

Texas Board of Law Examiners

[Main Menu](#)

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.

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