



Evidence  
Professor Seaman  
Final Exam – Spring 2003

### Instructions for Part II

**Part II** consists of two questions based on the same general set of hypothetical facts. It takes place in a fictional town in a fictional jurisdiction. Assume that this jurisdiction has adopted the Federal Rules of Evidence, including the Advisory Committee Notes, and that it follows federal precedent on all evidentiary issues.

*You have two hours (120 minutes) to complete Part II. The suggested time for answering Question 1 is 80 minutes. The suggested time for answering Question 2 is 40 minutes.*

**If you are handwriting this exam:** (1) please begin a new Bluebook for your answer to Question 2; (2) skip lines between writing; and (3) write on only one side of the page. Please write legibly!!

**If you are typing this exam:** Please begin your answer to Question 2 on a new page.

In evaluating your answers, I will be looking especially for correct identification of issues, in-depth analysis, and good organization.

GOOD LUCK!!

On the night of January 16, 2002, Anna Victime was murdered in her home. Anna was a Gambrell Beach socialite, and her large waterfront home had apparently been broken into. Jewelry and cash were taken from the house. Her husband, Don, was away on a business trip at the time of the robbery and killing.

An eyewitness, Mr. Neighbor, called 911 at 11:37 p.m. on January 16. An audiotape of the 911 call reveals that he said to the 911 operator, "there are two guys in my yard – oh my G-d! Now they are climbing over the wall between my house and my neighbor's house! Please hurry!" The 911 operator asked Mr. Neighbor if he could describe the two men, and he replied, "One of them is very tall with curly red hair. He's wearing blue jeans. The other guy is shorter and darker. He has on a knit cap. Please hurry. The dog next door is barking like crazy!"

When police arrived approximately seven minutes later, they found Mrs. Victime dead of a single gunshot wound, and the home ransacked. A small white dog was sitting by the body. Later that night, at approximately 2:00 a.m., police pulled over a car for speeding approximately 20 miles from Gambrell Beach. The police officer writing the speeding ticket noticed that the driver and his passenger, brothers named Sammy and Louie Cooper, matched the description of the killers that had come over the police radio frequency earlier that night, and that their clothes were spattered with what appeared to be blood. She arrested them. When their license tag was called in, police records revealed that a parking ticket had been written for that same car earlier in the evening, at 11:25 p.m., for illegally parking at a beach access point approximately one-half mile from the Victimes' home.

Mr. Neighbor was at the police station giving police a statement when the Coopers were brought in. He saw them being led through the police station and said, "that's them. That's the guys who killed Anna." The dog, which had been sitting on Mr. Neighbor's lap, jumped to the floor and ran through the police station straight toward the Cooper brothers. It began growling and jumping at them, and bit Sammy Cooper on the leg. Mr. Neighbor said, "I know that dog. He is the sweetest, most gentle animal in the world. He must know who killed his Mama."

Don Victime appeared to be grief-stricken after the murder of his wife. A prominent businessman, he was interviewed by several television news reporters following the discovery of the crime. A videotape of one of these interviews showed Don, crying and apparently distraught, saying "Anna was my life. We were as happy as two people could be. We trusted each other one hundred percent. How could anyone want to hurt her?"

However, the investigation of the crime soon revealed certain facts that seemed to contradict Don's description of his and Anna's relationship. First, police discovered that Don had been having an affair with his personal trainer for nearly a year. Second, Anna's best friend, Bessie, told investigators that Anna had told her, a few weeks before the murder, that she planned to ask Don for a divorce and was going to "take him to the cleaners." Finally, hospital records revealed that Anna had been treated in the months

before her death for unexplained and mysterious symptoms. A notation in the hospital records, dated October 3, read "patient stated 'I am afraid my husband has poisoned me.' Refer to psych for consult."

Pursuant to a valid warrant, police searched Sammy and Louie's apartment. There, they found a handwritten note which read, "make it look like a break-in. Take some jewelry and mess up the house. Do it on January 16!!! Do NOT do it on any other night!!!"

The police brought the brothers to the police station and interrogated them separately. Sammy Cooper ultimately decided to plead guilty, and agreed to cooperate with the government in return for a recommendation of leniency in sentencing.

The grand jury investigating the murder called Sammy Cooper as a witness. In his grand jury testimony, Sammy stated, "It was all Louie's idea to take the money and kill the lady. He put the add in 'Hit Man' magazine. He took all the money. He arranged it all with Mr. X on the phone. He kept that lady's diamond ring. He shot her and dumped the gun in the ocean." In response to questions as to the identity of "Mr. X," Sammy stated, "it was obvious he was her husband, but I never met him."

The Grand Jury indicted Louie Cooper and Don Victime on charges of murdering Anna Victime. Judge Nola Contenderi scheduled a joint trial.

#### **QUESTION 1:**

You have landed a summer job as an intern in the homicide bureau of the Gambrell Beach State's Attorney's Office. (It even pays a decent stipend!) The Assistant State's Attorney in charge of the case has asked you to help her prepare for the upcoming trial of Don Victime and Louie Cooper. She gives you a summary of the facts and potential evidence as outlined above, and give you the following assignment: "It seems like there are a bunch of issues that might come up in connection with our evidence at trial, especially all of the out-of-court statements. I'd like to know, before we go in, which statements will probably be admissible and which ones probably won't. Assume that, if we can, we'd like to use all of the out-of-court statements at trial. Please write me a memo in which you: list each potentially objectionable statement; present the best arguments available to the government in favor of admissibility; present the best arguments available to either or both defendants in favor of exclusion; and then state what you think the ruling is likely to be. Finally, please let me know if the admission of any of this evidence might raise a potential Constitutional issue, and how you think the judge is likely to rule on it.

If you need more information to answer any part of Question 1, please note the assumptions you've made or state the facts that are needed to answer the question.

**Turn to next page to begin Question 2**

The case came to trial before Judge Contenderi. The Government called Ella Expert, a forensic handwriting examiner, who testified about the note found in the possession of Louie Cooper when he was arrested. Judge Contenderi permitted Ms. Expert to point out to the jury similarities between the handwriting on the note in question and authenticated exemplars of Defendant Don Victime's handwriting. The judge further permitted the expert to testify as to her opinion that the note was written by Mr. Victime. Don Victime's counsel objected to this testimony and requested that the judge hold a Daubert hearing. The judge overruled the objection and declined to hold a hearing, stating, "I find as a matter of law that handwriting analysis is reliable because it is generally accepted in the field of forensic document analysis."

During his rebuttal case, Don Victime called Polly Graph, who had administered a polygraph test to Don Victime following his arrest. The prosecution did not challenge the qualifications of Ms. Graph, but objected to its reliability, arguing that polygraph evidence is not admissible at trial. Judge Contenderi ruled that, "under settled Supreme Court precedent, the polygraph evidence is not admissible." The judge did not hold a Daubert hearing prior to this ruling.

**QUESTION 2:**

You have a field placement in the chambers of the Hon. Ella Minnow Pea, a brand new appointee to the Appellate Court. Judge Pea is on the panel assigned to hear the appeal in the Victime case. Before she was appointed, Judge Pea was a law professor who was very interested in the issues surrounding the admissibility of expert testimony. She has asked you to prepare a bench memorandum for her to use during the oral argument, as follows: "Please tell me the state of the law on the issues surrounding the trial court's exclusion of the expert testimony and scientific evidence, and evaluate Judge Contenderi's rulings in light of the applicable law, and under the applicable standard of review. In addition, please discuss for me what you think the best rule would be, if we were writing on a clean slate."

**END OF EXAM**

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### Question One

Neighbor's call to 911 may come in as an excited utterance, because it was made under the stress of excitement and was nearly contemporaneous with the event he described, although there is usually more leeway for excited utterances in terms of the time-frame. It could probably also be admitted as a present sense impression: its contemporaneity and descriptive quality would support such a finding. The defense may demand that the tape be produced under the Best Evidence Rule and that it be authenticated as an incoming phone call by someone with knowledge of/familiarity with N's voice. This shouldn't be too hard to do, as long as we can establish that the procedures used by 911 were reliable and accurately recorded the incoming call. I imagine that we would have little difficulty finding someone to authenticate N's voice—and this may not even be necessary, if 911 and/or the phone company has a record of the number from where the call was placed. I believe that a judge would allow this in.

The police record of S and L's prior parking ticket (the one at 11:25 p.m.) is probably admissible, but we'll have to argue for it. The defense will likely object that, even if the police report is considered a business record (and it probably is, considering that it is kept in regular course of business, was made near or at the time of the event by someone with a duty to record it, and was made by someone with knowledge of what she was recording), the legislative history of the public records exception (803(8)(B)) and judicial precedent argue against "sneaking in" a police record against criminal defendants this way. However, I think that we have a good argument for trustworthiness here, and one

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that the judge will consider in applying either 803(6) or (8): namely, that the record concerning the parking ticket was made well before the defendants were under suspicion and was purely ministerial in nature. I think we have a good chance of prevailing on this, because the trustworthiness of this record is probative and should come in to establish defendants' proximity to the crime scene.

Neighbor's identification of the Coopers at the police station is admissible at trial, as long as he is available to testify. FRE 801(d)(1)(C). In fact, it isn't even considered hearsay, but is exempted from the rules concerning hearsay.

The dog's behavior and "identification" of the Coopers is probably inadmissible, unless we can somehow establish that this particular dog has "bloodhound-like" training. Of course, his "identification" is not hearsay per se, because it is not a "statement" within FRE's definition of hearsay—it was not "intended" to be an assertion. But I'm not certain that N's statements concerning the dog are sufficient to qualify him in this regard. First of all, the defense could object that N's statement is speculative ("He must know who killed Mama") and is, thus, not based on personal knowledge. FRE 602. His statement *could* come in under a hearsay exception—excited utterance is the best candidate—but I think that a judge would exclude it as not really probative and probably unfairly prejudicial. FRE 403. [I'm not sure that a dog can have "character" such that evidence of his habit/habitual behavior could come in under FRE 406, but it might be worth a shot. Then N would be open to have his credibility/basis for knowledge impeached if his statement is admitted.]

As for DV's videotaped effusions, they could probably be admitted as excited utterances. We would need to know exactly how much time had elapsed—anything over thirty minutes or so is probably too long—since her death, but one could reasonably argue that he is still under the stress of the traumatic event. [Present sense impression is out, because the statements are not contemporaneous or nearly contemporaneous. Also, present state of mind appears to be a poor candidate, because he uses the past tense and present state of mind cannot be used to support a fact remembered or believed.] Of course, we may not have to find an exception at all, since his statements could come in as admissions of a party opponent as long as we introduce them against him at trial. FRE 801(d)(2)(A). Incidentally, the defense could try to introduce them for the non-hearsay purpose of showing his state of mind—not for the truth of what they assert. Either way, whoever introduces the statements may run up against the Best Evidence Rule, in which case the original (or a duplicate copy) of the videotape will have to be produced at trial if its contents are sought to be proved. FRE 1002, 1003. But the BER need not apply if the news reporters are available to testify to their own independent knowledge/recollection of what DV said at the time. The bottom line is that we could introduce DV's statements as admissions of a party opponent if we choose, thus opening him up to impeaching evidence of his affair and the like. If we do this, there is not a whole lot that defense can do to keep it out.

A general note: anything that the police discover in their investigation and write up into reports—while technically admissible under 803(6)—will probably be excluded under

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803(8)(B). They may come in if properly authenticated AND the cop who made the record testifies to what they contain. If he has for some reason forgotten, they may be used to refresh his memory without being introduced into evidence, or if he still can't remember, they may be admitted under past recollection recorded if the requirements of "freshness," accuracy, and personal knowledge are met—which they presumably would be. The bottom line: to adequately protect the rights of the criminal defendants, any cop involved should be available to testify.

AV's statement to B could probably come in as evidence of AV's present state of mind. FRE 803(3). Note that the *Hillmon* doctrine teaches that her statements of future intent are admissible to show that she probably followed through—although here, this was not the case, her life having been tragically cut short. The defense might try to argue some kind of marital privilege here, but there is no indication that anything in AV's statement was a confidential communication between her and DV. Probably the defense's best shot would be to argue that unfair prejudice to DV outweighs any probative value. FRE 403. However, we could argue that the statement is probative—not because the victim's state of mind is at issue, but because it provides evidence of DV's possible motive for killing her. The statement is highly probative and certainly prejudicial to DV, but probably not unfairly so. FRE 403. A judge would probably admit it, but might only admit it subject to connecting up—establishing somehow that DV knew of AV's intent. If this isn't shown, I can't really see how the statement is relevant, and the judge would probably order it stricken from the record.



The hospital records are probably of dubious probative value and might be excluded by the judge under 403. But I'm getting ahead of myself here. If they *are* admitted, they present a potential problem of multiple hearsay. First of all, AV's statement might come in as a statement given for the purposes of medical treatment. FRE 803(4). The part of her statement implicating her husband, however, causes problems reminiscent of the *Shepard* case. Certainly, as that case teaches, the statement couldn't come in under the present state of mind exception, but I doubt the part specifically identifying her husband could come in under 803(4) either. It is simply irrelevant to her treatment or any possible diagnosis. It is likely that the hospital record could come in as a business record—if properly authenticated—but the statement about referring AV to “psych” for consultation might be excluded as unfairly prejudicial. The defense will probably be successful in getting the whole package excluded under 403—its relatively slight probative value (“unexplained and mysterious” symptoms?!) is significantly outweighed by its prejudicial effect (on both parties). However, the judge might let it in, and let the jury sort out matters of weight and credibility.

The note found in S and L's apartment is probably not hearsay at all. It could be admitted as the statement of a co-conspirator under FRE 801(d)(2)(E), provided that it could be established that the statement was made during the course of the conspiracy (its contents strongly suggest that it was) and in furtherance of it (ditto—although many courts give this only slight weight in their analysis) and provided that there is a least some corroborating evidence (quite a bit here) besides the statement itself that the conspiracy existed. And if it can be established that L wrote it, it could come in as a

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plain old admission of a party opponent under FRE 801(d)(2)(A). The defense would probably raise a fuss over authentication and the application of the BER. Under the BER, because the contents of the note are so crucial, we'll have to be sure to produce the original (or a duplicate copy) at trial, and we'll need to properly authenticate the handwriting. This can be done by a lay witness, provided that she has the requisite familiarity with the handwriting (not gained merely for purposes of the trial) or by an expert (or the jury) comparing the note with a properly authenticated exemplar of the purported writer's handwriting. Provided that we can do this, the judge should admit the note—especially given its highly probative contents (specifying the date the murder occurred, attempt to make it look like a robbery, and the like).

Once S begins cooperating with the police against L, constitutional issues become more of a concern in the case. For example, it would be very difficult—although not impossible, perhaps under the residual exception—to get S's grand jury testimony before the jury at trial if S refuses to testify. L's (and possibly DV's) Confrontation Clause rights—the right to confront witnesses called against them in a criminal trial—would be directly implicated. If S takes the Fifth or is otherwise unavailable, we *might* be able to get his testimony in under the former testimony exception. FRE 804(b)(1). However, we would have to show, at a minimum, that S is *truly* unavailable. *White*. The defense, though, will strenuously object that neither L nor DV had an opportunity—not even getting a chance to have a “similar motive”—to cross-examine S before the grand jury. Thus, it is very likely that a judge will exclude any such testimony if S is unavailable to testify (unless, in a non-near-miss jurisdiction, he could be persuaded to admit it under

## Question Two

While, under *Joiner*, it is within the trial judge's discretion either to require or dispense with a *Daubert* hearing, the reason she gave does not accurately reflect the state of the law post-*Daubert*. Under FRE 702, as amended post-*Daubert* in 2000, a judge is to determine the reliability of scientific (or other technical or specialized) knowledge serving as the basis for an expert's opinion using three factors: (1) is the testimony based upon sufficient facts or data? (2) is the testimony the product of reliable principles and methods? (3) has the witness applied the principles and methods reliably to the facts of the case? As *Daubert* teaches, these prongs may themselves be examined by considering a number of different factors: (1) whether and to what extent the method in question has been reliably tested; (2) the error rates revealed by such tests; (3) whether or not the methods have been subject to publication and peer review; (4) whether or not the methods are generally accepted within the relevant field; and (5) whether there are professional standards controlling the application of the method. Another key factor often considered is whether the technique or method has been developed specifically for the litigation at issue (i.e., whether the expert would feel confident about presenting it before his peers independent of the instant litigation).

Here, the judge should have expanded the basis for her ruling by applying more than the merely the "generally accepted in the field" factor to her analysis. It is true that before *Daubert*—and still in many state courts like California and Louisiana—this test, known affectionately as the *Frye* test, provides the only basis a judge needs in determining

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the residual exception—a long shot). It is *possible* to argue that, if S is unavailable, his statements before the grand jury should come in as statements against his (penal) interest under FRE 804(b)(3). However, because this exception is not “firmly rooted,” the court will look to “particularized guarantees of trustworthiness” and probably not find too many here—even if we could successfully argue that his statement were against interest (hard to do), they are so self-serving (he’s been promised a lighter sentence in exchange for his cooperation) that anything serving to inculcate other parties will be disregarded. *Williamson*. Thus, a judge would probably not buy this reasoning either. Bottom line: if we want to admit S’s grand jury testimony, we should make him available to testify at trial.

A note on S’s statements about “Mr. X”: any attempt to admit this would probably fail on the grounds that is speculative and that S lacked personal knowledge: since he had never met DV, it is hard to see how it would be “obvious” to him that Mr. X was actually DV. The statement is hardly probative at all and is unfairly prejudicial to DV, and a judge would likely exclude it under 403 (if not under 602), leaving aside the probable Confrontation Clause difficulties mentioned *supra*.

whether to admit scientific evidence. After *Daubert*, however, this factor is only one among several others—see *supra*—that the judge (as “gatekeeper”) is to consider before making her ruling. [Also, under *Kumho Tire*, even non-scientific (i.e., technical) evidence is subject to a *Daubert* analysis, so even if one were to argue that handwriting analysis is not “scientific,” it wouldn’t make any difference—*Daubert* would still need to be applied.] So, even if handwriting analysis is “generally accepted” in the relevant field—that of forensic document analysis—that, without more, is not dispositive of the issue. Instead, the judge should have inquired further into the standards and methods used in the field itself: how accurate are they? have they been tested? have they been subject to peer review? Even if the judge, in her discretion, determined that *Daubert* did not apply and that the expert’s testimony would be *helpful* to the jury—they wouldn’t have to go through the arduous process of comparing the handwriting samples—she probably should have given an instruction to the jury *not* to consider the expert’s testimony to be based on *scientific* evidence, as the judge in *U.S. v. Starzecpyzel* did. She could also have excluded any testimony that suggested levels of “certainty” by application of “standards,” lest the jury give this “expert” testimony too much weight. Finally, she could have done her best to encourage wide-ranging and probing cross-examination of this expert and her “scientific” evidence.

Thus, although any decision not to hold a *Daubert* hearing will be reviewed under an abuse of discretion standard, there is a strong argument that the judge misapplied *Daubert* here and, thus, committed an abuse of discretion by failing to consider other factors

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bearing on reliability and by failing to provide safeguards to keep the jury from seeing the evidence as “scientific.”

It is true that, for years, many courts have held that polygraph evidence should be per se inadmissible as unreliable. In fact, *Frye* itself was based upon a precursor of the modern polygraph. However, I think that Judge Contenderi goes a bit too far when she says that “under settled Supreme Court precedent” polygraph evidence is inadmissible. In fact, this per se inadmissibility appears to be changing ever so slowly after *Daubert*. For example, the 11th Circuit, in *U.S. v. Piccinonna* allowed use of polygraph evidence provided that (1) the opposing party was given adequate notice; (2) the opposing party would be allowed to perform their own polygraph test; and (3) FRE 608 applies [although this is open to objection: 608 only deals with *character* for truthfulness, and polygraph evidence really doesn’t have anything to do with *character*]. I think that, in the interests of moving the doctrine in this area forward, the judge in this case should have taken the time to go through the *Daubert* factors with regard to polygraph evidence, rather than just rejecting such evidence out of hand. For example, evidence could have been admitted concerning the reliability of polygraph evidence—test results, error rates, and the like. If it was determined that the polygraph was still too unreliable, or didn’t otherwise meet the requirements of *Daubert*, any such evidence could have still been excluded. Of course, judges are worried that juries will overweight polygraph evidence—despite studies showing the opposite—or that the polygraph evidence will usurp the jury’s proper function (a version of the old “ultimate issue” rule). However, both of these problems could be alleviated with appropriate instructions from the judge. In the end, however,

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I'm not sure that given the fact that a majority of courts still exclude polygraph evidence per se, that the judge abused her discretion by refusing to take the (probably considerable) time and expend the (probably considerable) judicial resources to conduct a *Daubert* hearing on this matter. Her view of current Supreme Court jurisprudence on this issue is incorrect—or at best overstated—but that in and of itself is not enough to overturn her ruling.

As a “political” matter, handwriting analysis is almost always introduced by prosecutors and is almost always admitted, while polygraph evidence is almost always introduced by defendants and is almost always excluded. If we were writing on a *tabula rasa*, I would argue that the judge should apply the *Daubert* factors and FRE 702 in determining whether to admit expert evidence, but should concentrate particularly on how *helpful* the evidence would be to the jury's understanding of complex issues. I would favor a rule favoring admissibility if helpful to the trier of fact, but subject to wide-ranging cross-examination by the opposing party, rather than a too-quick across-the-board exclusion of evidence that may not have yet gained the kind of acceptance in the relevant field it may one day achieve (e.g., DNA evidence).

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