- to inspect the batteries and notify BB of any defects. The promise does not directly limit any of PRU's rights and is therefore not material. It is of importance that the duty to inspect was not tied to any warranties - BB still remains liable for its implied warranty of mercantability.

Also note that under the UCC, modifications of a contract to not require consideration - they must simply be undertaken in good faith. This is contrary to the common law. There is nothing in the facts to indicate that BB's confirmatory memo was written as a bad-faith effort to "sneak in" new terms.

With no bad-faith, and all the elements for non-conforming acceptance met, the new term will be part of the contract.

MPT 1 - Sample Answer # 1

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

OFFICE MEMORANDUM

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

III. Legal Argument

Pursuant to the Fifth and Fourteenth Amendments, the prosecution may not suppress any exculpatory evidence. Haddon v. State, Franklin Sup. Ct. 2012. The three components for determining whether such evidence is subject to disclosure is: (1) the evidence is favorable to the defendant, (2) the government must have either willfully or intentionally suppressed the evidence, and (3) the evidence is material. Strickler v. Greene, 527 U.S. 263 (1999). If such evidence was admitted or suppressed in error, the court must then determine whether such an error is reversible under Franklin Code of Criminal Procedure 33.

A new trial may be granted if the trial court (1) violated a constitutional provision, statute, or rule (including a rule of evidence) and (2) such error was prejudicial to the defendant.

Franklin Code of Criminal Procedure 33. When the court erroneously admitted or denied admission of certain evidence, then the error is evaluated for its prejudicial effect. State v. Preston, 2011. Where there is a "strong probability" that the result at trial would have been different but for the error, then such an error is reversible under the Franklin Rules of Criminal Procedure 33. In Preston, the court reversed and remanded the defendant's conviction where the trial court admitted "blatant hearsay" by the defendant's wife, when the two were engaged at the time of the crime, and therefore their marriage did not qualify for the "procuring unavailability" exception. State v. Preston, 2011.

The defendant argues here that the prosecution failed to disclose and the trial court failed to admit two pieces of evidence, which it argues are in its favor. Further, he argues that it was reversible error to admit Sarah Reed's ("Reed") testimony because it should have been suppressed under the spousal privilege. Because evidence of Reed's recantation and Turmbull's inconsistent statements do not meet the three-part test for Brady violations set out above, the trial court properly suppressed such testimony. Further, because the defendant procured Reed's testimony by marrying her after the crime occurred and before trial, the court properly permitted her testimony under Rule 804.

Finally, because the trial court did not violate any constitutional provision, rule of evidence or statute, the court should deny the defendant's motion for a new trial under Federal Code of Criminal Procedure 33.

A. The motion for a new trial should be denied because evidence of Hale's recantation was not actually favorable or material to the case and was therefore properly excluded.

Evidence used to impeach a prosecution witness is "favorable" for the purposes of the test. Giglio v. United States, 405 U.S. 150 (1972). Here, the defense argues that the failure to admit Sarah Reed's ("Reed") recantation of her prior identification of Hale as the shooter is favorable and material to the defense because the jury would be less likely to convict based on such evidence. Generally, evidence used to impeach a prosecution witness is "favorable" for the purposes of the test. Giglio v. United States, 405 U.S. 150 (1972). However, the evidence here does not actually impeach Reed's prior inconsistent testimony, and therefore should not be admissible. Reed came in to "recant" the day after her marriage to the defendant, after "he told [her] to tell [police] that he didn't do it." Because the facts surrounding this statement to Detective Jones do not support it as being truly "favorable" to the defense, it is not subject to Brady disclosure.

The defense also argues that the failure to disclose evidence of Reed's recantation was prejudicial error. Suppression of evidence may be intentional or inadvertent; therefore, an open file policy, which reduces the defense's inclination to request conflicting documents, may still result in suppression of Brady evidence. Haddon v. State, 2012. Relatedly, the evidence must be solely in the possession of the prosecution or other entity charged with investigation to be subject to disclosure. Such evidence is not subject to Brady disclosure when the evidence is "fully available to the defense through the exercise of due diligence." State v. Capp, 2014. However, unlike the witness's statements in Haddon, the defense here had an equal opportunity to obtain evidence of Reed's recantation. Although it is true that an open-file policy, like the one maintained by the prosecution here, may lead the defendant to be less likely to investigate for further exculpatory evidence, this is not the case here. Reed recanted her testimony at the direction of the defendant. Therefore, he cannot claim to be unaware of such evidence. As discussed above, Reed's testimony is not subject to Brady because it is not favorable or material. But even if it were, the prosecution did not err by failing to disclose such evidence because it was not solely in their possession.

Evidence is material when there is a "reasonable probability" that result at trial would have been different had the jury heard the evidence. Haddon v. State, 2012. This determination

is based on a "collective" view of the evidence as a whole. Haddon v. State, 2012. Further, the victim's prior inconsistent statement was both material and favorable because the jury would have been less likely to convict the defendant based on such evidence. Haddon v. State, 2012. Here, Reed's prior inconsistent statement here is not material because it would not lead the jury to a different finding. As discussed below, Reed's recantation was procured the day after she married Hale and at his direction.

Given this context, the jury would be unlikely to reach a different determination and the trial court therefore rightfully suppressed the recantation.

Because the trial court did not violate a constitutional provision, statute, or rule of evidence in failing to admit Reed's testimony, there was no prejudicial error under Rule 33 permitting a new trial.

B. The motion for a new trial should be denied because the trial court properly suppressed evidence of Trumbull's statements to the EMT, which were not in the possession of an investigative officer, and therefore not subject to Brady disclosure.

The defense argues first that Trumbull's statements to the EMT, Gil Womack, are favorable to the defense because they conflict Trumball's trial testimony, thereby making the jury less likely to convict. Evidence used to impeach a prosecution witness is "favorable" for the purposes of the test. Giglio v. United States, 405 U.S. 150 (1972).

However, these statements are not "favorable" to the defense when viewed in totality. Womack's testimony states that Trumbull was under heavy narcotic sedation at the time the statement was made. Therefore, the trial court was correct to suppress Trumbull's statements that the event was "all Hale's fault" but that he wasn't "certain what happened" because his testimony lacks credibility.

Further, even if the evidence is deemed to be favorable and material to the defense, this evidence is not subject to Brady because it was not in the "possession" of an investigating officer. In determining whether the government "suppressed" evidence, the first question is to determine whether the evidence at issue was in the government's "possession." The government is in possession of evidence when it is in the possession of the police department or any government entity involved with investigation or prosecution. Kyles v. Whitley, 514 U.S. 419 (1995). If the entity is in possession of such evidence, then it must be disclosed under Brady. In State v. Capp, Franklin Ct. App. 2014, the court found that the evidence was not subject to Brady when the evidence at issue was in the hands of a county hospital, because such an entity is not involved in investigation.

Here, the evidence of Trumbull's statements were made to an EMT. Defendant's Brief. Like the evidence in Capp, evidence in an EMT's hands is used primarily for medical, not investigative purposes. Because it was not in the hands of a government entity charged with investigating the crime, the EMT's statements are not subject to Brady disclosure.
Further, Womack testified that he was not in any way involved in the prosecution or investigation of the crime. In fact, he was not even called as a witness by the defense. Therefore, Womack's statements were not in the "possession" of the government or an

investigative entity, and therefore were not willfully suppressed by the prosecution.

Because the trial court did not commit a violation of a rule of evidence or any constitutional or statutory provision, there is no reversible error under Rule 33. The court should therefore deny the defendant's motion for a new trial because there are no grounds on which a new trial may be granted.

C. The trial court did not err in permitting Reed's testimony because the spousal privilege does not apply in circumstances where the defendant married the witness after the crime occurred in order to preclude her testimony.

First, Franklin Rule of Evidence 804(a)(1) ("FRE") provides that certain evidence that would otherwise be hearsay may nonetheless be admissible if the declarant is unavailable. State v. Preston, Franklin Ct. App. 2011. A declarant is unavailable if they are subject to a recognized privilege, such as the spousal privilege. FRE 804(a). Second, if the declarant is unavailable, the next step is to determine if the statement meets any of the hearsay exceptions outlined in Rule 804(b). One exception to the spousal privilege exception exists where the defendant wrongfully caused the declarant's unavailability, intending such a result. FRE 804(b)(6). If a defendant marries the witness with the purpose of preventing her from testifying under spousal privilege, then this would qualify for the hearsay exception listed above. State v. Preston, 2011. However, when the marriage occurs in the normal course of events (for example, where they were engaged prior to trial), then the defendant did not "wrongfully cause the declarant's unavailability." State v. Preston 2011.

Here, the defense argues that the failure to admit Reed's initial out-of-court statement constitutes prejudicial error to the defense. They argue that a "significant motivation" in Hale marrying Reed was not to procure her unavailability, and therefore the statements should be admissible. However, in Preston, the defendant and the witness were engaged to be married before the crime occurred. Here, Hale proposed to Reed July 25, 2017, while the crime occurred on June 20, 2017. Therefore, the defense could have been said to "procure" her unavailability by proposing to her after the crime occurred, in order to prevent her testimony. Reed's testimony that Hale wanted to marry her quickly, before trial, supports this claim that his "purpose" in the proposal was to prevent her testimony.

Because the purpose of the marriage was likely to prevent Reed's testimony, her out-of-court statements should be admissible under FRE 804(b)(6).

Because the trial court properly permitted Reed's testimony under the rules, there is no prejudicial error under Rule 33. The court should therefore deny the defense's motion for a new trial because no violations of the rules occurred entitling the defense to a new trial.

For the reasons stated above, the trial court should deny the defendant's motion for a new trial.

MPT 1 - Sample Answer # 2

Legal Argument

I. The State did not violate Brady, but even if it did, Mr. Hale was not prejudiced by any violation.

There are two putative Brady violations: (1) The State's failure to disclose Sarah Reed's recantation in a statement to the police; and (2) the State's failure to disclose Bobby Trumbull's statement to emergency medical technician's (EMT) while Mr. Trumbull was heavily sedated by narcotics. Both arguments fail for a litany of reasons, as fully discussed below.

A. Ms. Reed's subsequent recantation was fully available to the defense and thus the failure to disclose the statement was not a Brady violation.

Hale argues that the State has violated its duty to disclose favorable evidence to the defendant. As the Franklin Supreme Court outlined in Haddon v. State, there are three elements for a Brady violation: "(1) The evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material." (Fr. Sup. Ct. 2012). These elements are addressed in turn; Mr. Hale fails to satisfy each element.

For evidence to be "favorable" to the defendant, as Hale states in his Brief in Support of his Motion for a New Trial, it must "make a neutral fact-finder less likely to believe that the defendant committed the crime with which s/he was charged." Here, Ms. Reed recanted her prior statement to the police on the day after she married Mr. Hale. More importantly, during this recantation, Ms. Reed stated that "He just tole me to tell you that he didn't do it." Testimony of Detective Mark Jones during the Hearing on Defendant's Motion for a New Trial. The only "He" should could be referring to was Mr. Hale. Thus, if Ms. Reed's recantation was admitted into evidence, the circumstances under which the recantation occurred would also have been admitted. Accordingly, a jury would find it more likely that Mr. Hale was guilty, rather than less likely, because Mr. Hale was the driving force behind the recantation per Ms. Reed's own words.

Turning to the second element, the government did not "suppress" this evidence because the evidence was fully available to the defense. Under State v. Capp, admittedly in dicta, the Franklin Court of Appeal recognized 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." (2014) (Emphasis added.) Here, Ms. Reed was married to the Defendant, Mr. Hale, and even told the officers during the recantation, as outlined above, that Mr. Hale told her to recant the story. Accordingly, this exception to the duty to disclose applies.

Third, the evidence is not material and necessarily not prejudicial. In Haddon, the Franklin Supreme Court recognized that if evidence was "material" it "necessarily" requires a finding of prejudice. The test of materiality is whether "there is a reasonable probability that the result of the trial would have been different." Here, there is no reasonable probability that the result would have been different because this evidence actually would have hurt Mr.

Hale if it had been admitted. It is reasonable to presume that the defense did not raise the issue of the State's failure to disclose the recantation, even though this evidence was fully available to the defense, because the defense made a tactical determination that this evidence would have hurt Mr. Hale. Accordingly, this evidence was not material nor prejudicial.

Lastly, Haddon recognizes that an "open file" policy, which Franklin prosecutors' employed in this case, makes it more likely that the defense will trust that the State has disclosed all Brady material. But Mr. Hale's reliance on this language is misplaced when the evidence is not only fully available to the defense, but was manufactured by the defense. Here Mr. Hale was the driving force behind Ms. Reed's recantation, according to Ms. Reed herself. Thus, there is no reliance interest by the defense due to the "open file" policy.

B. The State did not violate Brady because Mr. Trumbull's statement to the EMT was not in the "possession" of the State within the meaning of Brady and it was fully available to the defense.

Sticking with the elements outlined above, Mr. Hale fails to satisfy any of the three elements of a Brady violation.

While Haddon recognized that impeachment evidence is favorable, the evidence of Mr. Trumbull's statement may not have been favorable considering Mr. Trumbull's intoxication due to heavy narcotics. After being shot, the EMT recognized that Mr. Trumbull was heavily medicated by the EMT with potent narcotics. This statement is at best neutral because it was involuntary due to Mr. Trumbull's heavily medicated state. Nevertheless, Mr. Hale's argument regarding this alleged Brady violation fails for failure to satisfy the second and third elements.

The Franklin Court of Appeal recognized in Capp that the "first question raised by 'suppression' is whether the evidence at issue was in the 'possession' of the government." Capp recognized that records in the hands of Franklin government agencies that have no role in the prosecution of the case are not in the "possession" of the State within the meaning of Brady. In Capp, the court found that medical records held at a hospital were not in the possession of the State and thus held that these records were "not subject to disclosure under Brady." As the Capp's court found, this Court should find that the statement to the EMT was not in the possession of the State. Accordingly, this Court should hold that the State's failure to disclose this evidence did not violate Brady.

Furthermore, Mr. Hale fails to satisfy this second element for one more reason, this evidence was fully available to Mr. Hale. During the Hearing on this Motion, the EMT testified that he would have voluntarily spoken to Mr. Hale's attorney if he was asked to. Thus, both parties had equal access to this evidence, and this evidence was fully available to Mr. Hale. Accordingly, this element is not satisfied. See Capp.

Lastly, this evidence was not material given Mr. Trumbull's heavily intoxicated state. Mr. Trumbull fell asleep shortly after making this statement. Furthermore, the EMT recognized that Mr. Trumbull was heavily medicated by potent narcotics. Thus, a reasonable probability

does not exist that this evidence would have changed the jury's verdict.

II. The circumstances of Mr. Hale's marriage and Mr. Hale's threat to end the marriage were sufficient evidence to establish that the trial court's determination was not clearly erroneous.

Mr. Hale argues that the trial judge wrongfully permitted Ms. Reed's testimony under the Franklin Rule of Evidence (FRE) 804(b)(6) exception to hearsay. Under FRE 804(a)(1) a witness who claims spousal privilege is considered to be unavailable. But FRE 804(b)(6) permits the admission of a hearsay statement which is "offered against a party that wrongfully caused...the declarant's unavailability as a witness, and did so intending that result." As the Franklin Court of Appeal recognized in State v. Preston, "the Rule requires that the conduct causing the unavailability be wrongful" but not criminal. (2011). In the case sub judice, the trial judge determined that Mr. Hale wrongfully caused Ms. Reed to be unavailable as a witness. Trial Transcript, April 26, 2018. In making this determination, the trial judge relied on evidence that Mr. Hale threatened to leave Ms. Reed, if she testified, and evidence of the timing of the marriage, which was suspicious because the marriage occurred in between the shooting and trial.

As Preston pointed out, this Court must determine whether the trial court's determination of wrongful causation was clearly erroneous. As part of this inquiry, this Court must determine whether the evidence that the trial judge relied one was sufficient to justify its determination that Mr. Hale's wrongful conduct caused Ms. Reed to be unavailable. The trial judge had ample evidence that supported this determination. First, the suspicious timing of the marriage. Although Ms. Reed's self serving testimony stated that the two had begun dating in March 2017, Ms. Reed admitted that Mr. Hale proposed on July 25, 2017 and that they were married just one month later on August 25, 2017. Ms. Reed also testified that prior to their relationship in 2017, they had only dated "four years ago for about seven month." This evidence shows that the timing and rush to marry was at the very least suspicious. Second, Ms. Reed testified that Mr. Hale told her "that it would be hard for us to stay together if I testified against him." The coercive nature of this threat supports the trial court's determination. These two pieces of evidence are sufficient to satisfy the clearly erroneous standard that this court must adhere to. Accordingly, there was sufficient evidence for the trial court to have found that a significant motivation for Mr. Hale's marriage to Ms. Reed was to prevent Ms. Reed from testifying.

Mr. Hale primarily relies on Preston for his argument that the trial court's finding was clearly erroneous. But Preston is distinguishable because there the two had been engaged prior to the events that led to the charged crime. Furthermore, the court there specifically found that the "marriage appears to have occurred in the normal course of events." Here, the marriage did not occur in the normal course of events due to the timing and quickness of the marriage. Excluding their brief soiree in 2013, Mr. Hale and Ms. Reed had been seeing each other for less than five months before getting engaged in July of 2017. Furthermore, their engagement did not occur until after the shooting of Mr. Trumbull, which distinguishes these facts from Preston.

Lastly, Mr. Hale was not prejudiced, even if this court holds the trial court's finding was

clearly erroneous. Mr. Hale cannot show that but for the introduction of Ms. Reed's testimony, there is a strong probability that Mr. Hale would not have been convicted. Mr. Trumbull identified Mr. Hale as the shooter. Eye witness testimony such as that is too strong to overcome by the exclusion of corroborating evidence, such as Ms. Reed's. Thus, this Court should affirm Mr. Hale's conviction.

MPT 1 - Sample Answer # 3

State v. Hale
State's Brief In Opposition of Motion for a New Trial

I. Standard of Review

a. Standard for New Trial under FRC 33

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

b. Standard for Brady Violation

The Due Process Clause of the 5th and 14th Amendments prohibit the prosecution from suppressing any exculpatory evidence that is: 1) favorable to the defendant; 2) suppressed either willfully or unintentionally by the prosecution; and 3) material. Haddon v State (citing Strickler v. Greene)

I. Admission of Reed's Out-of-Court Statement was Proper Because Defendant Proposed to Marry Reed After the Crime with The Purpose of Making Reed Unavailable

For a new trial, an evidentiary violation requires a separate determination of prejudice under FRC 33. First, Franklin law grants a privilege to a person from testifying against their spouse. Only the accused may claim this privilege, and the spouse must be married at the time that the privilege is asserted... FCS 9-707. Reed and Hale meet these factors, as they were spouses during the time of trial.

Franklin Rule of Evidence 804, however, allows for privileged testimony to be admitted if it meets an exception under FRE 804(b). FRE 804 defines hearsay exceptions for unavailable declarants. The statute provides that some hearsay evidence may be admissible if the witness is unavailable. FRE 804; State v Preston. A witness who claims spousal privilege is considered to be unavailable. FRE 804(a)(1); Preston. To be admitted despite the privilege, a statement must meet a hearsay exception defined in 804(b). Preston. One exception is when the hearsay statement is "offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending the result. The conduct need only be wrongful, not

necessarily criminal. FRE 804(b); Preston. Franklin recognizes wrongfully causing a marriage for the purpose of excluding a person's testimony as a wrongful act that makes a witness unavailable, thereby allowing the previously privileged statement to come in under the exception. State v. Preston. A court must establish facts that demonstrate a significant motivation for the defendant's entering into the marriage was to prevent his or her spouse from testifying. Id.

Here, there is sufficient facts to establish that Hale's significant motivation in marrying Reed was to prevent her from testifying in this matter. Reed testified on the court's questioning that the Defendant wanted to marry her quickly before trial. (P. 6) The defendant also made a threat that he would not marry Reed if she testified against him. (p.
6) The day after they were married and the privilege was established, Reed returned to police to recant her statement to police officers because the Defendant "told me to tell you that he didn't do it". Finally, Reed testified that she and Hale had begun dating four years ago, but only for seven months. They did not date again until two months before the accident. Reed proposed the month after the alleged crime took place.

These facts are sufficient to establish the Hale's motivation in making Reed unavailable for testimony. These demonstrate the marriage did not occur in the "regular course of conduct", rather, they were Hale's attempts to make Reed unavailable to testify against Hale. The defense would cite and read Preston differently saying that a marriage after a crime does not necessarily mean the defendant acted wrongful. Preston, however, contained no facts supporting the marriage occurred outside the regular course of conduct, this case is rife with such facts. Further, the defendant was also engaged to his spouse some time prior to the crime in question. The court could not establish facts that showed the defendant's significant motivation, unlike the case here. Therefore, the court should uphold the admission of the hearsay-excepted statement from Reed.

Finally, public policy should not exclude this exception to hearsay because it arises from the defendant's improper action. The policy behind the exception is that wrongful conduct cannot make witnesses unavailable, it has little to do with finding spousal privilege and then allowing testimony because of the defendant's wrongful conduct. As the law stands, the exception serves an important policy purpose of deterring wrongful conduct to remove witnesses.

II. The Defendant Will Not Be Prejudiced by the Failure to Disclose Because There Was Sufficient Evidence to Convict Regardless of the Inadvertent Non-Disclosure and the Excluded Testimony Was Not Reliable in the First Place

The Due Process Clause of the 5th and 14th Amendments prohibit the prosecution from suppressing any exculpatory evidence that is: 1) favorable to the defendant; 2) suppressed either willfully or unintentionally by the prosecution; and 3) material. Haddon v State (citing Strickler v. Greene). The defense is correct that impeaching evidence is considered favorable to the defense. The statements were contrary to the in-court testimony, and therefore are probably favorable to the defense. Giglio. But the state contests the material was in their possession, and this brief will discuss this element later. The main contention is that this evidence, even taken cumulatively, would not materially prejudice the defendant.

"Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Haddon. The court must look at the evidence in question cumulatively to determine materiality. Id. Here, there is substantial evidence that the inclusion of the evidence would not have changed the outcome.

A. Reed's Recantation and Trumbull's Mistaken Statement Were Not Material Because They Would not Change the Outcome of Trial

Franklin law requires a "reasonable probability" that the result of the trial would have been different had the excluded evidence been given to defense counsel. The defense argues that the prior inconsistent statements would determine this case, but the facts surrounding them speak otherwise, even when taken cumulatively as required by Haddon.

First, Reed's Recantation would not lead to a reasonable probability of an acquittal because she told officer's it was at the behest of Hale. Reed testified that she had first hand, eye witness sight of the incident. She identified the defendant, her boyfriend at the time and described the event in detail. The recantation did not occur until after the two were married, which was after the crime. Reed further suggested that Hale had asked her to come the police officer because "He told me to tell you he didn't do it." (p.9) When asked if she meant the defendant, Reed did not deny it. This would have lead to cross examination based on the inconsistency and would have not lead to a reasonable probability the jury would believe the recantation over the original, pre-privilege testimony. (p.9)

Second, Trumbull's statement would not be reliable either as an inconsistent statement because he was under heavy narcotics use when he said it. If the statement had come in, the prosecution would have pointed to the EMT's use of "heavy narcotics" (p.8) while Trumbull made the statements. he could have easily mistaken who owed the money to whom while discussing it with The EMTS. This again, would not lead a reasonable probability that Trumbull was biased against the Defendant and make his testimony unbelievable enough to lead to an acquittal. Plus, the defense cross-examined Trumbull's credibility while on the stand by bringing in a prior conviction for a fraud crime. The jury still believed his testimony despite this. This should lead the court to conclude that there is no reasonable probability that the result would change if the previous statement were admitted.

When taking both of these statements into account and cumulatively, there is not a "paucity" of evidence surrounding the statements and testimony that supported the conviction like in Haddon. In Haddon, there was only one eyewitness and, essentially, no other evidence supporting the conviction. Therefore, when the statement was given, it discredited the only piece of evidence. Here, there is a living victim, unlike Haddon, who can ID the perpetrator, along with a girlfriend who identified Hale immediately after as the shooter. Both have explanations for their prior inconsistent statements unlike the statements considered in Haddon. Therefore, the Court should find that the exclusion did not materially prejudice the defendant.

III. The Defense Could Have Found the Evidence of The EMT Statement through Due

Diligence

Lastly, the Court should recognize the due diligence exception mentioned in State v. Capp. While not "essential to the case",The Capp court stated that "the prosecution 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." The Defense attorney had an opportunity to seek out the testimony of the EMT operators who took Trumbull in to the hospital.
Because the defense and prosecution had equal opportunity to subpoena the EMT witnesses, then the court should excuse The non-disclosure.

IV. The Police Officer's Report on Recantation Was Not In the Possession of the State

The officer in this case testified that he turned over the file to another governmental actor that he could not recall when he finished recording the recantation statement. Franklin Law says that "if the evidence was with a government agency not involved in the investigation or prosecution of the defendant, its records are not subject to disclosure under Brady." Capp. The investigating officer testified that he did not have the report because he turned it over before going on medical leave. This document could have been in the possession of any other governmental agency not involved in the investigation. We know this because the prosecution asked the police force to turn over the entire file, which they stated they did. This means the file could have been in another government agency not involved, such as the clerk's office. The defense did not prove the statement was in the possession of the prosecution and therefore the court should deny the motion .

Second, the EMT evidence was not in the prosecution's possession because the EMT is not an investigatory part of the government. Capp held that when information that is not disclosed is held by a non-investigatory part of the government, the prosecution is under no duty to disclose the information. Furthermore, the defense had an opportunity to go an subpoena the EMT's based on their testimony that they would have told the defense the information they needed if they had simply asked for their deposition or some other form of evidence. (p.10).

Therefore, both statements were not within the possession of the government and the prosecution was not under a Brady obligation to turn them over.

Conclusion: This Court should deny defendant's motion for new trial based on the above reasons.

MPT 2 - Sample Answer # 1

Art. IV s 1:

Language: The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of 16 directors, who shall represent each class of members as follows: 1 representative of each 8 teams selected by the owner of

each team ("team directors"), and 1 representative of each 8 team's players selected to be each team's liaison to the players' union ("player directors"). If a team is added to the League, 1 new team director and 1 new player director will be added to the Board of Directors to represent that team and its players. If a team is removed from the League, that Board of Directors will lose that team's team director and player director.

Explanation: At a minimum, the Board of Directors (BoD) needs at least 3 directors (see Walker's Treatise on Corporations and Other Business Entities s. 10.4), so my recommendation complies with this basic requirement. I also suggest an even number of directors, despite the potential downside. Fischer and Peters repeatedly stressed in their meeting that they wanted equal representation on The BoD. While Peters raised the possibility of an independent, non-voting chair of The BoD, and this could prevent deadlock caused by an even split of team and player directors, Fischer was opposed to this idea. Furthermore, a core concern of both parties is equal control between the two sides. Having an independent 17th director could lead to one side having more or less of an advantage, depending on that director's viewpoints. Overall, I suggest equality is too important to the parties to allow for a 17th director. Even numbers could also be an advantage; when there are different classes of directors, equal numbers of each class "may encourage cooperation among the various classes" (see Walker's s. 10.4)

Because Fischer and Peters indicated that they hope the league will expand in size, I recommend clarifying in the Articles of Incorporation that as the number of teams increases, the size of the BoD will increase accordingly. I also recommend providing for the unlikely event that the league loses a team, because rugby is still a relatively unknown sport and these Articles should be designed to survive the League's ups and downs.

Art. IV s 5:

Language: When a vacancy arises due to a team director's departure from the Board of Directors, the owner of that team shall name a new team director to fill the vacancy. When a vacancy arises due to a player director's departure from the Board of Directors, the vacancy shall be filled by the new players' union liaison for that team.

Explanation: Under Franklin law, the Articles of Association may specify a method for the filling of vacancies on The BoD (see Walker's s.10.8). The suggested language above is based on the parties' explanation for how they want vacancies filled, and you may wish to tweak it after further discussions with the parties to ensure that this method of filling vacancies is feasible.

Art. IV s 6(b):

Language: A quorum of 10 directors, consisting of at least 5 team directors and at least 5 player directors, must be present in order to conduct any Association business.

Explanation: Franklin law requires, at a minimum, a quorum of a majority of board members to take any action (see Walker's s. 10.9). When there are different classes of directors, a minimum number of each class directors may be required to reach a quorum (see id.). It

is of utmost importance to the clients that each side be prevented from taking unilateral action. In the interest of maintaining fairness and trust to the extent possible between the two sides, I recommend a slightly higher quorum requirement than the law requires, such that there is a majority of each class of director present at each meeting and able to give input and vote on all issues.

Art. IV s 6(c):

Language: For matters of great importance, including hiring key employees or altering the apportionment and distribution of revenues, a super majority (2/3) of all directors present and voting must vote in favor of the action, and in addition, a super majority (2/3) of the directors present and voting from each class of directors must vote in favor of the action. For all other matters, a simple majority of those present and voting must vote in favor of the action, and in addition, a simple majority of the directors present and voting from each class of directors must vote in favor of the action.

Explanation: It is important to specify that the number of votes required to pass an action should be based on the number of directors present and voting, as opposed to the number of votes relative to the number of directors attending for purposes of achieving a quorum. This is because under Franklin law, "once a quorum . . . is present for a board meeting, it continues to exist for the duration of the meeting" (see Schraeder v. Recording Arts Guild par. 7, Franklin Court of Appeal (1999)). The Articles of Association may require a super majority of those present and voting or even unanimity among those present and voting in order pass matters of great importance (see Walker's s. 10.9). This type of requirement can act as a safeguard against one class of directors acting unilaterally (Schraeder par. 2-3). Because the two sides are so concerned about limiting each other's power to act unilaterally and want to ensure that revenue-splitting may not be changed by a simple majority, I recommend requiring a super majority of each class of members present and voting in order to make major decisions. Furthermore, while often a mere simple majority of those present and voting would be required to pass routine matters, because the parties are so deeply concerned about fairness between the two classes of directors, I suggest that a majority of votes in each class favor any action before it is passed. This suggestion could make passage of routine matters too cumbersome to be workable, so I recommend that you discuss it with the two sides to see if they would instead be comfortable with requiring merely a simple majority of those present and voting to pass routine matters.

Art. V:

Language: The Chair shall rotate among directors, alternating every other meeting between a team director and a player director. When the Chair duties fall to the team directors, the Chair position shall rotate on a set schedule between all team directors so that all team directors chair one meeting before any team director chairs a second meeting. The same shall apply to player directors.

Explanation: Because I recommend rejecting the idea of a disinterested 17th director to serve as Chair, as stated above, I recommend that the Association rotate between team directors and player directors as meeting Chair for each meeting, as suggested by Fischer

(see also Walker's s. 10.10). In order to avoid one director exerting an unfair amount of influence over the board, I recommend rotating between each team's directors and each player's directors on a set schedule, such that all directors serve as Chair on an equal, rotating basis.

Art. VII:

Language: All Association costs will be covered by income it receives for its activities. After all costs have been paid, any remaining revenue will be split evenly and distributed on an annual basis at the end of the fiscal year, with 50% going to the Rugby League of America and 50% going to the Professional Rugby Players Association.

Explanation: This language reflects the clients' stated desire to first pay all Association expenses from revenue and then split any remaining revenue between the two sides 50-50.

Art. VIII:

Language: These Articles may be amended by a super majority (2/3) of all directors present and voting, and in addition, a super majority (2/3) of the directors present and voting from each class of directors.

Explanation: As explained above, on matters of great importance a super majority of all members present and voting as well as all members from each class present and voting may be required in order to move forward (see Walker's s. 10.9). The parties expressed a desire for such an arrangement in order to avoid unilateral action by one side or the other; they also made clear that unanimity should not be required because they do not want any one director to have veto power.

Therefore, I recommend that amending the Articles require the same super majority (overall and within each class) as all other matters of great importance.

MPT 2 - Sample Answer # 2

ARTICLES OF ASSOCIATION OF THE
RUGBY OWNERS & PLAYERS ASSOCIATION

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, who shall represent each class of members as follows:

a. The Board of Directors shall consist of two classes of eight members each.

b. One class of directors shall include eight members to represent the owners of the teams of the Rugby League of America, and the other class shall include eight members to represent the roster of players of the teams of the Rugby League of America.

Explanation: As set forth by both parties during the client interview, neither side fully trusts the other. Both sides stressed the importance of structuring the board so that neither side would have an advantage over the other, meaning that the players and owners should have equal board seats. Requiring unanimity would enable one side to easily veto any measure. Ensuring an equal number of directors will provide adequate protections.

Walker's Treatise on Corporations and Other Business Entities notes that while Franklin law requires a minimum of three directors and that boards usually contain an odd number of directors, if more than one class of members is represented on a board, the board may consist of an even number of members from each class. This could lead to a potential deadlock; however, it could also encourage cooperation among the classes. I believe providing for an even number of directors would best achieve the goals of each side. By providing for an even number of directors to represent each side, neither side will have an advantage over the other, in accordance with the parties wishes. While there may be a possibility of deadlock, this would likely only occur on very contentious issues and would therefore encourage compromise on such matters. The parties have explained that they have a shared interest in many areas, so as a result, compromise is likely.

Language: SECTION 5. VACANCY IN BOARD OF DIRECTORS. In the event of a vacancy on the Board of Directors, such vacancies shall be filled as follows:

a. If a vacancy occurs within the class of directors representing the owners of the teams, the replacement director shall be elected by the owner of the team which the director is to represent. Such election shall be accomplished in the same manner as that set forth in Article IV, Section 3 above.

b. If a vacancy occurs within the class of directors representing the roster of players of the teams, the replacement director shall be the team's replacement players' representative to the Professional Rugby Players Association. Such election shall be accomplished in the same manner as that set forth in Article IV, Section 3 above.

Explanation: Walker's allows for vacancies to be filled in a number of ways, such as by specifying an alternative method in the Articles. This can include allowing each class of members or directors to fill vacancies in their respective class.

Given the relationship between the two classes, I believe requiring vacancies to be filled in the same manner as general board elections would protect the interests of both sides. If the board were allowed to vote to replace its own members, one class of directors would conceivably be given the power to select the replacement directors to represent the other side.

Language: SECTION 6. MEETINGS OF THE BOARD.

a. [Provided]

b. Quorum: A quorum shall consist of a simple majority of nine directors, subject to the requirements of subsection © below.

c. Voting: At least three directors representing each class must be present for to constitute a quorum. A majority of directors present and voting from each class must vote in favor of any proposed resolution for it to be adopted.

Explanation: Franklin law requires that a quorum consisting of a majority of directors be present to conduct business. In Schraeder v. Recording Arts Guild, the articles of association required that two members of each class be present for a quorum in order to ensure that both sides are represented in a quorum. In order to strengthen that requirement, I would increase that number to three and require that a majority of the members of each class vote in favor of a resolution. This would further protect both sides from action by the other side if the other side had a larger number of members present at a meeting.

ARTICLE V --- OFFICERS

Language: The Chair shall serve for a term of one year and shall be an existing director. The Chair for the first year shall be elected by a majority of the directors representing the owners' class of members. The Chair for the second year shall be elected by a majority of the directors representing the players' class of members. Election of the Chair shall rotate between classes from year to year.

Explanation: Both sides clearly disfavored the idea of an independent director; therefore, the chair should be appointed from within the association. Allowing the election of the chair to rotate between classes from year to year would ensure fairness and equal long term representation.

ARTICLE VII --- APPORTIONMENT & DISTRIBUTION OF REVENUES

Language: After all administrative and operating expenses are deducted, all remaining revenues shall be divided evenly, with one half to be paid to the Rugby League of America and one half to be paid to the Professional Rugby Players Association.

Explanation: Both parties wished that all remaining revenues be split evenly and paid to the two parties
to use as they see fit.

ARTICLE VIII --- AMENDMENT OF ARTICLES

Language: These Articles may be amended by a two-thirds majority of the Board of Directors.

Explanation: This provision provides substantial protection to both sides, preventing either from changing the articles in their favor. This provision is also allowed under Franklin law

MPT 2 - Sample Answer # 3

Article IV--Board of Directors

Section 1. Government. The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of sixteen, who shall represent each class of members as follows:

Eight of the board members will represent the owners and eight of the board members will represent the players. Each team's union representative will sit on the Board as that team's players' representative. Each team's owner shall name its board member.

Explanation: As set forth in the client interview, the two entities seek the same number of seats on the board and seek equality in the decision-making process. Though deadlock might result from an equal number of board members, an equal number also may encourage cooperation between the classes.

Section 5. Vacancy in Board of Directors.

A vacancy of an owner director shall be filled by the team's owner. A vacancy of a player director shall be filled by the players of the team whose director has been removed. Vacancies shall be filled within 45 days of their occurrence.

Explanation: Walker's Treatise suggests a variety of ways vacancies can be filled, such as members filling vacancies. Owners filling their respective vacant seats and players filling their respective seats is consistent with the position of the parties in the client interview.

Section 6. Meetings of the Board.

b. Quorum:

A quorum of 6 directors from each of the classes shall be required from each side.

Explanation: Franklin law provides that a present quorum exists for the duration of the board meeting. A quorum requirement of equal owner and player directors effectively prevents either side from gaining an advantage should the other side not be present to vote. Furthermore, requiring a quorum of 6 directors prevents a large walk-out of directors leading to a small number of directors on either side from preventing an otherwise good action of the Association from being implemented.

c. Voting:

Any action of the Board requires the consent of a majority of directors from each side once a quorum is present.

Explanation: Requiring a majority of directors from each side fosters the kind of good-will and agreement each side seeks in the Association. This equal voting power is consistent with the overall equality this Association seeks, as evidenced by the equal share of revenue.

Article V--Officers

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be chosen by the other side every second year. The Chair shall first be chosen by the owner directors.

Explanation: If the CEO is to be entirely neutral, as suggested in the meeting, he or she cannot be an independent director, as both sides agree upon. A rotating Chair fosters consensus. The Chair first being chosen by the owner's directors is to ameliorate the burden of the considerable start-up expenses they bear.

Article VII--Apportionment & Distribution of Revenues

Revenues earned by the Association, after deduction of expenses and reserves, shall be distributed to the directors of the separate classes of members for further distribution.

Explanation: Both parties seek a 50-50 distribution of revenue earned. Article VIII--Amendment of Articles

Amendment of the Articles shall be passed by a super majority of two-thirds of the entire board.

Explanation: The requirement of a two-thirds super majority protects The equally divided revenue apportionment the parties seek. Furthermore, it protects all other major decisions from being changed without significant support.