

February 2009 Multi-State Performance Test

1. The test materials include an interoffice assignment memorandum from the law firm partner to the examinee, transcript of the Administrative Hearing, the Police Department Incident Report, and the Police Department Laboratory Report of blood alcohol test results. The library consists of portions of statutes from the Franklin Vehicle Code, the Franklin Code of Regulations, the Franklin Administrative Procedure Act, the Franklin Evidence Code and the full text of three cases, *Pratt*, *Schwartz*, and *Rodriguez*. The interoffice memorandum requests that the examinee draft a persuasive memorandum arguing the following issues: (1) the police officer did not have reasonable suspicion to stop Ms. Ronald (“Ronald”); (2) the administrative law judge cannot rely solely on the blood test report to find that Ronald was driving with a prohibited blood-alcohol concentration; and (3) that in light of all the evidence, the DMV has not met its burden of proving by a preponderance of the evidence that Ronald was driving with a prohibited blood-alcohol concentration.

2. General observations: Most of the examinees followed the call of the question by drafting a memorandum. The test can be divided into three sections corresponding to the three arguments assigned. The majority of the examinees organized the memorandum to correspond with the specific issues assigned. Most examinees addressed the issues in the order presented in the interoffice memorandum.

3. The first issue involves the reasonableness of the stop. The supporting case regarding this issue is *Pratt v. DMV*. Many examinees provided support for the argument that Officer Thompson did not have a reasonable suspicion to stop Ronald.

This issue requires a determination of whether the facts warranted Officer Thompson’s stop of Ronald. Good answers began by citing *Pratt* as having rejected a bright line test and holding that the reasonableness of the stop is determined under a totality of the circumstances standard. Many examinees not only cited the ruling in *Pratt*, but also went further and distinguished the specific facts in *Pratt* from the current case. The stronger answers additionally addressed the facts in *Kessler* (which was cited in *Pratt*) and distinguished them from the present case.

To support a finding that the stop was not warranted, many examinees identified the fact that Ronald was only weaving within her lane prior to being stopped. Many examinees addressed the significance (or lack thereof) of the fact that Ronald was observed leaving the restaurant/bar at 1:00 a.m. or about the time bars were closing. Most examinees addressed specific reasons for the stop not being warranted. These included Officer Thompson’s “tailgating” or following Ronald very closely and that he had his high beams on at the same time, and that these actions by the officer may have caused her to be afraid and to weave as she drove. The stronger papers not only addressed both of these issues but also pointed out that Ronald was not speeding or committing any other traffic violation.

4. The second issue concerns the sufficiency of the blood test as evidence. There are two areas to be addressed in this section. Both areas bear on the underlying issues that determine whether the ALJ can rely solely on the blood test to find Ronald was driving with a prohibited blood-alcohol concentration, or whether the blood test report can only be used to supplement other evidence to support the charge. Many examinees correctly concluded that the blood test could only be used to supplement other evidence. The more complete answers provided specific reasons why the report could not be the sole basis for a finding that Ronald was driving with a prohibited blood-alcohol level.

In the analysis concerning the use of the blood test report, the examinee should have discussed that Section 121 of the Franklin Code of Regulations requires the report to be signed by a forensic alcohol analyst and certified as authentic by a records custodian in order to be admitted without further foundation. Many examinees who recognized this issue not only correctly pointed out the legal requirement, but also observed that the report was signed by Charlotte Swain, a Senior Laboratory Technician, rather than Daniel Gans, the Forensic Alcohol Analyst, and then concluded that, because the report did not comply with Section 121, it would not be admissible under Sec. 121.

A second aspect of this analysis concerns whether the report is hearsay and, if so, whether a hearsay exception applies. Most examinees reached the conclusion that the report is, in fact, hearsay. In addition, most examinees set forth the three requirements of Section 1280 of the Franklin Evidence Code that sets forth a public-records exception to the hearsay rule. Many of the examinees who identified the public-records exception argued that the test and report do not meet the timeliness requirement set forth in the second factor. More complete answers thereafter provided the conclusion that, because the report is hearsay, and would not be admissible under an exception in a judicial proceeding, it cannot be used as the sole basis to conclude that Ronald was driving with a prohibited blood-alcohol concentration, but that it can only be used to supplement other evidence.

5. The third issue addresses whether the DMV has met its burden of proof. Most examinees correctly argued that the DMV has not met its burden of proof by a preponderance of the evidence, as was suggested in the assignment memorandum. In supporting this conclusion, many examinees compared the evidence presented at the hearing in the current case to the facts and findings in *Rodriguez* and *Schwartz*, noting that the case against Ronald lacks additional factors such as slurred speech or the smell of alcohol to support the license suspension. Many examinees also reasoned that Ronald's difficulties with the field sobriety test were due to Ronald's fatigue and being required to take the test on the shoulder of a busy highway while wearing high heels. Stronger answers included Ronald's explanation for weaving (due to the officer's following her closely with his high beams on) as further support that the DMV did not meet its burden.

July 2009 MPT

1. The test materials include an interoffice memorandum from the City Attorney for the City of Bluewater (City), a preliminary research memorandum from Rhonda Hostetler, a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS), an article from the *Bluewater Tribune*, and a Draft Service Plan for the Annexed Area. The library consists of portions of statutes from the Consolidated Farm and Rural Development Act, the Franklin Code, and the full text of two cases, *Fountain Water Supply (Fountain)* and *Klein Water Company (Klein)*. The interoffice memorandum requests that the examinee draft a letter responding to TWS' attorneys' demand letter by addressing: (1) each of TWS' contentions; and (2) persuasively setting forth the City's position that the City has the exclusive right to provide water and sewer services to the Acadia Estates subdivision.

2. General observations: Most examinees followed the call of the question by drafting a letter. The test can generally be divided into two sections. The first section discusses why TWS does not have an exclusive right to provide water and sewer services to the new subdivision. The second section discusses why the City was not barred by state law from providing such services there, and why the City is authorized, and has the exclusive right, to provide the services. Many of the examinees chose to blend the arguments for and against each side rather than organize the letter based on the rights of the individual parties.

3. The first issue involves whether TWS can claim a federally protected right under Section 1926(b). This involves the three part test set forth in the *Fountain* and *Klein* cases. The three parts relate to whether TWS: (1) is an "association" under the Act; (2) has an outstanding federal loan, and (3) has provided service or made service available to the disputed area (also known as the 'pipes-in-the-ground' test). Many examinees discussed only the third factor. The more complete letters specifically set forth relevant facts establishing that TWS has met the first two parts.

The third part has a two prong test that requires TWS to prove it has: (1) the legal right under state law to serve the area; and (2) the physical ability to serve the area. The more complete papers identified and discussed each prong.

It should be noted that to establish its exclusive right to serve the area, the City is required to meet the same three part test under Section 1926(b). Many examinees engaged in this analysis for the City's claim at some point in the letter. The more complete letters specifically addressed each of the three requirements.

4. The discussion regarding TWS' legal right to serve the area requires an analysis related to TWS's status as a Certificate of Convenience and Necessity (CCN) holder. Most examinees identified that TWS is required to obtain a CCN for Acadia estates before serving the area. The more complete letters, after identifying this requirement, addressed and analyzed four issues: (a) TWS has a CCN for an area within El Dorado County; (b) this CCN does not cover the Acadia Estates area; (c) TWS has only applied for an amendment to the existing CCN, and an application alone does not provide TWS the right to serve the new area; (d) it is unlikely that

TWS will be able to obtain an amendment to the CCN because TWS is not capable of providing "continuous and adequate service" as required by Section 457. This analysis would result in the examinee determining that TWS does not currently have the legal right to serve the area and is unlikely to acquire this right.

5. The second prong, the 'pipes-in-the-ground' test, requires an analysis of TWS' current ability to provide service. Three facts related to TWS's ability to provide service include: (1) TWS's nearest lines are 3 miles away; (2) TWS's pipes are only 6" when the subdivision requires 12"; and (3) it will take TWS approximately two years to complete its expansion. The more complete letters factually compared these factors with the facts and holdings in *Glenpool* and *Klein*, (which discuss the need to have existing lines within or adjacent to the disputed area or to be able to provide service within a reasonable time period, and conclude that existing lines more than a mile away are too far to be considered "within or adjacent to" the disputed area, and that 12 months to construct new lines is too long to be considered "within a reasonable time") and reached the conclusion that TWS did not have existing lines in the area and could not provide service within a reasonable time. Many examinees used non-persuasive generalized terms to suggest TWS did not meet the requirements, and failed to provide the specific factual information supporting the City's position on the claim of TWS.

6. Analysis of the City's argument also involves a discussion of the two prong test set forth above in the *Fountain* and *Klein* cases. Regarding the City's legal right to provide services, the stronger letters addressed TWS's claims that Sections 450(b) and 675 preclude the City from providing service. Such letters addressed the fact that TWS is not a CCN holder for the disputed area and, therefore, not entitled to protection, and that Section 675 specifically authorizes a City's expansion into an adjacent territory as long as the territory is not served by a holder of a CCN. This foregoing analysis would result in the examinee determining that the City has the legal right to serve the area.

As for the 'pipes-in-the-ground' test, a basic analysis for the City's position would include a discussion that: (1) the City's lines are a quarter mile from the new subdivision; the City's lines are already 12" in diameter; and (3) the City can provide service within a few months. Many examinees did not provide factual information supporting the City's position that it would have exclusive rights.

7. The more complete letters compared the City's legal right and ability to provide services with TWS's legal right and ability to provide services. By conducting this comparison, an examinee should have expressly concluded that the City possesses the exclusive right to provide service to the Acadia subdivision.

February 2010 Multi-State Performance Test Comments

1. The test materials include an assignment memorandum from Marcia Pierce (the court appointed attorney for Defendant Brian McLain); the criminal complaint; the Motion to Suppress Evidence and to Dismiss Count Two; excerpts of the transcript of a call to CrimeStoppers Hotline; excerpts from the hearing transcript; excerpts from the Franklin Criminal Code and the full text of three cases, *State v. Montel* (Montel), *State v. Grayson* (Grayson) and *State v. Decker* (Decker). The interoffice memorandum requests that the examinee draft the argument section of a brief to support (1) the Motion to Suppress evidence from a search because Officer Simon had no reasonable suspicion that would justify the stop of McLain's vehicle on the night in question; and (2) the Motion to Dismiss Count Two of the criminal complaint regarding possession of equipment to manufacture methamphetamine because it is a lesser-included offense of Count Three, manufacture of methamphetamine.

2. General observations: The test can generally be divided into two sections. The first section sets forth the basis for why Officer Simon did not have reasonable suspicion to stop McLain's vehicle. The second section discusses why Count Two is a lesser-included offense of Count Three. Most of the examinees followed the call of the question by drafting the requested arguments. Most examinees kept the discussion of the arguments supporting the two Motions separate.

3. Reasonable Suspicion. The first issue involves whether Officer Simon was authorized to stop McLain's vehicle. Initially the analysis requires identification that the stop is a Terry Stop, and that such a stop requires that the officer have reasonable suspicion grounded in specific and articulable facts that the person is involved in criminal activity at the time. Reasonable suspicion is determined by looking at the totality of the circumstances. The answer should include citation to authorities, which included Montel case and cases cited within.

In support of McLain's position, most examinees cited Montel, and identified the distinction between tips provided by known informants and those provided by anonymous informants. Montel requires that tips from anonymous informants must be corroborated. Furthermore, an anonymous tip must be "reliable in its assertion of legality, not just in its tendency to identify a determinate person" (citing *Florida v. J.L.*). Most examinees did provide some level of discussion regarding these legal standards.

After setting forth the specific legal standards, it was necessary to analyze (1) whether the tip was reliable and (2) whether Officer Simon corroborated the tip. While most examinees noted that the anonymous tip vaguely identified McLain and that he was driving a red Jeep Cherokee, many of the examinees failed to discuss Officer Simon's corroboration efforts. The stronger exams discussed Officer Simon's specific acts (omissions) and concluded that he failed to conduct a sufficient investigation to corroborate the tip. Many examinees generally noted that the specific items purchased were legal, and that the amount of Sudafed purchased was insufficient to manufacture methamphetamine. Many also observed that being in a high crime neighborhood was not sufficient to establish reasonable suspicion (Washington).

The Grayson case afforded the examinee the opportunity to discuss the extent of corroboration necessary to support an anonymous tip. Many examinees briefly discussed the Grayson facts and accurately concluded that Officer Simon's investigation failed to corroborate the anonymous tips. The more complete exams undertook a specific analysis of the differences between the information provided by a tip and investigated in Grayson, and the tip provided to the officer and

his investigation in the McLain case.

Most of the examinees correctly concluded that Officer Simon did not have reasonable suspicion to stop McLain's vehicle. The stronger answers provided that the Officer Simon's lack of reasonable suspicion resulted from his failure to sufficiently corroborate the anonymous tip.

4. Double jeopardy. While the Motion to Suppress required an analysis and application of case law to the facts, the Motion to Dismiss required the examinee to analyze criminal statutes and case law and apply these to the charges brought. Most examinees adequately supported the conclusion that Count Two (possession) is a lesser-included offense of Count Three (manufacture). However, a small number of examinees incorrectly concluded that Count Three is a lesser-included offense of Count Two

Decker, the provided case applicable to this issue, discusses the strict elements test and double jeopardy. Most examinees identified if "the elements of the 'greater crime' necessarily include the elements of the 'lesser' crime, then the latter offense is a lesser-included offense and the prosecution of both crimes violates double jeopardy. Decker, citing *Blockbuster v. United States*. In reaching the conclusion that Count Two is a lesser-included offense of Count Three, many examinees correctly discussed the principle that two counts do not have to be identical to violate the double jeopardy provisions of the Constitution. Rather a count is a lesser-included offense if it is impossible to commit the greater offense without also committing the lesser one.

The more complete answers further analyzed the specific elements of the two charges at issue and discussed the fact that manufacturing methamphetamine requires equipment. A smaller number of examinees distinguished Jackson and discussed that while it is possible to possess drugs without drug paraphernalia and visa versa, it is not possible to manufacture methamphetamines without manufacturing equipment.

5. As this was intended to be a brief to the court, the more complete answers were supported with citation to case law and statutory authority. A number of examinees failed to cite any authority regarding the applicable legal standards. Since the examinees were requested to write the argument section of a brief to the court, the examinees were expected to support the argument with applicable authority.