate that Defendant was not in custody for *Miranda* purposes. The motion is denied.

Does Defendant plan any other motions?

DEFENSE COUNSEL: Your Honor, Defendant moves to exclude the statement made while confined in the hospital as involuntary. At the time of his questioning, Defendant was not sufficiently lucid and the coercive surrounding circumstances of the questioning were such that, under the United States Supreme Court's *Mincey v. Arizona*, his statement was not the result of a rational intellect and free will. Defendant was at the complete mercy of the detectives because he was in physical shock from being stabbed in the lung and in mental shock from being involved in the death of his uncle. I think everyone will agree that Defendant sustained a stab injury. He had to go through surgery in order to recover from that injury. He was administered pain medication. Further, he was still under the constant care of a medical professional while the interview began and as it progressed. I don't know exactly what the medication was at that point, but it was pain medication consistent with surgery.

COURT: Does the State stipulate to these facts?

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

DISTRICT ATTORNEY: We certainly do not stipulate to the allegations characterizing the lucidity of Defendant or the coercive nature of the questioning. It is also unclear what medication Defendant was on at that point. The rest of the facts we would concede.

COURT: All right. As I said, I have listened to the recording of the statement. I don't think I need briefs on this motion. The law is pretty straightforward. I would, however, like to hear counsels' arguments on the point. Let's schedule those arguments five days from today at 9:00 a.m. See you then counsel.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Transcript of Interview of Sebastian Hughes
with Detectives Ray and Martindale
August 22, 2022

DETECTIVE RAY: Good evening Mr. Hughes, I'm Detective Ray and this is …..

HUGHES: He's dead?

RAY: If you mean Peter Gault, yes, he's dead. Mr. Hughes, this is my partner, Detective Martindale. We need to ask you some questions about what happened. You understand you're not under arrest, right? You do? You're nodding yes. Are you able to speak?

HUGHES: I've got tubes in both my lungs and I'm a little drugged up, but yeah, I can speak. It's just, I can't believe it.

RAY: We need to interview you. Our job is to come in when someone passes away. We weren't there. We don't know what happened. If it's okay, we are going to tape record our interview.

HUGHES: It's okay.

RAY: We are starting the interview with Mr. Sebastian Hughes in the surgical observation unit of the hospital at 7:50 p.m., after calling the hospital about three or four times throughout the day to see if you were well enough to speak with us. We understand that you were injured around 11:30 this morning. You've been in the hospital about 8 hours. You got out of surgery two hours ago.

Just for our record, Mr. Hughes, I want to describe what I see. Mr. Hughes is shirtless and lying down kind of in a quasi-seated position with his back kind of at maybe a 45–degree angle in his bed in his room. Mr. Hughes has redness or an abrasion on his forehead, and a stab wound on his right side near the right chest area under the armpit.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Can you tell us what happened?

HUGHES: I've got to call my mom.

RAY: Mm–hm. What happened?

HUGHES: I received a phone call from my mom's brother, Peter Gault, this morning around 11:00 o'clock. He wanted to know the whereabouts of a Corvette engine he had been storing in the garage of my mom's house. I had sold the engine for $800 several months ago, and told him about the sale at that time. I reminded Peter that he had sold the engine to me and I figured it was mine to sell. He became angry.

RAY: Mm-hm.

HUGHES: I heard my mom crying in the background. I feared for her safety because Peter had a short temper and he was hot-headed when it came to her. I decided to leave work and drive to the house to make sure she was okay.

RAY: Did you go directly there?

HUGHES: I've really got to call my mom.

RAY: Yeah, yeah, will get to that. So, you were at work and decided to leave. What happened next?

HUGHES: I stopped at my work locker on my way out and placed an eight-inch wrench in my shirt pocket as protection, just in case it came to that.

UNIDENTIFIED VOICE: Excuse me officers, I'm from Cardiology and need to draw some blood from Mr. Hughes.

RAY: We'll get out of your way here.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

1 **HUGHES:** You guys aren't leaving, are you?

RAY: No, we're not going anywhere. We will turn the tape off while medical staff draws blood and Detective Martindale and I stretch our legs.

BREAK IN RECORDING

RAY: Okay, we're back, Mr. Hughes. We left off just as you were going to the house. What happened when you got to the house?

HUGHES: Peter and my mom were standing in the driveway in front of his van. Peter was furious. My mom stood between Peter and me, crying her eyes out trying to keep us separate. She grabbed the wrench from my pocket. I guess to make sure I didn't use it on Peter.

We argued at first. Then things got wild. Eventually, Peter knocks me to the ground. He pushed my mom a couple of times and grabbed the wrench from my mom and tried to hit me with it. At some point, Peter either dropped the wrench or threw it at me. Somehow, it ended up on the ground.

RAY: So what happened then?

HUGHES: I bent down and tried to pick up the wrench. Peter said, "You're not gonna do anything with that," and kicked me real hard on the right side of my forehead. I wound up on the ground between the van and the truck. He had the wrench in his hand.

RAY: Mm-hm.

HUGHES: Peter ran to the back doors of his van. I thought he was going to grab a knife or tool from the van. So I pulled my knife from my boot. Peter saw me getting up with the knife and ran toward the front of the van and got his own knife. I chased him. He tripped

READING POINTERS

1 **Use voluntary engagement**

Hughes's request that detectives remain helps distinguish persistent questioning against a patient's wishes.

and fell near the porch, but got up right away. He lunged at me, saying, “I’m gonna kill you,” and that’s when I stabbed him with my knife.

RAY: I’m sorry. I guess I missed where your knife comes into the story. Were you wearing the knife while at work?

HUGHES: Yeah, I guess I forgot to mention that I got it from my work locker when I got the wrench. I placed a big knife in my boot, underneath my pant leg. Because, you know, I know how he is.

I realized I had been stabbed only when I saw blood all over myself and could not breathe. I thought I was going to die and walked over to a neighboring house to lie in the shade.

RAY: Do you think that, if you didn’t bring the knife, your uncle would be alive right now?

HUGHES: Probably, but I would still be in the hospital.

RAY: How do you know that?

HUGHES: I know. This was all self-defense, man. If I had not stabbed Peter, Peter would’ve killed me. You guys don’t know what that man was capable of. Look, I see you’re skeptical. You can give me a lie detector test, or check my phone records, or talk to my family to confirm the truth I’m telling you.

RAY: We may do that Mr. Hughes, but for now I think we have enough. You’ve been generous with your time and we need to let you rest.

HUGHES: I may stay awake. I’m going to try to watch the University of Columbia game on TV. I went there for a couple of years.

RAY: Enjoy. We’ll be in touch.

Interview concluded at 8:20 p.m., August 22, 2022.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

February 2023

California Bar Examination

Performance Test

LIBRARY

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

STATE v. HUGHES

LIBRARY

State v. Perdomo
Columbia Supreme Court (2007) .....

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

State v. Perdomo

Columbia Supreme Court (2007)

Defendant Gerson Perdomo was involved in a single-car accident in which he and another occupant of the car, Marco Quinonez, were seriously injured. A third occupant, Ismael Rodriguez, was killed. Defendant was convicted by a jury of felony vehicular manslaughter while driving intoxicated. The only seriously contested issue at trial was whether Defendant was the driver.

After a night of heavy drinking, at around 2:45 a.m. on August 23, 2003, Defendant was allegedly driving on the freeway at approximately 80 miles an hour when he crashed into, and nearly went over, the concrete center median. Rodriguez, found in the back seat, was pronounced dead when taken to a nearby hospital. Quinonez and Defendant were found in the front seat. Each had serious injuries.

Defendant based his defense on the contention that the other surviving occupant, Marco Quinonez, was driving at the time of the accident. Defendant moved pretrial to exclude the evidence of inculpatory statements he made to the police officers. Near the end of the interview, Defendant admitted he sometimes smoked marijuana and then said, “Maybe that day I was smoking. I’m not going to mess with you guys. I was driving Marco’s car.”

Defendant argued that admission of his statements violated his Fifth and Fourteenth Amendment rights to a fair trial. He claims it was error of constitutional dimension to admit statements he made to officers who interrogated him in the intensive care unit of the hospital while he was recovering from surgery and heavily sedated with narcotic pain medications.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Defendant suffered severe traumatic injuries to his chest area. Several of his ribs were fractured. He underwent emergency surgery to remove his spleen. He also had some bleeding in his brain.

Four days after the accident and Defendant's surgery, medical personnel in the intensive care unit of the hospital finally granted Officer Laubscher and his partner Officer Jensen permission to speak to Defendant. Medical personnel directed the officers to keep their discussion brief. Around 6:30 a.m., the officers interviewed Defendant in the intensive care unit of the hospital. The interview was tape recorded.

Defendant was lying flat on his bed, recovering from the splenectomy, broken ribs and head injury. He was in obvious pain. Defendant had received his last pain medication five and a half hours earlier. He was still connected to intravenous solutions and monitors. He had been on a ventilator since the surgery, but this device had been removed the day before and he was breathing on his own. Defendant's speech was slow and deliberate but not slurred or overly raspy from the intubation. The officers' questions were also slow, subdued and deliberate. The interview, with numerous pauses, lasted approximately 20 minutes.

The officers questioned Defendant about the events occurring before and after the accident. Defendant's answers were responsive to the officers' questions. Most significantly, according to Officer Jensen, who was present and later transcribed the tape, Defendant admitted he had been driving the car when the accident occurred.

A statement is involuntary if it is not the product of "a rational intellect and free will." *Mincey v. Arizona* (U.S. 1978). The question posed by the Due Process Clause in cases of claimed psychological coercion is whether the influences

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.

In determining whether or not an accused's will is overborne, an examination must be made of all the surrounding circumstances, including: 1) the characteristics of the accused, including such factors as the defendant's maturity, education, physical condition, and mental health (including mental acuity), and 2) the details of the interrogation that indicate coercion, which include the length of the interrogation, the location of the interrogation, and the interrogation's continuity. Additional factors that might indicate coercion include whether the officers dominated or controlled the course of the interrogation; whether they allowed defendant to tell his story, then asked follow-up questions to clarify the details; whether their questions were open-ended and neither aggressive nor particularly accusatory in nature; and whether there is evidence that the officers had or drew weapons or otherwise employed threatening or intimidating interrogation tactics. No single factor is dispositive.

1

Defendant asserts there are numerous parallels between his case and the factual circumstances of *Mincey v. Arizona*, sufficient to find his statements involuntary and require reversal of his convictions.

Surrounding Circumstances

1. *Characteristics of the Accused*

In *Mincey v. Arizona*, Mincey was shot in the hip by police officers in a raid on his apartment. Mincey was transported to the hospital where he received emergency treatment. When he arrived at the hospital, he was almost to the point of coma. The shot caused damage to the sciatic nerve and partial paralysis of his right leg. In the emergency room, tubes were inserted into his throat to help him breathe, and through his nose into his stomach to keep him from vomiting. A

READING POINTERS

1 Apply the whole framework

Assess the defendant's capacities and the questioning, confronting the unfavorable facts in each group.

catheter was inserted into his bladder. He received various drugs, and medical personnel attached a device to his arm so he could be fed intravenously. Mincey was then moved from the emergency room into the intensive care unit.

Around 8:00 p.m., a police detective came to the intensive care unit to interrogate Mincey. The detective told Mincey he was under arrest for the murder of the police officer. He gave *Miranda* warnings to Mincey and then started questioning him about the activities and shooting at his apartment. Mincey could not talk because of the tube in his mouth. He responded to the detective's questions by writing answers on pieces of paper. The detective continued to question Mincey until almost midnight. During the interrogation, Mincey repeatedly asked for the interrogation to cease. Several times, Mincey requested the assistance of counsel before responding. He complained to the detective that the pain in his leg was unbearable. Some of Mincey's written responses were incoherent and on their face showed he was confused and unable to think clearly about the events at his apartment or about the interrogation.

The Supreme Court concluded Mincey's statements were not the product of his free and rational choice: "To the contrary, the undisputed evidence makes clear that Mincey wanted *not* to answer Detective Hust. But Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."

Like the situation in *Mincey,* here Defendant was questioned while lying in a hospital bed in the intensive care unit. As in *Mincey,* no family members or friends were then with him. He was recovering from surgery for the injuries he received four days earlier. Intravenous tubes were still attached to his body. Defendant had been receiving narcotic pain medications since his admission to the hospital.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

According to the interrogating officers, Defendant appeared to be in pain and also appeared to still be under the influence of the narcotic pain medication.

However, this is where the similarities end. Unlike what occurred in *Mincey,* Defendant was not interrogated within hours of his injuries, and not interrogated only a few hours after receiving medical treatment. Also unlike in *Mincey,* Defendant was not interrogated while going in and out of consciousness. In this case, the officers were not permitted to interview Defendant until four days after Defendant's surgery. Hospital personnel did not permit the officers to talk to Defendant until they determined he was "alert," "oriented," and could "obey commands," as indicated by his medical chart. By this time, Defendant no longer needed the assistance of a respirator and medical personnel had removed it the day before the interview.

On the day of the interview, hospital staff determined Defendant's condition had improved sufficiently so that he could safely be cared for in a regular hospital room. At 8:30 a.m., and two hours after the interview, Defendant was moved out of the intensive care unit, taken off intravenous pain medications and thereafter given oral doses of Vicodin for pain as needed.

The evidence showed Defendant was probably still under the influence of the pain medications, although the effect of the morphine he received five and a half hours earlier had likely diminished over the hours.

Nothing on the tape shows Defendant's thinking was impaired by the medications. Defendant's speech is slow and deliberate, but is not slurred or incoherent. Each of Defendant's answers is appropriate to the question asked. In some instances, his answers were detailed. For example, when asked the name of the security company for which they all worked, Defendant stated the name for the officers, spelled out the company name several times, and even recited the company's telephone number.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

At the beginning of the tape it appears Defendant was even alert enough to attempt to deceive the officers. He initially told the officers the night of the accident that he had been driving his mother's Nissan, alone, and without passengers. He later acknowledged being with Rodriguez and Quinonez in Quinonez's mother's Honda.

2. *Details of the Interrogation*

In *Mincey*, the detective ceased the interrogation only during the intervals when Mincey lost consciousness or received medical treatment and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

Most importantly, the interrogation in the present case exhibits none of the coercive police activity found in *Mincey* and other cases finding statements to have been involuntary. The interview in the present case was relatively short. It lasted a maximum of 20 minutes, as compared to the three hours Mincey was forced to endure. The officers in the present case posed their questions in a calm, deliberate manner. The officers' voices on the tape are very quiet and subdued, perhaps in deference to the other patients in the unit, and/or because of the relative lack of privacy in the room. The 20-minute interview includes several pauses as well, as medical personnel enter and exit the room providing treatment for the other patients. Unlike Mincey, who had asked for the interrogation to cease and had refused to answer some questions without the assistance of counsel, Defendant made no such requests and did not express distress or otherwise indicate any unwillingness to speak to the officers.

As the trial court noted, the officers' tone was conversational and not threatening. One of the subjects discussed was how supportive and attentive Defendant's mother had been. Defendant expressed gratitude for his recovery. He

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

asked the officers questions regarding his friends' conditions. At the end of the tape the officers wish Defendant good luck and a speedy recovery.

In short, the record is devoid of any suggestion the officers resorted to physical or psychological pressure to elicit statements from Defendant. Absent some indication of coercive police activity, an admission or confession cannot be deemed involuntary within the Due Process Clause of the Fourteenth Amendment.

The judgment is affirmed.

READING POINTERS

1 Connect pressure to choice

Injury and medication alone do not establish that police overbore the defendant's will.