

Exam # \_\_\_\_\_  
Part I: Retain by College   X    
Part II: Return to Student   X  

UNIVERSITY OF CALIFORNIA  
HASTINGS COLLEGE OF THE LAW

FINAL EXAMINATION: EVIDENCE  
(COURSE # 36811)

PROFESSOR ROGER PARK

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FALL SEMESTER 2002

TUESDAY, DECEMBER 10, 2002

TOTAL TIME: THREE AND ONE-HALF HOURS

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CLOSED BOOK EXAMINATION

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Final Examination  
Evidence  
Professor Roger Park

Exam # \_\_\_\_\_  
Part I: Retain by College X  
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**PART II**

**ESSAY QUESTION**  
**TWO HOURS**  
(120 Minutes)

Assume that you are located in a jurisdiction that has adopted the Federal Rules of Evidence. If additional facts would be helpful, state what you need to know and why. You should not, however, discuss factual possibilities that are bizarre and improbable. Assume that any writing is authentic and the original can be offered at trial.

**ESSAY QUESTION: TWO HOURS**

Dillinger is charged with robbing a convenience store clerk (named Chameleon) and displaying a firearm in the course of the crime. Dillinger, unfortunately, has been down this road before; in 1995 he was convicted of the armed robbery of a different convenience store in the same town. In both the earlier case and the current case, the robberies occurred between midnight and 1A.M., the victim was the store clerk, a female, and there was no one else in the store (in addition to the robber and the victim). In both cases, the robber displayed a small firearm, which he withdrew from his right pants pocket, and ordered the clerk, "Empty the register or I'll blow your brains out!" In both cases, after receiving the money, the robber walked from the store and jumped into the passenger seat of a car parked in front of the store, which immediately pulled away from the curb.

In the earlier robbery, Dillinger was the only person charged. In the current case, Hapless has been charged as a co-defendant and has a trial date set a month after Dillinger's. According to the police report, the night after the current robbery, Hapless told her good friend Jones that she would treat to drinks because "I picked up a lot of easy cash when Dillinger and I pulled that convenience store job last night. I was the wheel woman. You should've seen the look on that clerk's face when Dillinger pulled out his roscoe and said he'd kill her." Jones enjoyed the drink and genuinely likes Hapless, but went to the police, reported the conversation and is prepared to testify at Dillinger's trial. Jones was arrested on drug possession charges one month before the current robbery and the drug charges are currently pending.

Chameleon called 9-1-1 immediately after the robbery and was taped saying, in a very emotional voice, "Help me! I've just been robbed by a guy with a gun. Come quickly, I'm scared to death!" The police arrived within minutes and interviewed Chameleon, who described

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the robber as wearing short sleeves, and having a tattoo on his right arm of a dollar sign with wings and the words "Born to Steal." Chameleon's brother, Smith, has been in touch with your investigator. Smith is prepared to testify that, in his opinion, Chameleon is a compulsive gambler, who is constantly in need of money and commits crimes to get it. According to Smith, on at least two occasions Chameleon told him she committed crimes for this purpose. Three years ago she admitted she had forged several checks and, without pleading guilty, she entered a diversion program, attended Gambler Anonymous classes for 90 days and the charges were dismissed. Last year she was convicted of petty theft and served 10 days in jail. Chameleon's employment application, prepared six months before the robbery, reflects that she made no response to the question asking her to list all previous arrests.

Dillinger will testify that he did not commit the robbery. He had been in the convenience store several times before the robbery occurred and may have encountered the clerk at that time. When he wears a short sleeve shirt his Born to Steal tattoo is readily visible and perhaps she observed it. The defense theory of the case is that Chameleon stole the money and lied about a robbery.

At Dillinger's trial, Hapless will refuse to testify.

Discuss significant issues of admissibility of the evidence that the prosecution and the defense will offer at trial.

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(End of Examination)

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MODEL ANSWER  
ESSAY QUESTION

1. D's prior robbery.
  - a. R. 404(b). The 1995 robbery may not be admitted to prove that D has a propensity to commit robberies. However, under FRE 404(b), the prosecution may introduce evidence of the prior offense to prove identity, if the facts of the two offenses are very similar and sufficiently unique to suggest that the method of operation is the handiwork of the accused. Here, though many similarities exist between the charged and the prior offense, none seem unique or even unusual. The two convenience store robberies are garden-variety crimes. Thus the 1995 offense is not admissible under FRE 404(b). Even if a court were persuaded that the offenses were sufficiently similar to pass the 404(b) test (perhaps because of the similarity of the threats employed by the robbers), the court should exclude the evidence under FRE 403. The probative value of the evidence would be slight because the crimes lack unique similarities. Undue prejudice would, on the other hand, be high because the jury would be apt to resolve the current charge on the basis that D had done this same crime before.
  - b. R. 609. Evidence of D's robbery conviction from 1995 may be admissible under FRE 609(a)(1), to impeach D's testimony, subject to the special balancing test imposed by that provision. Robbery is a felony punishable by more than a year in prison. When the prosecution seeks to impeach an accused with a prior conviction under 609(a)(1), the court should exclude it, unless it determines that the probative value outweighs its prejudicial effect on the accused. This balance test is more restrictive than the FRE 403 test, to better protect the accused. D will argue persuasively that the prior conviction should be excluded because the prior crime is somewhat remote, it is identical to the current charge and robbery is more a crime of violence than dishonesty. The prosecution will respond that the defendant was in prison for several years, reducing the significance of the remoteness, and a limiting instruction could be given to ensure that the jury did not improperly consider the robbery to conclude that D has a character trait as a robber. Most judges would exclude the robbery conviction under FE 609.
2. Jones's testimony will relate Hapless's (H) out-of-court statement for its truth, and is,

therefore, hearsay. The most likely exception is FRE 804(b)(3), statement against interest. Though only statements against pecuniary interest were admissible under the common law, the FRE (reflecting the modern trend) admits a statement that so far tends to subject the declarant to criminal liability that a reasonable person would not make it unless believing it to be true. Here H's statement incriminates her in a robbery and to that extent seems admissible under this exception. Two questions remain. Is it against H's interest to incriminate D in the crime? This portion of her declaration is the only part that is relevant in these proceedings. It appears that this portion of her statement demonstrates an insider's knowledge of the details of the crime and, so, incriminates H. In addition, it incriminates her by revealing her knowledge that a firearm was used in the offense. Would a reasonable person in H's position fear that disclosing her criminal involvement to a friend over drinks in a bar was likely to be passed on to the police? This is a close question. Since no one should know better than criminals that there is little honor among thieves, a court is likely to find that the risk of a friend turning against you is sufficiently high that the purposes of this exception are fulfilled by admitting H's statement.

To qualify under this hearsay exception, the declarant must be unavailable. Because she refuses to testify, presumably relying on her privilege against self-incrimination, H is unavailable. (FRE 804(a)(1); see, also 804(a)(2).)

D may object that admitting this testimony violates his 6<sup>th</sup> Amendment right to confrontation. A hearsay exception survives a confrontation clause challenge when the declarant is unavailable and the exception is firmly rooted or the challenged statement has particularized guarantees of trustworthiness. (Roberts) In evaluating the existence of these particularized guarantees, we look only at the circumstances under which the statement was made and not to other corroborative evidence. A declaration against interest made by one participant in a crime and introduced against another is not treated as firmly rooted. (Lilly) In Lilly, the challenged statement was made to the police and consisted of statements that seemed to shift primary responsibility for the crime from the declarant to the co-defendant. Though Lilly reversed because the statement was insufficiently reliable, a different result should be reached here, because the statement was made to a friend under circumstances that suggest a lack of motive to distort D's responsibility.

D may impeach Jones with evidence that he has a pending drug charge. While FRE 608 and 609 would not permit evidence of this charge, it is admissible as evidence of bias, despite the absence of any specific rule dealing with such evidence. (Abel) The existence of the pending charge suggests a reason for Jones to modify his testimony to win the favor of the prosecution.

There was no reason to assume Jones would not testify and the prosecution would

attempt to introduce the police report of her statement. However, an insightful discussion of the inability to use FRE 803(8) and 803(6) for this purpose was given credit.

3. The prosecution will seek to admit Chameleon's (C) 9-1-1 phone call. This should be admissible as an excited utterance (803(2).) The robbery would have been a startling event and her tone of voice in the phone call, as well as her comment that "I'm scared to death," suggest that she is still under the stress of that event. In determining under FRE 104(a) whether to admit this statement as an excited utterance, the court may consider the contents of the statement, itself. "Bootstrapping" is permitted under FRE 104(a). No 6<sup>th</sup> Amendment problem exists with admitting this statement, even if C did not testify and was available. Post-Roberts cases have pretty much eliminated the availability requirement, except where the proponent is relying on FRE 804(b)(1), former testimony. In addition, the excited utterance exception is firmly rooted. (White)
4. The prosecution will seek to introduce C's statement to the police, given after they arrived at the store and interviewed her. Though offered for the truth of the matter, this is probably admissible as a prior identification, which is not hearsay. (FRE 801(d)(1)(C).) The statement qualifies because C is testifying at trial and is subject to cross-examination concerning the statement. Though C does not explicitly state that D is the robber, her description seems to qualify as "identification" under this provision. (This statement would not be admissible as a prior consistent statement, because the motive to fabricate, whether thought of as the gambling habit or her possible role as the thief of the store's money, arose before her statement to the police. (FRE 801(d)(1)(B); Tome.)
5. When cross-examining C, D will be entitled to ask her about three different specific instances of conduct, in order to impeach her: the check forgeries, the petty theft and the failure to mention the arrests on her employment application. (FRE 608(b).) However, extrinsic evidence of these acts is inadmissible under this rule, even if C falsely denies their existence. Since she was never convicted of check forgery, FRE 609 will not permit extrinsic evidence of it, even though forgery is a crime involving dishonesty or false statement. (FRE 609(a)(2).) Extrinsic evidence of the petty theft is probably inadmissible under 609; though convicted of the theft, it does not qualify under 609(a)(1), because the penalty for petty theft is insufficient, and thefts have often been found not to qualify as a crimes of dishonesty or false statement under subdivision (a)(2). D could argue that C's gambling habit is relevant to show a motive to steal, and, if she were the actual thief, this would provide a motive to fabricate her testimony about D. Under FRE 403, a court is likely to exclude this testimony on the basis that the undue consumption of time outweighs its probative value.
6. The defendant will call Smith (S) for two purposes. First S is prepared to testify to his opinion that C is a compulsive gambler, constantly in need of money and commits

crimes to obtain it. Because C is both a victim of the crime and a witness at the trial, there are two different theories that might permit introduction of this character evidence. First, under FRE 404(a)(2), a defendant may introduce pertinent character evidence regarding the victim. Second, under FRE 404(a)(3) and 608(a), a party may introduce opinion or reputation evidence attacking the credibility of a witness, but the evidence may refer only to character for truthfulness and untruthfulness. Two barriers exist to admitting S's testimony under these theories. First, we have no basis for concluding that S is an expert. Under FRE 701, a lay witness may provide an opinion, but only if it is based on the witness's perception, is helpful to a clear understanding of the testimony and is not based on specialized knowledge. Opining that C is a "compulsive gambler" seems to be the kind of testimony an expert would give. Second, it is not at all clear that the opinion relates to a pertinent character trait of a victim or to truthfulness. If S clarified that his opinion is that C is a thief (motivated to steal by gambling) or is dishonest or both, these barriers would be overcome. A layperson can give such an opinion. Evidence that C is a thief is pertinent to the defense raised by D. Evidence that C is dishonest may be close enough to "untruthful," to qualify under 608(a).

S also is prepared to testify concerning certain crimes C admitted. If S denied committing those crimes when D cross-examined her, there is no hearsay problem with admitting the inconsistent statements she made to S to impeach her (but not for their truth.) The problem is that FRE 608(b) bars extrinsic evidence of these past crimes, as discussed above.