- MEE 1: 57.06
- MEE 2: 44.55
- MEE 3: 55.46
- MEE 4: 41.42
- MEE 5: 53.79
- MEE 6: 40.09
- MPT 1: 49.42
- MPT 2: 52.44

Total Written Score: 137.7

ID: **06007** (Seat #)

Question: 1

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

1)

1. Whether Section 11 of the Federal Drug Abuse Prevention Act is Constitutional under the Anti-Commandeering Doctrine

Section 11 of the Federal Drug Abuse Prevention Act is an unconstitutional exercise of power under the anti-commandeering doctrine.

The first issue is whether, as applied to State A, Section 11 of the Federal Drug Abuse Prevention Act is a constitutional exercise of federal power.

Congress's power to legislate is broad. However, the Tenth Amendment reserves certain power to the states, and Congress may not, under the anti-commandeering doctrine, force the states to either enact law or enforce federal law. The states have autonomy to enact and enforce their own state law.

In Section 11, Congress purports to claim what a state law enforcement officer or agency can and cannot do. It specifically states the procedure that the state law enforcement must undertake in complying with the Federal Drug Abuse Prevention Act. For instance, a state law enforcement officer must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana. The officers or agencies must file monthly reports with the federal DEA on the outcome of these investigations, including the name of any individual determined to have been under the influence at the time. Section 11 effectively forces the states to enforce the federal law, which violates the anti-commandeering doctrine. Although Congress' concern about drug abuse may be rationally related to a legitimate government interest in protecting against drug abuse, it may not do so by forcing the states to act. This constitutes an unconstitutional overstep.

Therefore, Section 11 of the Federal Drug Abuse Prevention Act is an unconstitutional exercise of federal power.

2. Whether Section 15 of the Federal Drug Abuse Prevention Act is Constitutional under Congress's Authority to Condition State Grants

Section 15 of the Federal Drug Abuse Prevention Act is constitutional insofar as Congres has the authority to control the purse strings for state government programs without overly coercing the states to either enforce a law or to enact one.

The second issue is whether, as applied to State A, Section 15 of the Federal Drug Abuse Prevention Act is a constitutional exercise of federal power.

As detailed above, Congress's power to legislate is broad. It may condition the distribution of state grants on certain requirements, so long as these requirements do not unduly coerce the states to enforce or enact legislation.

Here, Section 15 of the Federal Drug Abuse Prevention Act states that 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. In State A, the total spending by law enforcement agencies was $600 million, of which $10 million came from federal grants under this program. In total, the federal government gave approximately $300 million in grants under this program last year. Further, State A has a population about 4 million people, and its crime rate is below average. These facts suggest that the limitation on funding is not unduly coercive. Only $10 million of State A's spending on law enforcement agencies came from the Justice Assistance Grant program, and its crime rate is below average, rendering State A not heavily reliant on this funding to provide for its citizens.

Therefore, Section 15 of the Federal Drug Abuse Prevention Act is constitutional, given that Congress's limitation on the funding to State A is not unduly coercive.

END OF EXAM

ID: **06007** (Seat #)

Question: 2

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

2)

1. Whether the Homeowner Was Bound by His Promise to Keep His Offer Open for a Week

The homeowner was not bound by his promise to keep his offer open for a week, as the offer was not supported by consideration, thereby avoiding the creation of an option contract.

The first issue is whether the homeowner's promise to keep his offer open for a week formed an irrevocable option contract.

Usually, offers are revocable, even where the offeror promises to keep the offer open. However, there are two exceptional situations, where the offer will be considered irrevocable. The first is a UCC firm offer, which occurs between merchants. The second is the common law option contract. Under the common law rule, an option contract is formed where the offeror: 1) offers to keep the offer open, and 2) there is some mechanism to ensure the offer remains open, which is usually consideration. Consideration is usually a bargained-for-exchange of some type between the parties such that one party benefits and the other suffers a detriment.

Here, the common law applies. The homeowner told his neighbor that "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." Prior to this exchange, the homeowner had already called the neighbor and offered to sell his lawn mower to her for $350, to which the neighbor had replied that the price is too high. Thus, according to the facts, the homeowner had offered to keep the offer open, but there was no mechanism of subsequently enforcing the offer, as there was no additional consideration.

Therefore, no option contract was formed, and the homeowner was not bound by his promise to keep his offer open for a week.

2. Whether the Neighbor's Statement, "I Accept Your Offer" Created a Contract with the Homeowner for the Sale of the Lawn Mower

The neighbor's statement accepting the homeowner's offer created a contract with the homeowner, as the homeowner had failed to explicitly revoke his offer.

The second issue is whether the neighbor's statement, "I accept your offer," created a contract with the homeowner for the sale of the lawn mower.

A contract is created between two parties where there is offer, acceptance, and consideration. First, an offer is the manifestation of a present intent to enter into a contract. It creates a power of acceptance in the offeree. Second, acceptance must be clearly communicated to the offeror.

Finally, there must be consideration, which is a bargained-for-exchange. Without these three elements, a contract is not created. Generally, as mentioned above, offers are freely revocable by the offeror before the offeree accepts, even where the homeowner promises to keep the offer open. However, the revocation must be communicated to the offeree.

Here, the homeowner made an offer to the neighbor to buy the lawn mower for $350. The neighbor concluded four days after speaking with the homeowner that $350 was a good deal. However, the neighbor unfortunately learned that the lawn mower had been sold to another person, the acquaintance. The acquaintance told the neighbor that there was even a contract. Subsequently, the neighbor then went to the homeowner's house and told him as soon as the doorbell rang that "I accept your offer." Offers are freely revocable, even where the offeror promises to keep them open, and that was the case here. However, revocations must be communicated to the offeree, which was *not* the case here. Because the offer had not been explicitly revoked, the neighbor still had the power of acceptance, which he exercised by coming to the homeowner's door and saying "I accept your offer" as soon as the homeowner came to the door.

Therefore, the neighbor's statement accepting the homeowner's offer created a contract with the homeowner, as the offeror failed to explicitly revoke the contract. Had the homeowner revoked before the neighbor had the opportunity to accept, no contract would have formed. But because the neighbor accepted as soon as the homeowner opened the door, an enforceable contract was formed between the two parties.

END OF EXAM

ID: **06007** (Seat #)

Question: 3

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

3)

1. Whether the Expansion Project is a Nonconforming Use

The expansion project is a nonconforming use, as the local zoning board has passed an ordinance to rezone the district from "light commercial" to "residential," and convenience stores are not considered "residential."

The first issue is whether the expansion project is a nonconforming use.

A nonconforming use is an otherwise valid use of a property that fails to conform to a zoning ordinance that is subsequently passed. The use will be considered nonconforming where the existing use of the property no longer satisfies the specific zoning ordinance but may be upheld under public policy. The government will allow a nonconforming use to continue for a temporary duration where a zoning ordinance rezones an area.

Here, in 2018, the man decided to expand his store by 1,100 square feet to add a small dining area. The other stores in the area are also convenience stores that have small dining areas. A new zoning ordinance was passed in 2017, which rezoned the district from "light commercial" to "residential," and convenience stores are not considered "residential." The man will be protected under the language of the ordinance that seeks to protect existing nonconforming uses.

Therefore, the expansion project constitutes a nonconforming use, as convenience stores are not considered "residential" and will not qualify under the new zoning ordinance.

2. Whether the Bank is Obligated to Disburse Further Funds

The bank is not obligated to disburse further funds, as the mortgage did not specifically identify the meaning of "satisfactory progress."

The second issue is whether the bank is obligated to disburse further funds.

A valid contract for real property must satisfy the Statute of Frauds, which dictates that the terms of the contract must be sufficiently detailed. The parties must be named, the property at dispute must be specific identified, and the price must be clearly designated. Where there is ambiguity in the contract, such ambiguity will render the real property contract violative of the Statute of Frauds.

Here, the man obtained a $200,000 loan commitment from a local bank in order to finance the expansion to his convenience store. The bank agreed to disburse funds 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. The meaning of "good faith judgment," as well as "satisfactory progress" are not specifically outlined in the contract. Where the terms are ambiguous, such ambiguity will render the real property contract violative of the Statute of Frauds.

Therefore, the bank is not obligated to disburse further funds as stipulated in the mortgage contract, as it did not specifically designate the meaning of "satisfactory progress."

3. Whether the Mechanic's Lien has Priority, in Whole or in Part, over the Bank's Mortgage

The mechanic's lien does not have priority over the bank's mortgage because the bank's mortgage was a properly recorded purchase-money mortgage.

The third issue is whether the mechanic's lien has priority, in whole or in part, over the bank's mortgage.

Generally, a purchase-money mortgage ("PMM") that is recorded will have superior priority over any other claim, even those that were recorded previously. A purchase money mortgage is a mortgage given to secure the repayment of a loan used to fund the property itself.

Here, the man entered into a mortgage with the bank to secure the repayment of a loan from the bank, which was to be used to add a small dining area to his convenience store. This was a purchase-money mortgage. The PMM was properly filed in the local land records office. Four weeks into the project, the plumbing subcontractor installed all the plumbing fixtures in the convenience store. When the general contractor failed to pay the subcontractor, the subcontractor filed a mechanic's lien against the man's property to secure its claim for $20,000. Because the PMM was properly filed and recorded, it takes priority over the mechanic's lien.

Therefore, the mechanic's lien does not have priority, either in whole or in part, over the bank's superior purchase-money mortgage.

END OF EXAM

ID: **06007** (Seat #)

Question: 4

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

4)

1. Whether the Trustee Violated any Fiduciary Duties in Administering the Trust

The trustee violated his fiduciary duty of care by failing to ensure the apartment building's roof and by failing to follow the testator's instructions with respect to paying Albert all of the trust income. The trustee also violated his fiduciary duty of loyalty by commingling his assets with those of the trust.

The first issue is whether the trustee violated any fiduciary duties in adminstering the trust.

A trustee owes fiduciary duties of care and loyalty to the trust. To uphold the duty of care, the trustee must manage the trust prudently, using prudent business sense and judgment. Part of this duty of care is to diversify the trust assets, to follow the settlor's instructions, to care for the interest of the remaindermen, and so on. Where the trustee is personally responsible for a violation of the duty of care, he, not the trust, will be held financially responsible. To uphold the duty of loyalty, the trustee must not mix his personal financial interests with those of the trust, including by avoiding the commingling of his assets and those of the trust.

Here, it appears the trustee violated both the duty of care and the duty of loyalty he owed to the trust. First, he violated duty of care to care for the trust assets by failing to purchase a fire insurance policy for the apartment building's roof. Any prudent business person would understand that such a policy is a reasonable investment in protecting an asset such as an apartment building. As a result of his failure to insure the roof, the trustee ended up having to spend $50,000 to repair the roof and 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 the repair. The trustee's specific instructions were that "all trust income will be paid to my cousin, Albert, during his lifetime." Thus, by deducing the $50,000 from the trust income, the trustee failed to follow the testator's instructions, and thereby failed in his duty of care to the trust.

Second, the trustee violated the duty of loyalty by commingling his assets with those of the trust. In 2010, when one apartment was vacated, the trustee rented the apartment to himself for $1,300 per month. By doing so, the trustee commingled his own assets with those of the trust.

Therefore, for the foregoing reasons, the trustee violated both his duty of care and his duty of loyalty to the trust.

2. The Distribution of the Principal upon Albert's Death

Upon Albert's death, the trust principal should be distributed to Betty's husband.

The second issue is how the trust principal should be distributed upon Albert's death, given the fact that the will did not make any provision for the testator's son, as well as the fact that Betty's will left her entire estate to her husband.

Where there is a pour-over provision in a will, that provision will be valid so long as the provision clearly evinces the Testator's intent and was contemporaneous with the will. A pour-over provision is a provision in a will that directs to whom the trust assets should be distributed upon the testator's death. The law respects testators' explicit wishes, even where the testator excludes children as beneficiaries. Where a child is alive at the time that a will is executed, there will be a presumption that the testator specifically chose to exclude the child from benefitting from the will. Further, where all of the estate is left to a spouse, this will be presumed valid, as the law assumes that the spouse will incidentally care for the child.

Here, the testator left a will that said that "upon Albert's death, all trust principal will be distributed to my granddaughter, Betty," failing to make any provision for the testator's son, who was living at the time the will was executed. The son, therefore, will receive nothing, and Betty will take all of the trust principal. Because Betty died in 2013, however, we must look to Betty's will to determine how the principal should be distributed even further. Her will leaves her entire estate to her husband. Although Betty's estate would have been distributed equally between her husband and daughter had she died intestate, she did not die intestate; she had an explicit will. And because the law will presume that her husband will care for her daughter, the trust's principal will all go to her husband.

Therefore, upon Albert's death, the trust principal shall be distributed to Betty's husband.

END OF EXAM

ID: **06007** (Seat #)

Question: 5

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

5)

1. The Admissibility of the Mechanic's Testimony

The mechanic's testimony is admissible because it is directly relevant to the case.

The first issue is whether the mechanic's testimony is admissible.

Testimony will be relevant where it tends to make a fact more or less likely to be true. A witness's testimony will be relevant where it is based on his own perception and his helpful to the trier of fact.

Here, the mechanic will testify that he inspected the woman's truck a week before the accident, and at that time, the brakes on the truck were worn and in need of repair. Therefore, he ordered new parts. Whether or not the woman's brakes were in need of repair is directly relevant to the man's claim that the woman was driving her truck over the speed limit and that she could not stop the car because her brakes were defective. This is both highly relevant as to fault and valid witness testimony because the mechanic perceived the bad quality of the brakes by inspecting it himself.

Therefore, the mechanic's testimony is admissible.

2. The Admissibility of the Invoice for the New Parts for the Woman's Truck Brakes

The mechanic's invoice for the new parts is admissible under the business records exception to hearsay.

The second issue is whether the invoice for the new parts for the woman's truck brakes is admissible.

Hearsay is an out-of-court statement being offered for its truth. The general rule is that hearsay may not be admitted into evidence, as it presents credibility issues. However, there are numerous exceptions and exemptions to hearsay, one of which is the business records exception. Under the business records exception, a business record will be admitted into evidence where it was kept in the ordinary course of business and the person offering the business record has personal experience dealing with that record.

Here, the man's attorney seeks to offer into evidence a written invoice signed by the mechanic stating that new parts for the woman's truck brakes were ordered on December 23 and received on January 2. The invoice was found in the mechanic's file cabinet among similiar invoices for other customers. Such an invoice falls into the business records exception, as the mechanic recorded the invoice in the ordinary course of business, as evinced, in part, by the

fact that it was kept in the cabine with other similar invoices. Although the invoice would be hearsay because it is an out-of-court statement being offered to show that the woman's car had defective brakes, the invoice should be admitted under the exception for business records.

Therefore, the invoice for the new parts is admissible.

3. The Admissibility of the Doctor's Testimony

The doctor's testimony is admissible under the exception for statements offered for medical diagnosis or treatment.

The third issue is whether the doctor's testimony is admissible.

As stated above, hearsay is a generally inadmissible out-of-court statement being offered for its truth. However, one exception to hearsay is statements offered for medical diagnosis or treatment. The statements that were given must not have been incidental to the giving of treatment, but rather aimed specifically at arriving at a diagnosis or directly treating the patient.

Here, the man's attorney seeks to offer into evidence 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." This statement is likely admissible under the statements offered for medical diagnosis exception, assuming the the woman told the doctor about her painful arthritis as a statement offered for medical diagnosis, rather than in contemplation of litigation. Because the woman did not include facts about the accident, one could assume that the woman made the statement to facilitate the giving of medical treatment.

Therefore, the doctor's testimony is admissible under the exception for statements offered for medical diagnosis or treatment.

4. The Admissibility of the Roommate's Testimony

The roommate's testimony is inadmissible because it is highly prejudicial character evidence, and because a lay witness may not opine as to the ultimate issue in a case.

The fourth issue is whether the rommate's testimony is admissible.

Character evidence is generally indmissible to show that a defendant acted in accordance with some propensity at the incident at dispute. This is because such propensity evidence is highly prejudicial and likely inadmissible because under the FRE 403 balancing test, evidence is inadmissible where the evidence is so prejudicial as to render admission of the evidence substantially unfair. Moreover, a lay witness may not offer an opinion that goes to an ultimate

issue in the case. This is distinguishable from experts, who *may* offer opinions as to ultimate issues.

Here, the plaintiff'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." This statement is *highly* prejudicial against the defendant, as it effectively tells the jury that the man was, in fact, texting on his phone when he entered the traffic circle, rendering him negligent. Generally, only the defendant may open the door as to character evidence, which the plaintiff may rebut, but here, the woman's attorney seeks to introduce this character evidence, which is impermissible. It also goes to an ultimate issue in the case--that of fault.

Therefore, because the roommate's testimony is highly prejudicial character evidence that goes to the ultimate issue in this case, it is inadmissible.

END OF EXAM

ID: **06007** (Seat #)

Question: 6

Exam Name: NYSBOLE_7-24-18_6-MEE

GRADE _____

6)

1. When Solar Inc. Came into Existence

Solar Inc. came into existence on November 10, the date on which the Articles of Incorporation were filed.

The first issue is when Solar Inc. came into existence.

A corporation will have come into existence on the date the Articles of Incorporation are filed, regardless of whether there is otherwise an error in the Articles.

Here, on November 10, the woman mailed to the Secretary of State X the Articles of Incorporation for Solar Inc. The fact that the woman inadvertently failed to include in the document the number of authorized shares, as required by the business corporation act of State X, as well as the Model Business Corporation Act, will not render the corporation *un*-incorporated as of that date.

Therefore, Solar Inc. came into existence on November 10, which was the date the Articles of Incorporation were filed with the Secretary of State X.

2. Whether the Woman is Personally Liable to the Installer on the Employment Contract That She Signed

The woman is not personally liable to the installer on the employment contract because she entered into the contract under the actual authority to do so and acted in good faith on behalf of the corporation.

The second issue is whether the woman is personally liable to the installer on the employment contract that she signed.

Generally, directors and officers of a corporation are not held personally liable for decisions made in the conduct of ordinary business and those decisions made in good faith. Further, where they have the actual and apparent authority to act, their decisions will be protected under the presumption of the business judgment rule, which presumes that directors and officers act prudently in making business decisions on behalf of the corporation.

Here, 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.," which she had the actual authority to do, as the man and the woman explicitly agreed that she would be solely responsible for managing the business. The contract fell within the scope of ordinary business,

as Solar Inc. was a solar-panel installation business. And, importantly, the woman entered into the contract in good faith, believin that the articles of incorporation had been filed.

Therefore, the woman is not personally liable to the installer on the employment contract that she signed because she acted under the actual authority to do so and acted in good faith.

3. Whether the Man is Personally Liable to the Installer on the Employment Contract

The man may be personally liable to the installer if Solar Inc. is insolvent and the installer seeks to pierce the veil.

The third issue is whether the man is personally liable to the installer on the employment contract.

Majority shareholders do not ordinarily have duties to the corporation. However, where they carry on managerial tasks, they may be assumed to have fiduciary duties to the corporation. Further, where the corporation is insolvent, the veil may be pierced, rendering the shareholders personally liable for any outstanding debts.

Here, the man and the woman decided together to incorporate a business called Solar Inc. They were to be equal shareholders. They agreed that the woman would be solely responsible for managing the business. However, the man is an equal shareholder of the corporation. Therefore, if Solar Inc. is insolvent, the installer may pierce the veil and assert that the man is personally liable for any outstanding debts to the installer.

Therefore, the man may be held personally liable to the installer if Solar Inc. is insolvent and the installer seeks to pierce the veil to get to the man's personal assets.

END OF EXAM

ID: **06007** (Seat #)

Question: 7

Exam Name: NYSBOLE_7-24-18_2-MPT

GRADE _____

7)

To: Juliet Packard

From: Examinee

Date: July 24, 2018

Re: Draft Legal Argument for *State v. Hale*, Case No. 17 CF 1204

You have asked me to prepare the "Legal Argument" portion of our brief in response to Hale's motion for a new trial. Please find it below.

I. The Prosecution Did Not Violate *Brady v. Maryland* by Failing to Disclose Reed's Recantation Because the Prosecution Did Not Suppress the Evidence and the Evidence Was Not Material

The prosecution asserts that it did not violate *Brady* by failing to disclose the two pieces of evidence that Hale claims should have been admitted at trial.

Brady established that under the due process clause of the Fifth and Fourteenth Amendments, the prosecution must 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. Haddon v. State. There are three components of a *Brady* violation: (a) The evidence must be favorable to the defendant; (b) the government must have suppressed the evidence, either willfully or unintentionally; and (c) the evidence must be material. This brief argues that a *Brady* violation did not occur, as the evidence was not favorable to the defendant; the government did not suppress the evidence; and the evidence was not material.

a) The Evidence Was Not "Favorable" as It Was Not Appropriate for Impeachment and There Was No Forensic Evidence

The prosecution did not violate *Brady*, as the evidence the defendant asserts should have been admitted was not appropriate for impeachment purposes.

In determining whether a *Brady* violation occurred, the first element is to determine whether the evidence was favorable to defendant. Evidence which will serve to impeach a prosecution witness is "favorable" evidence. Haddon (quoting Giglio v. United States). In Haddon, the court found that the evidence consisting of police interviews with a witness, in which he gave conflicting accounts of an alleged robbery that defendant was convicted for, would have served

to impeach that witness and was therefore favorable to Haddon. It would have benefitted defendant to have been able to cross-examine the witness about the conflicting statements. Moreover, the court found that the forensic evidence in that case would have been favorable, as as neutral fact-finder who learned that defendant's fingerprints were not found on the witness's wallet would be less likely to believe that defendant had committed the crime.

In our case, the defense asserts that 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. He also claims that 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 defendant and directly contradicted Trumbull's trial testimony. However, the conflicting statements in our case do not rise to the level of trustworthiness as the statements in Haddon, rendering the evidence in our case distinguishable. Neither Reed nor Trumbull were necessarily trustworthy witnesses. Reed was not particularly responsive to questioning when interviewed by the detective. Additionally, Trumbull was not a trustworthy witness, as he was convicted in Franklin of the felony of fraudulently obtaining money. Moreover, there was no forensic evidence in this case linking Hale to the crime.

Therefore, the prosecution did not violate the first element of *Brady*, as the witnesses could not have been impeached.

b) The Prosecution Did Not, Either Willfully or Unintentionally, Suppress Reed's Recantation or Trumbull's Statements to the EMT Because the Material was Fully Available to the Defense Through the Exercise of Due Diligence and the EMT Was Not an Agency of the Government of Franklin City

The prosecution did not violate *Brady* because it did not, either willfully or unintentionally, suppress either Reed's statement or Trumbull's statement.

Under *Brady*, it does not matter whether the suppression was intentional; *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." Haddon (quoting Strickler). In determining whether the evidence was "suppressed," the court must consider whether the evidence was in the "possession" of the government. Capp. Evidence can be in the "possession" of the government even if it is unknown to the prosecutor. Id. 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. Id. (quoting Kyles v. Whitley). However, there is a limit to this rule: If a government agency was not involved in the investigation or prosecution of the defendant, its records are not subject to

disclosure under *Brady*.

Here, in our case, the prosecution was not in "possession" of either Reed's statement or Trumbull's statement. First, the defense asserts that the evidence of Reed's recantation was in the possession of the prosecution because it was held by Detective Jones, and that his possession of the evidence is considered to be the possession of the government. The prosecution rejects this argument. In Capp, the court opined 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, as was the situation in that case. Here, the detective was on medical leave when the prosecutor's office requested information from his file. Assistant District Attorney Lucy Beale did not know about the information about Reed's statement until after trial, despite the fact that she asked the police department for the file in advance. There was no information about Reed's statement in the file that she received from the police. As the defense asserts, it is true that the prosecution's office has an "open file" policy. However, as the court in Capp argued, a prosecutor is not required to furnish a defendant with readily available *Brady* material, as was the case here.

Second, the defense asserts Trumbull's statements to the EMT was in the government's possession, as the ambulance service is an agency of the government of Franklin City. The prosecution rejects this conclusion as well. In Capp, the court found that because the role of the hospital was to treat patients, not to investigate crime, the government did not actually "possess" the records that were housed at the county hospital, meaning there was no suppression of evidence. Moreover, the limit to the *Brady* rule applies here: If a government agency was not involved in the investigation of the defendant, its records are not subject to disclosure. Similarly, in our case, the role of the EMT for the Franklin City ambulance service is to treat patients, not to investigate crime. Just because the EMT helped transport Trumbull to the Franklin City Hospital, and just because Trumbull blurted out a statement during this transport does not mean that the government thereby "possesses" such a record. The finding in Capp definitively supports this conclusion.

c) The Prosecution Did not Violate *Brady* Because the Evidence Hale Points to Was Not Material

The prosecution did not violate *Brady* because the evidence was not material.

Evidence will be considered material where, had the jury been provided with the evidence, there is a reasonable probability that the result would have been different. The state's obligation is not a piecemeal obligation; rather, it is a cumulative obligation to divulge all favorable evidence. Haddon. The Franklin Rule of Criminal Procedure 33 further provides that 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.

Although the defense asserts that there is more than a reasonable probability that the result at trial would have been different had the defendant been given all of the suppressed evidence, the cumulative evidence in this case suggests otherwise. Because there was no violation of any rules, as stipulated in Franklin Rule of Criminal Proceudre 33, the court just not vacate this judgment.

II. Under Franklin Rule of Evidence 804, Hale is Not Entitled to a New Trial, as He Was Not Clearly Prejudiced by Error, as He Was Barred from Asserting the Spousal Testimonial Defense

Next, Hale is not entitled to a new trial, as he was not prejudiced by the admission of Reed's statements.

Rule 804 of the Franklin Rules of Evidence ("FRE") provides that certain hearsay evidence may be admissible if the witness is unavailable. An example of such a witness is one who claim spousal privilege. FRE 804(a)(1). The next step in the analysis is determining whether any of the hearsay statements qualify under any of the exceptions under 804(b). FRE 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." The Rule requires that the conduct causing the unavailability was wrongful, but it does not require that the conduct be criminal.

In Preston, the court found that defendant did not marry the witness with the intent to enable him to claim spousal privilege, thereby preventing his wife from testifying against him. The evidence suggested that defendant and his wife were engaged to be married when the theft occurred and had set a date for the wedding. Their marriage appeared in the "normal course of events." Preston. The court pointed out that 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, and in that case, there was no such evidence.

Here, unlike in Preston, the facts surrounding Hale's marriage to Reed provide sufficient indicia that the marriage was not in the "normal course of events," suggesting that Hale in fact married Reed with the intent of enabling him to claim spousal privilege and of preventing his wife from testifying against him. Hale proposed to Reed on July 25, 2017 and they married on August 25, 2017. The incident happened just several weeks prior, on June 20, 2017. When Detective Mark Jones interviewed Reed, she told him, "He just told me to tell you that he didn't do it." She did not make eye contact with the detective, appeared to be nervous, and did not give

a conclusive answer when the detective asked her whether she was afraid of her husband Although Reed states that Hale married her because he loves her, he also told her that he wanted to marry her quickly before the trial started and that it would be hard for them to stay together if she testified against him. She is unsure whether he would really love her due to her testifying. We are also aware that Hale threatened to leave her if she testified.

The defense asserts that the marriage was a loving one. The couple dated for four years and seven months. However, as the court asserted in Preston, a finding of wrongful causation must be rooted in facts establishing a significant motivation, and the facts here, those of a rushed proposal and marriage, threats by Hale to Reed, and Reed's own uncertainty as to whether Hale would stay with her if she were to testify, all point in favor of wrongful causation.

Therefore, the admission of Reed's testimony was not prejudicial, and Hale is thereby not entitled to a new trial.

Conclusion

For the foregoing reasons, Hale's claims will not succeed and he should not be afforded a new trial.

END OF EXAM

ID: **06007** (Seat #)

Question: 8

Exam Name: NYSBOLE_7-24-18_2-MPT

GRADE _____

8)

To: Abraham Ringer

From: Examinee

Date: July 24, 2018

Re: Rugby Owners & Players Association - Draft Articles of Association

You have asked me to draft provisions of the Rugby Owners & Players Association's ("ROPA") Articles of Association. Please find such language and accompanying explanations below.

ARTICLE IV - BOARD OF DIRECTORS

Language: 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 [sixteen directors, eight directors representing the class of owners, and eight directors representing the class of players], who shall represent each class of members as follows: [Each team will name a representative to sit on the board. The players will be represented by the union liaisons.]

Explanation: As set forth in the client interview, the two entities have prioritized equal control between the two classes of members, the owners and the players. The entities seek to structure the organization such that they are required to cooperate. This entails requiring that each class of members has an equal number of seats on the Board of Directors, such that they can protect each side against unilateral action by the other. Fischer suggests that each team will name its own person to sit on the board, and Peters suggests that the players are afforded the same number of seats as the owners. As there are eight teams, this renders sixteen directors the most appropriate number of directors on the board.

Note that Franklin law requires a minimum of three directors for the association's board of directors, and boards usually have an odd number of directors in order to prevent a voting deadlock. However, when more than one class of members is represented on a board, as is the case with ROPA, an even number of directors for each class may be named. This may lead to a deadlock in voting, however, this may also be beneficial insofar as it will encourage cooperation among the various classes, as the board would not otherwise be able to take action. This is in line with the clients' wishes to maintain equanimity between the owners and the players. The clients do not desire to appoint a disinterested director.

Language: SECTION 5. VACANCY IN BOARD OF DIRECTORS. [Each seat on the board of directors will continue in his or her position until a change in position renders that seat vacant. This will apply to both classes of members. In case of vacancy, each class will fill the vacancy with members of their own class.]

Explanation: We have some flexibility with respect to how ROPA may handle vacancies in the board of directors. These may be filled in a number of ways, including allowing each class of members or directors to fill vacancies in that class.

Language: SECTION 6. MEETINGS OF THE BOARD.

b. Quorum: **Language**: A quorum of a majority of board members present and voting is required to take any action.

Explanation: Franklin law provides that a quorum of a majority of board members is necesary to take any action. Further, 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, as provided below.

c. Voting: **Language**: A vote will be invalidated for the lack of a quorum in cases where board members, who were once present at the meeting, have left the meeting. Certain matters of great importance, such as the amendment of the articles, must be passed by a supermajority of two-thirds of those present.

Explanation: Boards may, by resolution or provisions in their Articles of Association, require that certain matters of great importance (such as amendment of the 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. The clients acknowledge that requiring unanimity is not ideal, as each side could veto an action of the other. This requirement is particularly in line with the clients' goal of requiring that Article III, which deals with the apportionment of revenues, may not be amended by a simple majority.

With respect to the requirement that a board vote will be invalidated for the lack of a quorum in cases where board members leave the meeting, I have included such language to encompass the finding of the court in Schraeder v. Recording Acts Guild. In that case, the court found that the fact that there was only one performing artist director present when the vote was taken does not invalidate the vote for lack of a quorum. The court pointed out that under Franklin law, once

a quorum is present for a board meeting, it continues to exist for the duration of the meeting. It also stuck to the letter of the Articles of Association at issue in that case, by asserting that because those Articles require that a majority of each class of directors present and voting actually vote in favor of that resolution, and because that requirement was not met, the disputed resolution could not take effect. In our case, this type of outcome controverts the desires of the entities, who seek for equal control in the voting and management of ROPA. By explicitly incorporating language discouraging this outcome, I believe the entities will be able to function more cooperatively.

ARTICLE V - OFFICERS

Language: The Chair shall be [an individual who rotates between both sides. At no point will an outside independent director be nominated as chair.]. The board will name a chief executive officer, secretary, and treasurer. The chief executive officer will manage the day-to-day operations of the association. The chief executive will be named by and report to the board. The chief executive must be neutral between the classes of members.

Explanation: Franklin law requires that boards name, at the very least, a chair, secretary, and treasurer. In cases where the board is made of different classes of members, typically, a disinterested, independent, novoting chair may be named to preside. It is important to the clients that the CEO is not beholden to either the league or the players alone, and that the CEO is neutral. And while an appointment of a disinterested director presents a clear advantage insofar as avoiding deadlock, the clients specifically oppose the appointment of an independent director.

Note that the entities are in disagreement with respect to who should reside as chair of the board of directors. The players believe that to avoid any favoritism, the chair should be the CEO as a nonvoting director. However, the owners believe that the chair should rotate between both sides; they do not want additional directors represented in the board meeting, whether voting or not. The entities *are* in agreement that the chair should not be an independent director. I believe the best option for ROPA would be to have the chair of the board of directors rotate between both sides, as this further reflects the entities' mutual interest in collective cooperation. However, I defer to you on this question, as this is a key consideration that the entities have voiced.

ARTICLE VII - APPORTIONMENT & DISTRIBUTION OF REVENUES

Language: The Association's revenues will be apportioned and distributed equally between the class of owners and the class of players. Each class will independently decide how to utilize the

revenues thereafter.

Explanation: The clients have decided to enter into this association primarily to maximize revenue opportunities, including merchandising and marketing. The owners and players will pool their properties and market them for their mutual benefit. Thus, in accordance with this combined and equal effort, the entities seek to divide the revenues equally.

ARTICLE VIII - AMENDMENT OF ARTICLES

Language: The Articles may be amended by [a supermajority only].

Explanation: The entities seek to ensure that the equal division of revenue stipulated in Article VII cannot be changed by a simple majority.

END OF EXAM