Editing for Clarity and Conciseness Exercise
Autumn School of Global Legal Skills and Legal Writing 2020
Professor Kimberly Holst

Based on the information gathered from the interview with Cody Young, it is unlikely that he will be considered guilty of arson in the second degree by a reasonable court of law. Although the fire did result in damage to his neighbor's house, the action does not satisfy the requirement that it be committed "willfully and maliciously," which is a necessary component of the rule as established by the original statute and subsequent case law.

In regard to the requirement that the action be "willfully" done, Cody does not satisfy this requirement based on the precedent set by the case of *Grable v. Varela*. In *Grable v. Varela*, the defendant set the fire with the intention of clearing a patch of grass, and it was only due to extraneous forces that the fire spread and caused property damage. This is similar to the circumstances in this case against Cody since he only started the fire to dispose of some trash in his backyard, with no intent to cause property damage and with no awareness that the fire would spread significantly outside of the pile. Based on this evidence, it does not seem that the act satisfies the conditions necessary for it to be willful.

The requirement that the action be done "maliciously" is also not fulfilled based on a combination of factors. Although Cody was aware of the close proximity of the fire to the neighbor's house, the fire was not started with the intent to cause damage to the property. Cody believed the fire would burn itself out, and he reaffirmed in the interview that he didn't mean to have it spread beyond the pile. Based on previous precedent, it is clear that the fire needs to be started with the intent that the fire will cause damage. While Cody may have shown a lack of precaution by starting the fire and leaving it unattended, his lack of premeditated intent does not make the act "malicious" in nature.

Based on the evidence presented in the interview, it is clear that the fire started by Cody Young does not fulfill two key components needed to make him guilty of arson in the second degree. Cody did not display the foresight needed to make the act willful or the intent to cause damage needed to make the act malicious, thus he cannot satisfy the requirements of the charge in question.

Memo Self-Editing Checklist

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I. Formatting & Instructions

- Did you follow all of the formatting guidelines: word or page limit, name in caption and electronic filename, include page numbers, etc.?
- Did you include a proper caption (Memorandum, to, from, re, date)?
- Do you have headings for each section of the memo?
- Did you avoid orphaned or widowed headers?

II. Questions Presented

- Do you have a question for each issue or sub-issue discussed in the memo?
- Did you follow the under/does/when or similar structure?
- Do you include key facts and avoid legal conclusions in the question?

III. Brief Answers

- Do you have an answer for each question presented?
- Does the organization parallel the organization of the questions presented?
- Do you answer the question (probably yes/no)?
- Do you state the overarching rule?
- Do you describe how the answer will be resolved in our scenario (in this case…)?

IV. Facts

- Do you have all the legally relevant and necessary background facts?
- If you look at the facts used in the A1/A2 sections below, are all of the facts mentioned there included in this facts section?
- Have you presented the facts in a narrative fashion with a logical organization?
- Do you have enough facts for the reader to understand the context in which this legal issue takes place?
- Are the facts presented in an objective fashion?
- Are all legally relevant facts (even those that are unfavorable to your client) included?

V. Discussion Section

- Roadmap(s)—do you have an overarching roadmap for the entire discussion section? Do you have mini-roadmaps for any subdivided issues?
- Do your roadmaps guide the reader through the organization of your analysis and include the overarching rules for each major issue?
- CRAC your memo, i.e. in the left hand margin, mark each section of your draft with the appropriate letter (C, R1, R2, A1, A2, C).
- Did you follow the proper structure?
- Are any sections missing or out of order?
- Is there any information in a section that does not belong, i.e. do you discuss the facts of your case in a rule section?
- Do you have a point heading for each issue and sub-issue (if applicable)?
- Do your opening conclusions state your prediction with a “because” type statement for support?
- Does the R1 state the fully synthesized rule—including any relevant statutory and case law?

- Does your R1 come from all binding authorities?
- Do your R2s illustrate the rule as it was articulated in the R1? Does the organization of the R2 section parallel the presentation of the rule in R1?
- Does each rule illustration contain the relevant facts, reasoning, and holding from the precedent case or cases?
- Is the illustration solely focused on the legally relevant information for the particular rule (or portion of the rule) from R1?
- Did you start your R2 paragraph with a rule-based (rather than a case-based) thesis sentence?
- Does the rule illustrations contain phrases, words, or ideas similar to the phrases, words, or ideas in the rule statement?
- Did you provide enough information for the reader who has not read the case to independently evaluate your illustration?
- Did you improperly address the facts of your case before completing the rule section?
- Did you anchor your R2 section using mandatory (binding) authority?
- Did you use persuasive authority only to supplement the mandatory authority?
- Does your A1 section focus on your client's strongest arguments? Does your A2 section focus on the opposing party's strongest arguments?
- Do you use specific and direct analogical and counter-analogical arguments to connect your case to the precedent cases from R2?
- Did you improperly use facts from a precedent that were not articulated in the R2 section?
- Did you analogize or counter-analogize to specific facts within a case rather than to the entire case?
- Did you eliminate party names from the precedent cases and instead use labels or descriptors that would be more helpful to the reader?
- Did you explain the relevance of any analogical statements?
- Did you start your A1/A2 paragraphs with rule-based thesis sentences?
- Does the organization of your A1/A2 section parallel the presentation of the rule in R1 and the illustrations in R2?
- Have you focused on specific facts from your case instead of improperly relying on legal conclusions?
- Did you use the same language in your A1/A2 that you used in your R1 and R2 sections?
- Did you set forth the necessary facts from the precedent case?
- Did you improperly force the reader to go back to the R2 section to understand your case comparison?
- Did you state the necessary facts from your case that are analogous or distinguishable?
- Is the analogy or distinction improperly based upon a holding or legal conclusion instead of facts?
- Did you conclude each CRAC paradigm with a conclusion that restates your prediction and includes the key reasoning that supports your conclusion?
- Did you avoid mentioning cases in the conclusion to each CRAC paradigm?

VI. Conclusion

- Does your conclusion to the entire memo include your prediction and next steps or advice to your supervising attorney?

VII. Writing, Grammar, and Citation

- Highlight every thesis sentence.
- Do your thesis sentences form a complete and accurate outline of your analysis?
- Does each thesis sentence focus on the main point of the paragraph (which should be focused on the R1 or a portion of the R1)?
- Does each thesis sentence improperly focus on a case instead of a rule?
- Do all of the sentences that follow the thesis sentence relate to that main point?
- Do the thesis sentences guide your reader through your analysis?
- Read your draft for sentence structure and grammar.
- Is your memo written in the active voice?
- Do you avoid the use of multiple words when a single word will do? For example, do you state "in lieu of" or "instead"?
- Does your writing include announcements that can be eliminated? For example, do you tell the reader that you are going to discuss a particular case when you could simply begin the actual discussion?
- Highlight transition words between sentences and between paragraphs.
- Do you overuse transition words? Are they the proper words to indicate the transition?
- Try to eliminate unnecessary repetition by asking yourself whether there are multiple sentences that address the identical information.
- Have you identified prepositional phrases that could be eliminated or condensed?
- Do you have strong subject-verb units?
- Do you have any unnecessary or empty modifiers (clearly, obviously)?
- Have you avoided overusing quotations?
- Have you used short sentences?
- Have you avoided long and difficult to read paragraphs?
- Have you properly used singular pronouns to replace singular nouns (i.e. did you avoid using a plural pronoun like they or them to replace a singular noun)?
- Does the memo contain all of the necessary information so that the reader can independently analyze the issue?
- Have you properly cited to the statutes and cases using the Bluebook?
- Have you cited with sufficient frequency? (After every or almost every sentence in the R1/R2 sections, but not in the A1/A2 sections.)
- Have you used the correct citation format for the statute (electronic database v. printed publication)?
- Have you used the correct long form (full) citation format for each case?
- Have you used the correct short form citation format for each case (short cite with or without case name or *id.*)?
- Have you included the proper pinpoint pages?
- If you quoted language from the statute or cases, did you follow the proper Bluebook rules?

Caption

MEMORANDUM

TO: Supervising Attorney
FROM:
RE: Botwin File (10-5114); marijuana possession and conspiracy
DATE: October 25, 2010

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sub-issue

Questions Presented: ← plural

1a. Under Arizona marijuana possession law, does constructive possession occur when two pounds of marijuana are found in the lining of the backseat of a person's car while she is driving with a passenger, and when the car was recently loaned to a known drug dealer?

sub-issue

1b. Under Arizona marijuana possession law does knowing possession occur when two pounds of marijuana are found obscured from view in the lining of the backseat of a person's car while she was driving and where the car was recently loaned to a known drug dealer?

Issue

2. Under Arizona law does conspiracy to sell marijuana occur when two pounds of marijuana are found in the lining of the backseat of a car where the defendant is a passenger and non-owner and a defendant's bong is found in the back seat of the car?

Brief answers parallel questions presented

Brief Answers: ← plural

Answer Rule

1a. Probably yes. Constructive possession occurs when circumstantial or direct evidence leads to a reasonable conclusion that a person had dominion and control over the substance. In this case, the marijuana was found in a car in which the defendant was the driver and registered owner.

Answer Rule

1b. Probably no. Knowing possession occurs when evidence can establish that actual knowledge of the marijuana exists, and mere presence is insufficient to establish this knowledge. In this case, the marijuana was found hidden beneath the lining of the back seat of her car, which she had recently loaned to a known drug dealer.

Answer Rule

2. Probably no. Conspiracy occurs when a person makes an agreement to help commit a crime and any party to the conspiracy performs an overt action in furtherance of a crime. In this case, the defendant's mere presence and ownership of a bong found at the time of arrest are likely to be found insufficient to establish an agreement.

Facts:

Nancy Botwin was driving from Argestic, CA to Tucson, AZ in her blue Toyota Prius with her son Silas, when she was stopped in Phoenix. As the car was being stopped, Silas shot several nervous glances over his shoulder and in the mirror towards the back seat. The officer

↑ number pages

legally relevant & necessary background facts for BOTH issues

instructed Nancy and Silas to exit the vehicle, and conducted a search of the car. During the search, Nancy told Silas, who was still fidgeting, "Just relax and keep your cool" and "Remember what we talked about earlier." The two were arrested after the arresting officer found a two pound block of Marijuana concealed and tightly sealed within the lining of the back seat. The search also produced a bong, which Silas claimed was his and was the reason for his nervousness. Both Nancy and Silas denied knowledge of the Marijuana. Further, Nancy claimed that she had lent the car to her friend and known drug dealer, Guillermo, the day before they left. Guillermo was seen driving a blue Prius around the time Nancy claimed to have loaned the car.

Roadmap / umbrella / thesis

Discussion:

A two pound brick of marijuana was found in the interior lining of the back seat Nancy Botwin's car when she was driving with her son, Silas, in the passenger seat. The court will examine whether Nancy is guilty of knowingly possessing marijuana for sale, and whether Silas is guilty of conspiracy to sell marijuana. Due to the volume of marijuana, it is undisputed that if the elements of possession are satisfied, then the intent to sell is also satisfied.

Roadmap

undisputed issue

I. **Possession:** - 1st issue (sub-issues)

mini-roadmap

Under Arizona law, it is illegal to possess marijuana for use or sale. Ariz. Rev. Stat. Ann. §13-304 (West 2010). To determine that illegal possession has occurred, the prosecution must establish physical possession or constructive possession with actual knowledge of the presence of marijuana. *State v. Jenson*, 562 P.2d 372, 373 (Ariz. 1977).

governing rule

Roadmap

a. Constructive Possession: 1st sub-issue

C It is likely that the court will find that the requirements of constructive possession were satisfied because Nancy owned the car where the drug was found.

Full statement of the rule for 1st sub-issue

R1 In cases where physical possession is not present, the court may establish constructive possession so long as a defendant maintained some "dominion and control" over the substance. *State v. Caroll,* 526 P.2d 1238, 1240 (Ariz. 1974) (citation omitted). Dominion and control are present when the drug is found on a person or an object owned by the person and that person has the right to command an object's orientation. See *Id.* It is not necessary that possession be exclusive, immediate, and personal to establish constructive possession. *Id.* Both circumstantial and direct evidence may be used such that a reasonable inference arises that the accused had dominion over the substance, though the defendant's presence is insufficient by itself to establish dominion and control. S*tate v. Murpy*, 570 P.2d 1070, 1074 (Ariz. 1977).

Rule-based thesis sentence

R2 Marijuana found in an object under the dominion and control of a defendant may satisfy constructive possession. *Jenson,* 562 P.2d 372, 373. In *Jenson*, a baggie of marijuana seeds was found under chest of drawers located in the hallway of the defendant's mother's apartment. *Id.* The defendant admitted to owning the chest of drawers, and two marijuana cultivation manuals found within. *Id.* The court reasoned that the chest was under his dominion, though not exclusively, and the finding of marijuana seeds and manuals were enough to infer constructive possession. *Id.* at 374.

holding

facts

reasoning

R2 On the other hand, when found in another person's property, knowledge of marijuana and presence at the time of arrest are not enough to establish constructive possession. *State v. Curtis*, 562 P.2d 407, 409-410 (Ariz. App., 1977). In *Curtis,* the officers found the defendant sitting with three others in a room that had a strong odor of burning marijuana. *Id.* Further, she was about two feet from bag containing marijuana that was in plain sight. *Id.* Still, the courts reasoned that because it was not her house, and she was in the room with the house's owner, sufficient dominion and control over the substance had not been shown to establish constructive

possession. *Id* at 410. Likewise, in *Miramon,* the defendant was found seated in the passenger seat of a car, which was being driven by its owner. *State v. Miramon,* 555 P.2d 1139, 1140 (Ariz. 1976). An officer stopped the car, and found a paper sack containing "baggies" of marijuana beneath the defendant's feet, and two marijuana cigarettes in the defendant's sock. *Id.* at 1140-1141. Despite the fact that the defendant "obviously knew that the marijuana was there," the court reasoned that constructive possession of the "baggies" had not been established, because it was not shown that the defendant had the right of dominion or control of its orientation. *Id.*

A1 ✓ The State will argue that constructive possession occurred because Nancy owned the vehicle where the marijuana was found. Unlike in *Miramon* and *Curtis,* where the defendants were not the record owners of the house and car respectively, Nancy owned the car where the drugs were found. Further, as the driver, she was in control at the time of arrest. Here, as in *Jenson,* the marijuana was found hidden away in an object owned by the defendant. In that case, the drawers were found in his mother's hallway, yet court ruled that the defendant shared dominion over them. ✓ As that court clarified, joint dominion and control is sufficient to establish constructive possession. In the present case, Nancy's constructive possession is not defeated even if the court is to attribute joint dominion and control to Guillermo or Silas. ✓

A2 ✓ Nancy will argue that she relinquished dominion and control of her car temporarily when she loaned the car to Guillermo. In *Jenson,* the court ruled that the defendant maintained dominion over the drawers located in his mother's hallway. Unlike the present case, Nancy had no control, access, or even knowledge of the location of the vehicle at the crucial time when she will allege the marijuana was installed. Like in *Miramon* and *Curtis*, she was situated near the marijuana at the time when it was found, but as those cases illustrate, her presence fails to establish constructive possession. Further, in the present case, the marijuana is located out of

sight and reach. Nancy has no actual control over its orientation within the car, a fact that the court considered important in deciding that no possession occurred in *Curtis*.

C ✓ The court will likely find that constructive possession occurred. The fact that marijuana was found in a car that was registered to Nancy while she was driving will likely be enough to establish the requisite dominion and control necessary to establish constructive possession.

focused on reasoning

b. <u>Knowingly Possessed</u>: – sub issue 2 –

C ✓ The court will likely find that Nancy did not knowingly possess marijuana because evidence fails to establish her actual knowledge of the drug's presence.

R1 ✓ In order to convict on a charge of possession of marijuana, the prosecution must show that a defendant had knowledge of the drug's location. *Murphy*, 570 P.2d 1070, 1074. The defendant's presence when the drug is found is insufficient to establish actual knowledge. *Id.* Both circumstantial and direct evidence may be used to establish knowledge, so long as a reasonable inference arises that the accused had actual knowledge substance. *Id.*

R2 ✓ If marijuana is found in a place where the defendant resides in an "unsecluded or obvious" place, then knowing possession is satisfied. *Id.* In *Murphy,* marijuana was found in plain view in the kitchen. *Id.* The court held that because marijuana was found in an obvious location within the defendant's home, it was a reasonable assumption that he would have actual knowledge of its presence. *Id.*at 1075.

R2 When marijuana is found in a place where several people are in use of a common space, compelling direct or circumstantial evidence is necessary to establish knowledge. *State v. Allen*, 512 P.2d 1228, 1229 (Ariz. 1973). In *Allen*, a search of a house where the defendant had previously lived produced narcotics in nearly every room in the house. *Id.* The prosecution produced several pieces of evidence suggesting that the defendant still lived there (e.g.

defendant's dog, prescriptions, and letter addressed to the defendant). *Id.* Despite this, the court reasoned that not enough evidence was given to show that he knowingly possessed narcotics because numerous other people were present at the time of arrest and were living there. *Id.*

A, The state will argue that because marijuana was found inside Nancy's car while she was present, she knowingly possessed marijuana. In *Murphy,* knowing possession was shown when marijuana was found in the defendant's kitchen. Like the defendant in *Murphy*, Nancy knew or should have known what was inside of her property. Further, unlike in *Allen*, where the residency of the defendant was in dispute, Nancy maintained sole ownership of the property. Additionally, briefly lending the car to a known drug dealer is distinguishable from sharing a permanent residence with multiple parties, as was the case in *Allen.* Lastly, Nancy's statement to Silas to "keep your cool" and "remember what we talked about," is an additional factor that further suggests that she had actual knowledge of the marijuana in her backseat.

A2 Nancy will argue that because she had recently loaned her car to Guillermo, and because the marijuana was found in an unobvious place, that she did not knowingly possess marijuana. Like in *Allen,* other people were in use of the car around the time that the marijuana was found. In *Allen,* even when evidence was presented demonstrating the defendant's continued connection with the residence, and marijuana was found in obvious locations, it was not established that the defendant had actual knowledge of the narcotics. Unlike in *Murphy,* the marijuana was found inside Nancy's car, *not* in her home. Further, the marijuana was found inside of the lining of the seat, obscured from where a reasonable person might not have knowledge of its presence.

C The court will probably find that Nancy did not knowingly possess marijuana. Because she loaned the car to Guillermo, and because the marijuana was found in a secluded and unobvious location, Nancy's actual knowledge was not established.

Issue #2

2. Conspiracy:

C ✓ The court will probably find that Silas is not guilty of conspiracy to sell marijuana because the evidence is insufficient to establish his agreement sell marijuana.

R, ✓ Under Arizona law, it is illegal for a person to aid another in the commission of a criminal offense. Ariz. Rev. Stat. Ann. § 13-1003 (West 2010). The elements of conspiracy are intent to promote or aid the commission of an offense, an agreement with one or more persons that one of them or another person will engage in conduct constituting the offense, and an overt act committed in furtherance of the offense. *State v. Saez*, P.2d 1119, 1123 (Ariz. App. 1992).

The first elements of conspiracy are intent and agreement. *Id.* Because an agreement is necessarily predicated upon intent, demonstration of an agreement between conspirators is sufficient to show intent. See *id.* An agreement need not be definite, and can be inferred from the overt actions of the conspirators. *State v. Stanley*, 597 P.2d 998, 1007 (Ariz. App. 1979). However, a defendant's knowledge and approval of the object of a conspiracy is insufficient to infer the existence of an agreement. *State v. Rodriguez,* P.2d 867, 869 (Ariz. App. 1991).

Finally, in order to support a charge of conspiracy, an overt act in furtherance of the conspiracy must be proven. *State v. Verive,* 627 P.2d 721, 732 (Ariz. App. 1981). However, the primary focus of the crime is the agreement itself, and any action sufficient to corroborate the existence of the illicit agreement and show that it is being put into effect is sufficient to satisfy the overt act element. *Id.* The overt act need not amount to an attempt to commit a crime, but can be satisfied by showing mere preliminary arrangements. *Id.* Conviction for conspiracy is not precluded if the attempted offense remains inchoate or is never completed. *Saez*, P.2d 1119, 1123. Where there are multiple conspirators, an overt act by any conspirator will satisfy the element for all coconspirators. *State v. Green*, P.2d 755, 757 (Ariz. 1977)

The elements of intent and agreement can be inferred from the overt actions of parties and requires no formal or definite agreement. *Stanley*, 597 P.2d 998. In *Stanley,* prosecution alleged that the defendant conspired to rob a potential buyer of counterfeit cocaine. *Id.* The defendant acquired a sample of cocaine, accompanied his coconspirator to acquire a shotgun, subsequently sawed the barrel off of the shotgun, and accompanied him to the site of the sale. *Id.* The court reasoned that the overt actions permitted a reasonable inference of an agreement to commit armed robbery, and that no formal or definite agreement was required. *Id.*

However, mere knowledge or approval of the object of a conspiracy, absent an agreement to cooperate in the execution of the crime does not make one party to conspiracy. *Rodriguez,* P.2d 867, 869. In *Rodriguez,* a defendant pled guilty at trial to conspiracy to manufacture dangerous drugs, and contended that a factual basis for conspiracy had not been established. *Id.* at 868. That court did not permit the inference of an agreement when the defendant was found having a strong odor associated with the production of PCP along with three others in a building that contained PCP and large quantities of drugs associated with the preparation of PCP. *Id.* The court reasoned that the mere presence of a person at the scene of the crime, even with the knowledge that a crime was taking place, is insufficient to show that a conspiracy exists absent an agreement to cooperate in the execution of the crime. *Id.*

To satisfy the overt act requirement, courts have found that an overt act only needs to show that some step has been taken toward advancing an illicit agreement. See *Saez,* P.2d 1119, 1123. In *Saez*, the defendant told a coconspirator that he "probably could obtain cocaine to sell" to the narcotics informant. *Id.* The defendant "made some phone calls to Los Angeles," and told the informant that he could obtain cocaine for him if he came along for the pickup in Los Angeles. *Id.* The court held that the phone calls and other preparatory actions were enough to

satisfy the overt action element, and further reasoned conviction of conspiracy is not precluded when the substantive crime is never completed or if it remains inchoate. *Id.*

A single overt act by one conspirator satisfies the overt act element for all coconspirators. *Green*, P.2d 755, 757. In *Green,* five defendants were charged with conspiracy to transport marijuana. *Id.* In that case, one defendant drove a vehicle, while two others unloaded boxes believed to contain bricks of marijuana from the vehicle, while still another defendant observed. *Id.* The court affirmed their convictions, reasoning that once an agreement between the defendants had been shown, the jury only needed to find a single overt act from any conspirator to support the conviction of all five defendants. *Id.*

4 The state will argue that an agreement to sell marijuana between Silas and Nancy exists and is a reasonable inference from their overt actions. The court clarified in *Stanley,* the element of agreement may be satisfied by a reasonable inference arising from the conspirators' actions. Like in the defendant in *Stanley,* Silas accompanied Nancy during parts preparatory portions of the substantive crime. Further, Nancy's made statements of "Relax and Keep your cool," and "Remember what we talked about earlier," which imply that they had previously agreed to sell marijuana, and discussed a contingency plan in case they were stopped by the police. This distinguishes this case from *Rodriguez,* where defendant was present with drugs, but no evidence was offered linking defendant to an agreement.

The state will contend that the packaging, installing, and transporting the two pound brick of marijuana into the back seat of the car independently satisfy the overt action element. As demonstrated in *Saez,* the overt act only needs to naturally advance the illicit agreement. To be found in the lining of Nancy's back seat, it is a reasonable assumption that conspirators must have packed, installed, and transported the two pounds of the marijuana. Any of these actions

would advance the illicit agreement, and would satisfy as overt acts. Further, *Green* illustrates that it is irrelevant which conspirator commits the overt acts. Whether it was Guillermo, Nancy, or Silas that packed and installed the marijuana, the overt act element is satisfied.

A2 ✓ Silas will argue that there is no evidence showing his agreement to sell marijuana. The court in *Stanley* held that an agreement can be inferred from defendant's overt actions. Unlike in *Stanley*, where a defendant supplied coconspirator cocaine and sawed the barrel off his shotgun, Silas has done nothing to further the alleged crime. As in *Rodriguez,* Silas was merely found at the scene. Further, there is no evidence that Silas knew of the two pound block of marijuana. Silas's admission that he was nervous about his bong found that was found in the back seat is consistent with his fidgeting as well as Nancy's statements during the search. Further, his presence in the car is easily explainable given that he is the driver's son. Even if Silas did know about the offense, the *Rodriguez* and *Saez* court held that knowledge is not enough to support a conviction for conspiracy without an agreement to aid. Silas will further contend that because there was no agreement on his part, any other party's overt acts are immaterial. The court in *Green* established that a single overt act from any conspirator would support conviction of conspiracy *only* once an agreement has been established.

C ✓ The court will probably find that Silas is not guilty of conspiracy to sell marijuana, because the evidence fails to establish that an agreement occurred. His presence during the arrest, nervous behavior, and Nancy's incriminating statements are likely insufficient to establish a reasonable inference.

Conclusion:

It is likely that a court will find Nancy and Silas not guilty of possession of marijuana for sale and conspiracy to sell marijuana respectively. As a next step, I suggest that we perform additional research into the nature of the relationship between the Botwins and Guillermo.

↑ next steps / practical advice for senior partner

Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE MORROW, Defendant.	Case No. CR 11-1532 **BRIEF SUPPORTING MOTIONS TO SUPPRESS EVIDENCE**

Parties

caption

Title of Doc

Introduction

theme

Mr. Clay Morrow's Constitutional rights were violated when FBI agents conducted a warrantless search within the curtilage of his home. Accordingly, the court should grant the motion to suppress the knife evidence obtained during the warrantless invasion of his property. Morrow's Constitutional rights were further violated when a suggestive FBI lineup procedure impacted the overall reliability of the Donna Winston's witness identification. Accordingly, the court should also grant the motion to suppress all identification evidence obtained from Winston during the suggestive lineup procedure.

What the court should do

On July 22, 2011, Morrow was indicted on one count of voluntary manslaughter for allegedly stabbing and killing June Stahl, a Bureau of Alcohol, Tobacco, and Firearms Agent. (Def. Indictment at 1). At his July 25, 2011, arraignment, Morrow pled not guilty and acknowledged that, if convicted, he could be sentenced to up to fifteen years in prison. (Id.).

Asserts argument

First, the evidence obtained during the warrantless invasion of Morrow's shack should be suppressed because the search was conducted within the curtilage of his home. U.S. v. Dunn, 480 U.S. 294, 300-01 (1987). Curtilage of the home is an area that an

- include page #'s

individual may reasonably expect to be treated as an extension of his home, thus falling under the home's "umbrella of Fourth Amendment protection." Id.

Second, the witness identification evidence obtained from Donna Winston should be suppressed because the lineup procedure was so impermissibly suggestive that it created a substantial likelihood of misidentification. Simmons v. U.S., 390 U.S. 377, 384 (1968).

Because the warrantless search of Morrow's shack and the suggestive nature of the FBI lineup violated his Constitutional rights to privacy and process, the court should grant the motions to suppress the evidence obtained through Constitutionally impermissible procedures.

use consistent formatting

STATEMENT OF FACTS

citations to Record

At 6:00 a.m on July 4, 2011, Clay Morrow returned home from an all-night motorcycle ride to find FBI agents concluding a warrantless search of his property. (Ex. 1 at 6). To his surprise, the agents questioned him about his whereabouts during the prior several hours, confronted him about a bloody knife that had been found inside his shack, and accused him of killing an Agent of the Bureau of Alcohol, Tobacco, and Firearms. (Ex. 1 at 6-7). Knowing nothing about the knife or the murder that had taken place, Morrow refused to answer the agents' questions and was arrested. (Ex. 1 at 7).

persuasive phrasing

Four hours prior, ATF agent June Stahl was stabbed and killed while working undercover at The Reaper, a bar in Charming, California. (Ex. 1 at 1). FBI Agents Estevez and Nichols arrived at The Reaper at 2:45 a.m. and spoke with individuals who were inside the bar at the time of the stabbing. (Id.).

facts presented logically

One person told Agents that the motorcycle club inside the bar was the Sons of Anarchy, and that their leader Morrow had been at the bar. (Id.). Another individual, Donna Winston, told agents she saw the stabbing occur. (Ex. 1 at 2).

Inside the dimly lit bar, Winston was only looking at the man for about 20 seconds from 10 feet away. (Id.). She described him as a white male, between six-feet and six-three, with a lean to average build. (Id.). Clay Morrow is six feet four inches tall with a large build of 230 pounds. (Ex. 1 at 7). Winston said the suspect had a thick black mustache, a tattoo on his left arm, a leather vest buttoned in the front, and a black and white bandana with a grim reaper design. (Ex. 1 at 2). Morrow has a *gray* mustache, a prominent grim reaper tattoo on his *left* arm, and was arrested wearing a leather vest with *only a zipper* and a bandana with a *floral filigree* design. (Ex.1 at 7). Winston said the man was wearing black jeans and boots (common attire for motorcycle riders), which Morrow was wearing at the time of his arrest. (Ex. 1 at 2,7). Other than common riding attire, the only similarity between the man Winston saw stab Agent Stahl and Morrow was a gold stud piercing in the suspect's left ear.

font to call attention to facts

When FBI Agents Estevez and Nichols left the bar and arrived at Morrow's property, they noticed a twelve-foot high cinder block wall enclosing the eastern boundary and dense bushes ranging from eight-to-ten-feet high enclosing the western boundary. (Id.). Morrow erected the high wall and dense bushes in order to maximize the privacy of his home and adjacent property. (Id.). In the bushes, Agents saw small opening that had been created by people walking through them. (Ex. 1 at 4). Through the opening, they could see part of a shack located ten feet inside the bushes and two small logs in front of the opening. (Id.). Painted on one of the logs were the words "Private Property—

Keep Out" and on the other a sign saying, "If you ride, then you're my friend—take a load off and grab a smoke outside of my shack if you need a break." (Id.).

subtle persuasion

The agents pushed through the bushes and approached the shack, which was located 48 feet from Morrow's home. (Id.). It had small windows on both sides and a large window in the front. (Ex. 1 at 5). Morrow purposely blacked out the small windows, and the front window was covered by a curtain drawn from the inside. (Id.). From the outside, FBI agents could not see into the shack. (Id.). They did not have a warrant to search it. (Id.).

Agent Estevez opened the door and entered the shack (Id.). Morrow possessed the only key to the shack but did not lock it. (Ex. 1 at 6). Inside the shack was a table, a stereo, a potted marijuana plant, joint rolling paper, and a half-smoked joint in an ashtray. (Id.). Underneath the ashtray was a bloody knife, and later tests established that Morrow's fingerprints were on the knife and that Stahl's blood was on the blade. (Ex. 1 at 5-6).

While at home, Morrow used the stereo to listen to music while doing yard work and used the marijuana medicinally to treat his arthritis. (Ex. 1 at 6). FBI agents had no prior knowledge of its existence before entering the shack. (Id.). Morrow slept in the shack on about twenty-five occasions after fights with his wife, and he also used the shack as an area of relaxation and quiet contemplation. (Id.).

After seizing the knife, the ashtray, and the marijuana, the FBI agents walked back toward their vehicle, where they encountered Morrow. (Id.).

The next day, Agent Nichols attempted to bring Donna Winston in for a lineup of suspects. (Id.). However, Winston had left town, and did not arrive at FBI headquarters

until seventeen days later. (Id.). When Nichols asked Winston to tell her which of the six men was the person she saw stab Agent Stahl, she could not answer, saying, "It has been so long. I am not sure." (Ex. 1 at 8). Nichols asked Winston if anything would help refresh her memory, and Winston said she did not think so. (Id.). Again, she highlighted her uncertainty, reiterating that it had been a long time since the crime. (Id.). Nichols then asked Winston if she remembered what she had told FBI agents about the suspect's piercing, and after saying she did remember, Winston narrowed the suspects down to the only two men in the lineup with left ear piercings. (Id.). After all of this, Winston was *still* not certain. She said she was "at least 75% sure" that she recognized suspect number five, reasoning that he was taller than the other remaining suspect and about "about the same size as the killer." (Id.). Following Agent Nichols's prompt, Winston eventually chose Clay Morrow from the lineup. (Id.).

ARGUMENT

I. The court should grant the motion to suppress the knife evidence because the shack where the knife was found was within the curtilage of Morrow's home and should not have been subjected to a warrantless search.

Because the shack was within the curtilage of Morrow's home, the motion to suppress the knife evidence should be granted. The Fourth Amendment protects the curtilage of a home from warrantless searches. Curtilage is determined by whether the area "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." Dunn, 480 U.S. 294, 300 (1987) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). The factors used to determine curtilage are: proximity of the area

in question to the home, whether the area is within an enclosure that also surrounds the home, how the area is used, and the steps taken by the resident to protect the area from public observation. Dunn, 480 U.S. at 300. Considered together, these factors are weighed to determine "whether the area in question is so intimately tied to the home itself that is should be placed under the home's 'umbrella' of Fourth Amendment protection." Id. at 301.

First, because "there is not any fixed distance at which curtilage ends," the consideration of distance carries less weight than the other factors. See United States v. Depew, 8 F.3d 1424, 1427 (9th Cir. 1993) (holding that a distance of 50-60 feet does not compel a finding of curtilage when considered by itself, but is close enough if other factors support such a finding). Morrow's shack is only 48 feet from his house, and therefore is close enough to be within curtilage of his home if the other factors support such a finding. Id. Second, Morrow intentionally enclosed his home with a twelve-foot high cinder block wall along the eastern boundary and eight-to-ten-feet high bushes along the western boundary. Because the shack is also located within this enclosure, there is little to dispute as far as whether the shack is included within an enclosure that also surrounds the home. Although a clothesline was located between the shack and the home, the clothesline did not distinctly separate the shack from the home in terms of creating a separate enclosure. Overall, this factor weighs in favor of the shack being within the curtilage of Morrow's home, and further analysis will concentrate on the remaining two factors.

issues discussed summarily

sub-heading asserts argument

A. Morrow uses his shack for private, domestic activities, which supports a finding of curtilage.

A building is likely to be within the curtilage of the home when it is used for the type of intimate activities that would also occur inside a person's home, and when an outside observer would have no objective information suggesting that the building is being used for other purposes. Depew, 8 F.3d at 1427. A building is unlikely to be within the curtilage of the home when it is used solely for the purpose of conducting illegal activity. United States v. Davis, 530 F.3d 1069, 1079 (9th Cir. 2008) (finding that the area around the defendant's workshop was not protected curtilage because officers' gained objective data from outside the workshop indicating that marijuana was growing inside.).

Specifically, adjacent property to the home is more likely to be within the home's curtilage when it is used for private, domestic activities, especially when there is no objective evidence to show that the area is being used for other purposes. Depew, 8 F.3d at 1427. For example, in Depew, a law enforcement agent walked onto a defendant's property, without a warrant, after receiving information that the defendant was growing marijuana. Id. at 1425. The agent walked up the defendant's driveway and met the defendant six feet from the garage and 50-60 feet from his home. Id. From this location, the agent was able to smell marijuana. Id. at 1426. In holding that the officer illegally entered the defendant's property, the court held that the defendant's driveway and the area around the garage were within the curtilage of the home. Id. at 1427. The court reasoned that because Depew was a practicing nudist and often walked around naked outside the garage, the area in question was used by the defendant for "activities

associated with private domestic life." Id. Further, the court reasoned that before the agent entered the defendant's property, he "had no objective data indicating that [the defendant] used his garage or adjacent driveway area for illegal activity." Id.

Morrow used his shack for domestic activities. Like the defendant in Depew who used his property for the intimate activity of walking around in the nude, and unlike the defendant in Davis who used his property to grow marijuana, Morrow used his shack for domestic activities like sleeping, relaxing, and quiet contemplation. Further, like the officer in Depew who possessed no objective data about the defendant's illegal activity, FBI agents observed *nothing* before invading Morrow's shack to suggest it was being used for illegal activity. While Morrow does keep marijuana in the shack, he does not cultivate marijuana like the defendant in Davis. Morrow uses marijuana for medicinal purposes, similar to any type of medication one would take while in the privacy of his home. Morrow uses the shack for intimate activities associated with the home, which weighs in favor of the finding that the shack is protected curtilage.

B. Morrow took many steps to prevent the inside of the shack from observation, which also weighs in favor of defining the shack as protected curtilage.

A person has taken sufficient steps to prevent a specific area from observation when a passer-by cannot see inside the area. Depew, 8 F.3d at 1427. A person has not taken sufficient steps to prevent a specific area from observation if it can be seen without actually entering the area. Dunn, 480 U.S. at 303 (finding that ranch style fences around an open barn "were [not] designed to prevent persons from observing what lay inside the enclosed area.").

Specifically, a person has taken sufficient steps to prevent a specific area from observation if the area is blocked or covered in some way in order to prevent anyone

from seeing inside. Depew, 8 F.3d at 1428. For example, in Depew, the area around the defendant's garage was not visible to the public because of his long driveway, a row of thick trees, and the lower elevation of the highway. Id. The defendant also took further steps to prevent public observation of his property, including having a P.O. Box and reading his own meter so no one had the need to enter his property. Id. In holding that the area around the defendant's property was protected curtilage, the court reasoned that the defendant made "numerous efforts to ensure [his] privacy," which were "significant in terms of constituting an effort to protect the inner areas from observation." Id.

Arg. Morrow intentionally protected the inside of the shack from outside observation. Similar to the defendant in Depew and unlike the defendant in Dunn, he intentionally blacked out the windows on each side of the shack and drew a curtain from the inside to cover the front window. Further, like the protected curtilage in Depew that could not be seen from outside the defendant's property, the inside of Morrow's shack could not be seen from outside the bushes or even through the windows of the shack. The *only* way to see into the shack was opening the front door. While Morrow extended an open invitation to fellow riders to enter his property and congregate outside the shack, his efforts to conceal the inside of the shack are clear evidence of his desire to secure the shack as a private and personal area. Although he never locked the door to the shack, Morrow's efforts to cover all windows show that he expected anyone in the area to treat the shack as a private extension of his home. Morrow took extensive measures to prevent public observation of the inside of his shack, which weighs in favor of finding that the shack was within the curtilage of his home.

Because Morrow used the shack for private, domestic activities and took extensive measures to prevent the inside from observation, this Court should suppress all evidence obtained through the warrantless invasion of the curtilage of Morrow's home.

II. This Court should grant the motion to suppress all eyewitness evidence obtained from Winston, because the suggestive nature of the lineup procedure created a substantial likelihood of Morrow's misidentification.

Roadmapping

Because the suggestive nature of the FBI lineup impacted the overall reliability of Winston's identification and violated Morrow's Constitutional right to due process, the court should grant the motion to suppress the identification evidence. While the State has conceded that the procedure was suggestive in nature, (Stipulations at 1), it is the "likelihood of misidentification [as a result of suggestive procedures] which violates a defendant's right to due process." Neil v. Biggers, 409 U.S. 188, 198 (1972).

The factors to be considered in evaluating whether a suggestive identification procedure impacted its overall reliability are: the witness' degree of attention and ability to view the person committing the crime, the accuracy of the witness' original description to police, the level of certainty expressed by the witness during the identification procedure, and the length of time between the crime and the lineup. Id. at 199-200. If under the totality of the circumstances the identification is sufficiently reliable, the evidence is still admissible at trial even if the identification was made in conjunction with an unnecessarily suggestive procedure." Id. at 199.

First, because the law is unclear on what length of time would damage the reliability of a witness' identification, the seventeen-day window between Agent Stahl's stabbing and Winston's participation in the FBI lineup would otherwise be a neutral factor within this analysis. However, because Winston admitted that length of time

between the crime and the lineup contributed to her uncertainty, this factor is subsumed into the analysis of the role her uncertainty played in increasing the likelihood of a misidentification. Second, an eyewitness is more likely to correctly identify a suspect when she has a clear, well-lit view of the suspect and is able to observe the suspect for an extended period of time. See Neil 409 U.S. at 200 (finding that because witness spent up to thirty minutes facing the defendant in "adequate artificial light" and under a full-moon, there was no substantial likelihood of misidentification despite a suggestive confrontation procedure). Because the bar was dimly lit and Winston spent only twenty seconds looking at the suspect's face, the impact of the suggestive procedures should largely be determined based on the accuracy of her original description of the suspect and the certainty with which she identified him during the suspect lineup.

A. Because of the multiple inaccuracies between the suspect Winston described and Morrow's actual appearance, there is a substantial likelihood that the suggestiveness of the procedure affected the reliability of Winston's identification.

The suggestive nature of a confrontation is more likely to affect the reliability of a witness' identification when there are discrepancies between the witness' prior description and the actual physical features of the suspect. Neil, 409 U.S. at 200. The suggestive nature of a confrontation is less likely to affect the overall reliability of a witness' identification if the witness' prior description of the suspect was accurate. See United States v. Jones, 84 F.3d 1206, 1210 (9th Cir. 1996) (finding that while three bank employees identified a robbery suspect under clearly suggestive circumstances, their identifications were reliable because of the accuracy of the original descriptions they gave to police about the suspect's appearance).

Specifically, the suggestive actions of a lineup procedure are less likely to lead to a witness misidentifying a suspect when the witness made no mistakes in her original description of the suspect. Neil, 409 U.S. at 200. For example, in Neil, a rape victim was subjected a suggestive identification procedure when police brought her in to identify her assailant. Id. at 199. In holding that the identification was reliable, the court reasoned that the victim's original description to police "included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice" and that her description was "more than ordinarily thorough." Id. at 200.

There were many discrepancies between the suspect description Winston gave to police and Morrow's actual appearance. Unlike the rape victim in Neil and the bank employees in Jones who gave correct descriptions of the suspects they later identified, Winston's original description of the suspect was far from an accurate description of Morrow. Compared to Morrow's actual appearance at the time of his arrest, Winston's description was inaccurate with regard to his height, build, and mustache color. Further, Winston described a suspect having a vest with *buttons*, a *left* arm tattoo, and a bandana with a design unlike the one Morrow was wearing. Morrow has a prominent tattoo on his *right* arm, and the vest he was wearing, when arrested, only had a *zipper*. While Winston's description of the suspect's boots and black jeans matched what Morrow was wearing, there is a high probability that most riders in the bar were wearing boots and black jeans. Also, while Winston's description of the suspect's gold earring in his left ear matches Morrow's earring, the inaccuracies in her description with relation to Morrow *far outweigh* the accurate and possibly coincidental features. Because the prior description Winston gave to police was so disproportionally inaccurate to Morrow's

actual physical description, the suggestive nature of the confrontation procedure violated Morrow's right to due process and gave rise to a very substantial likelihood of misidentification.

B. Because of Winston's uncertainty during the police lineup, the suggestive nature of the procedure led to an even more substantial likelihood of misidentification.

The suggestive nature of a confrontation procedure creates a substantial likelihood of misidentification when the witness demonstrates uncertainty during the actual confrontation. Neil, 490 U.S. at 200; Simmons, 390 U.S. at 385. A suggestive procedure does less to influence the likelihood of misidentification when the witness has no doubt as to the identification of the suspect. Neil, 490 U.S. at 200; Simmons, 390 U.S. at 385.

Specifically, when a witness says that she has no doubt that the person she is identifying is the person she saw commit the crime, the suggestive nature of the confrontation does not lead to a substantial likelihood of misidentification. Neil, 490 U.S. at 200. In Neil, the rape victim said she had "no doubt" that the person she identified in the confrontation was the same person who raped her. Id. In holding that the suggestive nature of the confrontation did not impact the reliability of her identification, the court reasoned that the victim "testified... there was something about [the defendant's face] 'I don't think I could ever forget.'" Id. at 201. See Simmons, 390 U.S. at 385 (finding that the suggestive nature of the identification procedure did not diminish the witness' reliability because "none of the witnesses displayed any doubt about their respective identifications of the suspect).

Winston was extremely uncertain during the FBI lineup. Unlike the witness' in Neil and Simmons who told police they had no doubt with regard to their respective

identifications, Winston expressed uncertainty during the entire procedure. In fact, after looking at each man carefully, Winston told the FBI agent, "It's been so long. I am not sure." After the agent asked if there was anything to help jog her memory, Winston said she did not think so and reiterated it had been a long time. This is a direct contrast to the witnesses in both Neil and Simmons, who never expressed doubt about the suspects they were identifying. After the agent suggestively reminded Winston of her description of the suspect's piercing, Winston was finally able to narrow the lineup down to two men: the *only* two men with earrings. After all of this, she still did not identify Morrow with certainty, saying that she was " at least 75 percent sure" of her identification because Morrow was taller than the other man with a piercing and "*about* the same size as the killer." Taking that into consideration, the suggestive nature of the procedure violated Morrow's right to due process and substantially enhanced the likelihood of his being misidentified.

Because of the multiple inaccuracies between the suspect Winston described to police and Morrow's actual appearance, and the uncertainty Winston expressed during the impermissibly suggestive lineup, this Court should suppress all witness identification evidence because the suggestive procedure violated Morrow's right to due process by affecting the overall credibility of Winston's identification.

CONCLUSION short prayer for relief

The Defendant respectfully requests this Court to suppress all evidence obtained through the warrantless search of his property and all evidence obtained through the suggestive FBI lineup procedure. Tells true court what Δ wants

Respectfully submitted this 29th day of February, 2012.

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endorsement

By _____/S/_____

Attorney for Defendant

* you will also include Certificate of Service not shown on this sample