

EVIDENCE
Final Examination
Fall 2000

Part II: Essay Question

ESSAY QUESTION
(95 Minutes, 90 Points)

THE FACTS

The defendant, Peter Michelman, was charged with DUI homicide, a crime defined as “driving a motor vehicle while under the influence of alcohol in a manner that caused death to any person.” Because the crime allegedly took place on the Presidio, a federal parkland in San Francisco, Michelman was tried in United States District Court. He was tried alone (without co-defendants) before a jury.

At trial, the government’s first witness was Detective Angela Acheson of the Presidio Park Police. She testified that at 10:20 p.m. on Friday, June 16, 2000, she was driving along a lightly traveled road on the Presidio. She came upon a Chevrolet that had crashed against a tree. The Chevrolet was empty. About 25 yards away, Acheson found the body of a man. Various pieces of physical evidence indicated that the Chevrolet had struck and instantly killed the man as he walked along the road. Records of the Department of Motor Vehicles showed that the Chevrolet was registered to the defendant, Peter Michelman.

During Det. Acheson’s testimony, the prosecutor showed her a handwritten note. Acheson testified that she had found the note tucked under the windshield wiper of the Chevrolet at the accident scene. The note said: “The driver of this car left in a VW that was following behind him—plate number 3XPT674.” The note was not signed. Acheson testified that, while she was still at the accident scene, she placed the note in an evidence envelope and labeled the envelope with her initials and the date. Later, she delivered the envelope to the evidence custodian of the Park Police. Although the custodian never testified in court, three other department employees—a fingerprint expert, a handwriting expert, and a chemist—testified that they had examined the note in an effort to determine who wrote it. The fingerprint expert testified that she had found no prints on the note and pointed out that standard notepaper of the sort used rarely shows fingerprints. Both of the other experts said they had discovered no means of identifying who wrote the note. The government offered the note as an exhibit, and the judge admitted the note in evidence over the defendant’s objection.

Acheson testified that after she found the note on the Chevrolet, she contacted the Department of Motor Vehicles and determined that plate number 3XPT674 was a Volkswagen registered to one Stephen Perry of Belmont, a suburban community about fifteen miles south of San Francisco. As soon as backup officers arrived at the accident scene, Acheson and a Belmont police officer drove to Perry’s address, arriving at Perry’s home at 11:08 p.m. The officers arrived in Acheson’s unmarked gray Ford LTD, which they parked at the curb in front of Perry’s house. After they knocked on the front door, a man who proved to be Stephen Perry opened the door. Just as Acheson began to

introduce herself, a second man emerged from a bathroom inside the front door. This man proved to be the defendant, Peter Michelman. Over the defendant's objection, Acheson testified that she immediately noted a strong odor of mouthwash on the defendant's breath. Later, in closing argument, the prosecutor suggested to the jury that the defendant had used mouthwash so that Acheson would not detect alcohol on his breath. The prosecutor said this evidence showed the defendant's consciousness of his guilt.

Acheson testified that the defendant agreed to submit to a blood test and rode with Acheson to a local hospital, where a nurse drew a vial of blood. Twenty minutes later, Acheson delivered the vial to the state forensics laboratory, which operates 24 hours a day. The government called a chemist from the laboratory as an expert witness. The chemist testified that she conducted an analysis of the blood on Monday, June 19. The analysis showed that Michelman's blood had an alcohol content of .24 percent, several times the legal limit. During cross-examination of the chemist, defense counsel elicited testimony that the blood had remained unrefrigerated for 30 hours before it was tested. The chemist admitted that a refrigerator had been conveniently available for storage.

During the defense case, the defendant presented an expert toxicologist who testified that the failure to refrigerate the blood for 30 hours had caused the blood to degrade. The toxicologist said that in these circumstances, no test of the alcohol level in the blood could be reliable. Over the prosecutor's objection, the defendant presented evidence that, during July 2000, the state forensics lab established new procedures for handling blood samples. The new procedures require such samples to be refrigerated within one-half hour of their delivery to the lab.

Both Perry and the defendant testified that the two men had spent the evening of June 16 watching a ballgame at Perry's house. They admitted they shared two six-packs of beer during the game. The defendant testified that he had walked from his home to Perry's home, a distance of a few blocks, at about 8:00 p.m. and had remained there until Det. Acheson came to the door. The defendant said he had left his Chevrolet parked in his own driveway. He explained that because the neighborhood is quite safe, he always leaves his keys in the ignition. He said he had no idea who might have driven his car to the Presidio that night and that the car must have been stolen. The defendant testified that his wife drives a gray Ford LTD very similar to the one driven by Det. Acheson. When he saw Acheson's car pull up in front of Perry's home on June 16, he thought his wife had come to take him home. The defendant said that he gargled with mouthwash because he had promised his wife he would quit drinking, and he did not want her to smell beer on his breath.

THE ISSUES

How should the trial court have ruled on the following objections and claims?
Please assume that all objections were made in a timely way:

1. The defendant's objection that the note found under the windshield wiper of the Chevrolet was inadmissible hearsay and that its admission violated his Sixth Amendment rights.
2. The defendant's objection that the note found under the windshield wiper was insufficiently authenticated.
3. The defendant's objection that Det. Acheson's testimony that there was a strong odor of mouthwash on the defendant's breath was improper opinion evidence.
4. The defendant's objection that Det. Acheson's testimony about the odor of mouthwash on the defendant's breath was unfairly prejudicial to the defendant.
5. The prosecutor's objection that evidence that the forensics lab adopted a new procedure for handling blood samples after the June 16 incident violated Rule 407.

With regard to each of these objections, please state the proponent's strongest arguments for admitting the evidence and the opponent's strongest arguments for opposing admission, and please say how the trial court should have ruled. **It is important that you allocate time and space according to the difficulty and complexity of each issue.** That is, please spend the most time on the hardest issues.