

On February 2, 2004, Dee Defendant was arrested on charges of possession and sale of cocaine. Perry Prosecutor will be trying the case. The possible evidence includes:

(1) A balloon filled with white powder, which was found in Defendant's pocket when he was arrested. Officer Oney placed the balloon in a plastic evidence bag and marked it as per the usual procedure. Once at police headquarters, he placed the bag in the evidence room and signed and dated the log-book. Some time later, Carla Chemist, a forensic chemist employed by a government-affiliated lab, tested the contents of the balloon and prepared a written report stating that the white powder was cocaine. Photocopies of the report were made, and one was filed by the lab as per usual office procedure. The original report was destroyed in a small office fire set by a disgruntled police employee. Chemist testified during a preliminary hearing at which Defendant's lawyer was present but chose not to cross-examine her testimony that the powder was cocaine. The day after the hearing, Chemist was killed in a car accident.

(2) Testimony of Ralph Ratten to the effect that Defendant is a "known drug dealer" in the neighborhood and has a reputation for selling drugs to young teenagers and for "beating up and threatening people who get in his way." In addition, if permitted Ratten would testify that he has on several occasions seen Defendant exchange money for red balloons with people on the street. Ratten would also testify that a mutual friend, Henry, told him that he (Henry) and Defendant had "gone into business together" selling illegal drugs. Ratten would also testify that Henry had said to Ratten: "Want to get in on the business? We'll make it worth your while. I know you've got good connections." Ralph Ratten recently was released from prison after serving three years for drug-related felonies.

(3) Evidence that Defendant is a drug addict and that he has in the past sold drugs in order to help finance his own drug habit. This evidence includes testimony of an undercover police officer that he has twice observed Defendant exchanging money for red balloons.

(4) Prior to being arrested, Officer Oney, who was dressed in plainclothes, heard Defendant say to a man standing near him, "watch my back; I've got some toys to play with." Officer Oney noted this statement in his arrest report, but now has no recollection of the statement. Officer Oney is a recognized expert on gang drug activity and drug lingo. It is his opinion that the phrase "watch my back" is jargon used in drug transactions to indicate that a lookout should make sure there are no law enforcement personnel in the area. It is also his opinion that "toys" refers to drugs and that "play with" refers to selling drugs. Defendant does not question Oney's qualifications as an expert in these areas. However, Defendant has indicated that he will challenge this expert testimony.

(5) As Defendant was being arrested, Gertie Girlfriend walked by. Girlfriend and Defendant had at that time been living together for ten years as husband and wife, though they were never formally married. (Under Gambrell state law, their relationship is recognized as a common law marriage.) When she realized that Defendant was being



arrested, Girlfriend shouted, “don’t tell me you’ve done it again! You are nothing but a lying, no good coke-head drug dealer!! I hope they lock you up and throw away the key!!” Defendant didn’t answer, but bowed his head and shook it slowly back and forth, muttering, “crazy, crazy.” Bernie Bystander, who witnessed this exchange, is prepared to testify to what he heard girlfriend say and what he heard and saw Defendant say and do.

Following the arrest, Officer Tuey interviewed Girlfriend. She stated, “Defendant promised me that he would stop selling drugs. He is a liar. Now I understand why he has all of those red balloons in our apartment and where all that cash is coming from.” Girlfriend also made similar statements to her best friend, Bessie. Girlfriend now states that she does not wish to testify against Defendant.

(6) After Defendant was arrested and charged with the crime, he arranged to take a polygraph (lie detector) test. Defendant passed the test, and wishes to introduce the results at the trial through the testimony of the polygraph examiner.

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You are the law clerk for Judge Wise who is presiding over Dee Defendant’s trial. Judge Wise has asked you to prepare a bench memorandum analyzing the evidentiary (and possible Constitutional) issues raised by this evidence. The judge would like you to discuss: the objections that will likely be raised, the probable responses, and the best ruling. At this time, it is unclear whether Defendant will choose to testify in his own defense, so the Judge would also like you to point out whether and how this might affect the analysis where relevant.

END OF EXAM

HAVE A GREAT SUMMER!!

ANSWER KEY SPRING '04 ESSAY

Exam #: _____

Part (1): (total 15 points)

_____ **Authentication** of the balloon/powder – chain of custody; testimony of witness with personal knowledge (officer); minor breaks go to weight (3 points)

_____ **Report: BER** – the copy of the report is a duplicate, admissible to the same extent as the original so long as no question raised as to the authenticity of the original; no issue as to non-production of original. Even if a question raised re admitting the duplicate under 1003, non-production is excused because destroyed and no bad faith (disgruntled employee's destruction of the report by setting fire probably not sufficient to show bad faith) (4 points)

_____ **Report: Hearsay** – Oates issue (**business records/public records** exceptions) – The report is hearsay. Normally would satisfy 803(6) so long as foundation laid (made at or near time; by a person with knowledge; kept in the regular course). But here, because the report is offered against a criminal defendant, there is an Oates problem (explanation) (4 points)

_____ **Preliminary hearing testimony of Chemist – Hearsay** issue. Admissible under **former testimony** exception because declarant is unavailable and Defendant had opportunity and similar motive to develop the testimony at the prior hearing. Possible **CC issue** – after Crawford, this is clearly “testimonial” hearsay. But probably because of opportunity to cross-x, this will not violate the CC (4 points)

Part (2): (total 15 points)

_____ **Character evidence – statement that Defendant is a “known drug dealer” and has reputation for selling drugs to teens and “beating up and threatening” people:** Ratten may not testify to Defendant's reputation unless D first “opens the door” by presenting evidence of his own good character (and must be a relevant character trait). Even if Defendant opens the door and the court finds that the character traits are pertinent, some of Ratten's testimony should probably be excluded under 403 as much more prejudicial than probative (3 points)

_____ If Ratten were allowed to testify, could he be **impeached with his prior drug felonies?** Yes, under 609 these prior felonies are admissible, subject to the normal 403 balancing test because he is a W other than the accused and these crimes were punishable by imprisonment in excess of one year (3 points)

_____ Ratten's **testimony regarding what he personally saw** – this is permissible prior acts evidence only if it is offered for some purpose other than propensity under 404(b). Here, there is no plausible non-propensity purpose. If Defendant “opens the door” to rebuttal character evidence, these other acts would still be impermissible under **FRE 405** (4 points)

_____ The **statements of Henry** raise **hearsay** issues – they may be admissible as admissions of a co-conspirator against Defendant pursuant to **FRE 801(d)(2)(E)**. They appear to have been made during the course of, and in furtherance of the conspiracy, since the statements suggest that Henry was attempting to recruit Ralph into the conspiracy. However, the rule requires some corroboration of the existence of the conspiracy and that the Defendant and Henry were members of it **(5 points)**

Part (3): (total 5 points)

_____ **404(b)** issues: addiction possibly admissible under the reasoning of Cunningham as evidence of **motive**. Evidence of past sales seems like pure propensity though. Issue whether the past balloon sales are admissible to prove **identity** through m.o. Under the reasoning of Carillo, these are not sufficiently distinctive to show identity and should be excluded under 404 **(5 points)**

Part (4): (total 15 points)

_____ **Hearsay** issue: the report is admissible as a business record, however there is an **Oates problem** because it is the report of law enforcement personnel. **(3 points)**

_____ If Oney testifies, though, it is admissible as a **recorded recollection** (provided the foundational requirements are satisfied). The statement, however, is double hearsay because the statement within is offered for its truth. It is admissible as an admission of a party-opponent (Defendant's own statement) under **801(d)(2)(A)**. **(5 points)**

_____ As to the above, Oney is testifying there as a lay or "fact" witness **(1 point)**

_____ **Expert opinion** testimony as to the meaning of the statements – under **rule 702 and Daubert**, the court must exercise its gatekeeper function and determine whether this opinion testimony will be helpful to the trier of fact and whether it is reliable. Gardeley suggests that this kind of expert testimony is often admitted; however Defendant can argue that "watch my back" is not the sort of jargon that would require expert interpretation. **(6 points)**

Part (5): (total 20 points)

_____ **Privilege** – under the federal marital **testimonial** privilege, the witness spouse may refuse to testify against the defendant spouse in a criminal trial (Trammel). Thus, if Gertie and Defendant are "married" under the law of the state in which they reside, she may refuse to testify against him. Here, Gambrell law would consider them married, and therefore Gertie may invoke the privilege. **(4 points)**

_____ **Hearsay** – Gertie's statement "don't tell me you've done it again . . .": This statement is hearsay, but may be admissible either as the admission of a party-opponent under **801(d)(2)(B)** (adoptive admission). Prosecutor would argue that Defendant

adopted Girlfriend's statement as his own either by **silence (not disagreeing)** or by **conduct (shaking his head)**. The **test** is whether a reasonable person in Defendant's position would have remained silent were the statement not true. This is a **104(a)** issue for the judge, as is the question what Defendant's ambiguous conduct and words meant. However, it is possible an appellate court would find his behavior and words so ambiguous as to hold it reversible error to allow the statements in as an admission (case?). **(8 points)**

_____ **Hearsay** – should the court decide that this statement does not satisfy 801(d)(2)(B), it may be admissible as an **excited utterance** of Girlfriend (note and apply foundational requirements) **(2 points)**

_____ **Statements to Officer Tuey – Hearsay** and probably not admissible under any exception. Also, should the court admit the statement under some exception to the rule against hearsay, this would present a serious **Confrontation Clause** problem under Crawford because statements to a police officer are probably testimonial under the reasoning of that case and Defendant did not have an opp't'y to cross-x those statements. [would also raise the issue of whether she is unavailable for CC purposes, an issue the S.Ct. did not address in Crawford.] **(4 points)**

_____ Statements to friend Bessie: **hearsay**. No applicable exception. **(2 points)**

Part (6): (total 15 points)

_____ **Polygraph:** Depending upon the rule followed in the particular jurisdiction, the results of Defendant's polygraph, offered by Defendant, may be admissible. First, based upon the reasoning of *Scheffer*, it is unlikely that a decision by the trial court to exclude the polygraph results would raise any Constitutional issue. Similarly, if Gambrell follows a per se rule of exclusion, this would likely be upheld as Constitutional under *Scheffer*. However, some jurisdictions have lately been re-examining their per se exclusions of various forms of scientific evidence (e.g. the 11th Circuit in *Piccononna*), and it would be entirely proper for the court to hold a Daubert hearing on the admissibility of the polygraph. (Discussion). **(15 points)**

subtotal _____

organization and misc. (possible 10 points) _____

TOTAL: _____