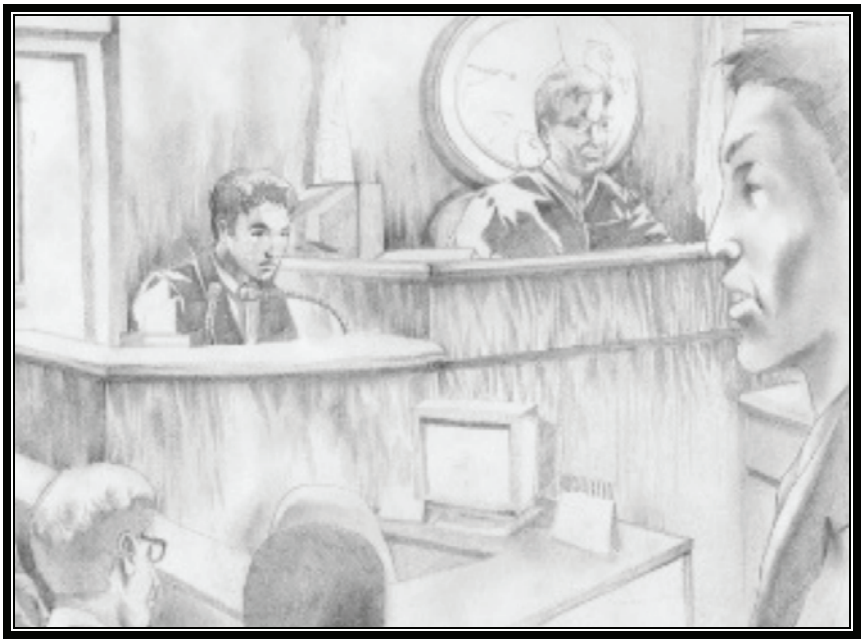
CONSTITUTIONAL RIGHTS FOUNDATION

PEOPLE
v.
PRICE

A TRIAL ON THE CRIME OF ARSON

Featuring a pretrial argument on the Fourth and 14th Amendments of the United States Constitution



Co-Sponsored by:

California Department of Education
State Bar of California
California Young Lawyers Association
Daily Journal Corporation

OFFICIAL MATERIALS FOR
THE CALIFORNIA MOCK TRIAL PROGRAM

ACKNOWLEDGMENTS

CRF207

v1.0

Developed by:
Marshall Croddy, Director, Program and Materials Development
William C. Hayes, Senior Editor
Laura L. Wesley, Director of Law Programs
Damon Huss, Research Intern, Writer

Reviewers:
Marvin Awbrey, Fresno Unified School District
George F. Bird Jr., Esq., Torrance
Gerald Chaleff, Esq., Los Angeles
Karen Hunter Bird, Esq., Torrance
Michael Concha, Esq., Los Angeles
Carla Garrett, Educator, Esq., Contra Costa
Commissioner Christina Hill, Los Angles Criminal Court
Michael Kewin, Esq., San Bernardino
Commissioner Ross Klein, Downey Municipal Court
Eden Kusmiersky, Esq. Los Angeles
Sharon Matsumoto, Esq., Los Angeles
Pamela J. McFarland, Esq., Fresno
Justice Steven Z. Perren, California Court of Appeal, Second District
Jodi Rafkin, Esq., Sacramento
Commissioner Ron Rose, Los Angeles Criminal Court
Professor Paul Von Blum, Esq., UCLA
Judge George Wu, Los Angeles Superior Court

Special Thanks to:
Marjorie Steinberg, CRF President
Sylvia Andresantos, CRF Program Coordinator
Charlie Degelman, CRF Writer/Editor
Gregorio Medina, Program Director
Todd Clark, CRF Executive Director
Andrew Costly, Desktop Publishing
Tina Esposito, Program Director

Cover Drawing: Ryan Edquist, Winner 2001 State Mock Trial Courtroom Art Contest

Participating California Counties for 2001-2002

Alameda	Los Angeles	Riverside	Santa Barbara
Butte	Madera	Sacramento	Santa Clara
Contra Costa	Marin	San Benito	Santa Cruz
El Dorado	Mendocino	San Bernardino	Shasta
Fresno	Monterey	San Diego	Solano
Imperial	Napa	San Francisco	Stanislaus
Inyo	Nevada	San Joaquin	Tulare
Kern	Orange	San Luis Obispo	Ventura
Kings	Placer	San Mateo	Yolo

The California Mock Trial Competition is a program of Constitutional Rights Foundation and the California State Department of Education and is additionally sponsored by the State Bar of California, the California Young Lawyers Association, and the Daily Journal Corporation.

TABLE OF CONTENTS

PROGRAM OBJECTIVES

For the students, the Mock Trial Program will:

1. Increase proficiency in basic skills (reading and speaking), critical thinking skills (analyzing and reasoning), and interpersonal skills (listening and cooperating).

2. Develop an understanding of the link between our Constitution, our courts, and our legal system.

3. Provide the opportunity for interaction with positive adult role models in the legal community.

For the school, the program will:

1. Provide an opportunity for students to study key concepts of law and the issues of poisoning, assault with a deadly weapon, and search and seizure.

2. Promote cooperation and healthy academic competition among students of varying abilities and interests.

3. Demonstrate the achievements of young people to the community.

4. Provide a hands-on experience outside the classroom from which students can learn about law, society, and themselves.

5. Provide a challenging and rewarding experience for teachers.

CODE OF ETHICS

At the first meeting of the Mock Trial team, this code should be read and discussed by students and their teacher.

All participants in the Mock Trial Competition must follow all rules and regulations as specified in the California Mock Trial materials or disseminated by CRF staff. Failure of any member or affiliate of a team to adhere the rules may result in disqualification of that team. All participants also must adhere to the same high standards of scholarship that are expected of students in their academic performance. Plagiarism* of any kind is unacceptable. Students' written and oral work must be their own.

In their relations with other teams and individuals, students must make a commitment to good sportsmanship in both victory and defeat.

Encouraging adherence to these high principles is the responsibility of each team member and teacher sponsor. Any matter that arises regarding this code will be referred to the teacher sponsor of the team involved.

***Webster's Dictionary defines plagiarism as, "to steal the words, ideas, etc. of another and use them as one's own."**

2001-2002 CALIFORNIA MOCK TRIAL PROGRAM

Each year, Constitutional Rights Foundation (CRF) seeks to create a mock trial that addresses serious matters facing young people today. By affording students an opportunity to wrestle with large societal problems within a structured forum, we strive to provide a powerful and timely educational experience. It is our goal that students will conduct co-operative, vigorous and comprehensive analysis of these materials, with the careful guidance of teachers and coaches.

The lessons and resources included in this packet offer schools and teachers additional methods to expand and deepen the educational value of the mock trial experience. We encourage all participants to share these resources with their colleagues for implementation in the classroom. We hope that through participation in the lessons and the Mock Trial Program, students will develop a greater capacity to deal with the many important issues identified in *People v Price.*

CLASSROOM MATERIALS

The following two lessons concern topics related to the case of *People v. Price*.

In the first lesson, students examine the law of search and seizure and discuss what constitutes a search or seizure. In an activity working in groups, students apply what they have learned to real search and seizure cases, which can be found on the Constitutional Rights Foundation web site. They report and discuss their findings to the class. **(Cases can be found at www.crf-usa.org , by clicking links: Criminal Justice in America: Appendix: Table of Cases).**

In the second lesson, students explore legal and policy issues related to the use of racial profiling by the police. First, in a reading, students examine the constitutional and legal dimensions over America's current debate on racial profiling. In the activity, students role play advisors to a governor deciding what to do about the problem of racial profiling.

LESSON 1
The Law of Search and Seizure

One of the most important and complex areas of criminal procedure comes from the Fourth Amendment. This amendment affects how police officers investigate crimes and gather evidence, because the Supreme Court has ruled that illegally seized evidence may not be used at trial. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

All police searches, seizures of evidence, and arrests must comply with this amendment. Courts have interpreted the amendment's meaning in hundreds of search-and-seizure cases. These interpretations have grown into a full body of law, known as the law of search and seizure. Although the law is complicated, determining whether a search or seizure is legal comes down to two basic questions:

• Has a governmental search or seizure taken place?
• If so, was the search or seizure reasonable?

In the sections that follow, you will learn how to answer these questions for most searches or seizures.

Has a Search and Seizure Taken Place?

To be a search or seizure under the Fourth Amendment, it must be (1) done by a government employee or agent **and** (2) it must fit the courts' definition of a search or seizure. We will examine each of these issues.

Did a government employee or agent conduct the search or seizure?

The first step in analyzing search-and-seizure problems is to determine who conducted the search or seizure. The Fourth Amendment protects citizens from actions by government officials. The Fourth Amendment does not usually cover actions by private individuals. If, for example, your neighbor breaks into your house, finds evidence of a crime, and turns it in to the police, your rights under the Fourth Amendment would not have been violated. If you were prosecuted, this evidence could be used against you at trial. Of course, the police could also arrest the person who broke into your house for burglary and you could sue the person in civil court.

Note, however, that if the police had requested your neighbor to break into your house, then Fourth Amendment protections would come into play. The neighbor would be considered an agent of the government.

Was it a search or seizure as defined by the courts?

The Fourth Amendment protects people from unreasonable searches and seizures of their "persons, houses, papers, and effects." But what is a "search"? What is a "seizure"? The next consideration is to decide whether a government official's conduct amounted to a search or seizure.

In the landmark case of *Katz v. U.S*. in 1967, the Supreme Court defined a search as any governmental intrusion into something in which a person has **a reasonable expectation of privacy**. This privacy interest covers places and things such as houses, yards, garages, apartments, diaries, briefcases, and mail.

The court has held, however, that there is no reasonable expectation of privacy in places or things that are in **plain view**. For example, a person growing a four-foot-high marijuana plant in a front bay window cannot claim that a search was conducted if a police officer spots it from the street. But officers who detect things in plain view must do so from places they have a legal right to be in. For instance, if an officer climbs over an eight-foot fence surrounding a yard and spots marijuana growing in some back corner, a search has taken place. Persons normally have a reasonable expectation of privacy in their private property that cannot be seen except by trespassing.

But the court has held there is no reasonable expectation of privacy for **open fields** away from a residence. Even though they are private property, they usually are readily accessible to the public. Thus police walking through open fields are not conducting a search.

A similar rule applies to **abandoned property**. For example, if a person placed letters containing incriminating statements into the trash, the police could retrieve them from the garbage dump without having conducted a search. There is no reasonable expectation of privacy in such items.

The idea of "seizure" is somewhat easier to understand. A seizure is any taking into possession, custody, or control. Property may be seized, but so may people. An arrest is one form of seizure, because in making an arrest, the police take someone into custody. Thus arrests fall under the requirements imposed by the Fourth Amendment.

For Discussion

1. What is the difference between a search and a seizure?

2. The Supreme Court has ruled that the police have **not** conducted a search if the object is in plain view, in an open field, or has been abandoned. Why does the court say this in each instance? Do you agree? Why or why not?

3. Why do you think the Fourth Amendment protects only against intrusions by the government? Are these intrusions more dangerous than intrusions by individuals? Why or why not?

4. For each of the following, decide whether a search or seizure has taken place and explain why or why not. Don't be concerned whether it was legal.

   a. A police officer arrests Mary Clark for shoplifting.

   b. Lois Kindel, a custodian at the Shadyville Police Department, believes her neighbor deals drugs. She tells police but they have no evidence. She agrees to keep a close watch on her neighbor. One day she spots a marijuana plant, which has grown taller than her neighbor's fence.

   c. Officer Sanchez climbs a hill in a public park and spots three stolen cars in a nearby backyard surrounded by a 10-foot-high fence.

   d. On surprising George Meyers, a known narcotics dealer, police observe him swallow several capsules. They take him to the hospital and have his stomach pumped.

   e. The police stop Anna and question her for a few minutes about where she's been and what she has been doing the past few days. (Anna has been arrested twice in the last year for prostitution but has never been convicted.)

Class Activity: Is It a Search?

In this activity, students analyze and research cases to determine whether a search or seizure has taken place.

1. Divide the class into groups of seven.

2. Each group should:

   a. Discuss each of the Cases below and decide if a search or seizure has taken place in the following situations.

   b. Assign each group member one of the cases cited to look up. The cases can be found on the Internet or at a law library. A good place to start Internet research is Research Links or *Criminal Justice in America* Links on Constitutional Rights Foundation's web site **(www.crf-usa.org, by clicking links: Criminal Justice in America: Appendix: Table of Cases).** Law libraries can be found at law schools and at county and municipal courts. (The librarian can help you find the cases you are looking for.)

3. After researching, students should meet in one of seven groups according to the case they looked up. In this "expert" group, students should:

   a. Discuss the case and prepare to report on it to the class.

   b. Assign one person to report on the facts of the case, another to report on what the court majority decided and why, another on what the court dissenters believed and why, and finally each member should state how he or she would

have decided the case and why.

Cases

a. Unable to see over Mike's 10-foot-high fence, police hire a plane and fly over the house at 1,000 feet and see marijuana plants growing in the backyard. See *California v. Ciraolo* (1986) and *Florida v. Riley* (1989).

b. Police install a device at the phone company office that keeps track of the numbers that Gilbert dials from his home phone. See *Smith v. Maryland* (1979).

c. Suspecting drug dealing, police have the trash collector turn over Bill's trash to them instead of throwing it in the trash truck. See *California v. Greenwood* (1988).

d. The FBI listens to Joe's conversation by attaching an electronic eavesdropping device to the outside of the public telephone booth he uses at 11 a.m. every day. See *Katz v. U.S*. (1967).

e. Investigating a shooting, police legally enter an apartment looking for weapons and the shooter. While inside, an officer spots a high-priced stereo which seems out of place in the rundown apartment. The officer picks it up, jots down the serial number, puts it down, calls headquarters, and finds out the stereo is stolen. See *Arizona v. Hicks* (1987).

f. Oliver posts "no trespassing" signs around his land and locks the gate to his property. Police go onto a highly secluded part of his land about a mile from his house and find marijuana plants growing. See *Oliver v. U.S.* (1984).

g. A Border Patrol agent boards a bus in Texas. As he walks down the aisle, he squeezes the luggage that passengers have stored above their seats. When he squeezes Bond's bag, he feels a suspicious "brick-like" object, which the agent believes to be a "brick" of methamphetamine. See *Bond v. U.S.* (2000)

Debriefing Questions

1. What is the test used by the Supreme Court to determine whether a search has taken place?

2. Do you think this is a good test? Explain.

3. Do you think the Supreme Court has applied this test satisfactorily in these cases? Why or why not?

LESSON 2
Racial Profiling

For many years, blacks and other minorities have complained that police often target minority drivers, pulling them over for minor infractions or no reason at all and often subjecting them to humiliating car or body searches. Christopher Darden, an African American and former prosecutor, has been stopped many times by police. He said that "to be pulled over for no good reason is very offensive. But then to be asked for consent to search your vehicle just ratchets things up another notch. And in those situations where you've been forced out at gunpoint or you've been asked to spread out on the street, to lay out on the pavement, makes you boiling with anger."

John Lambeth of Temple University conducted a study to determine whether blacks were being targeted on the New Jersey Turnpike. He found that African Americans made up 13.5 percent of highway users and 15 percent of the speeders, but he found that they represented 35 percent of those stopped by police. They were almost five times more likely to be pulled over as other drivers. Similar results were found in studies conducted in Maryland and Florida.

Other minority community members complain that they too are stopped and questioned by authorities for no good reason. Latinos protest that they are targeted at Border Patrol checkpoints within the United States, and Arab-Americans claim that they are often detained for long periods by airport security, especially after some terrorist scare.

Pulling over a car, or stopping a person, solely on the basis of the driver's race violates the 14th Amendment to the U.S. Constitution, which guarantees equal protection under the law. If proven, it would invalidate an arrest or the use of any evidence seized from the driver. Federal civil rights laws outlaw it and several states have passed laws specifically against this practice.

The more difficult question arises over police officer discretion in deciding who to pull over. In the 1996 case of *Whren v. U.S.*, the U.S. Supreme Court unanimously ruled that police may stop a car for any traffic or equipment violation even if they have a different motivation for making the stop, such as the suspicion of drug trafficking.

Some experts point to “profiling” as the major cause of disproportionate traffic stops on minorities. Profiles are systems used by police to predict criminal behavior. Some use scientific methods and statistics to develop a list of factors that make up a profile of a potential suspect. They might include age, location, type of car, time of day, driving patterns, route of travel, and whether the driver is alone. Profiles can also target white citizens. For example, a police officer might be more likely to pull over a late-model car for a minor traffic violation if it were driven by a white youth at night in an inner-city neighborhood where drug dealing occurs. In this case, the driver might fit a profile of someone who is likely trying to buy drugs.

There are two types of racial profiling—full and partial. A *full* racial profile is when race is the only factor that causes an officer to stop someone. As mentioned above, this practice is unconstitutional, illegal, and universally condemned. Even so, many minorities complain that it happens all the time. Police officials disagree and say the practice is not widespread.
In 1999, Connecticut and North Carolina passed laws requiring police to keep track of the race and ethnicity of everyone they stop. The data will be forwarded to experts to analyze whether and to what extent officers are targeting people on the basis of race or ethnicity. These laws are widely supported by minority leaders. Walter Wilson, legislative director of the National Association for the Advancement of Colored People, has stated: “The NAACP believes that comprehensive data collection is critical to the process of ending racial profiling. Without data collection, there is no progress on this issue.”

Other states and the federal government are considering such laws. But strong opposition to these laws has come from police groups. They argue that stopping people is already hazardous and forcing officers to ask people about their race and ethnicity will needlessly lengthen stops and inflame the situation. They also don’t think the statistics will prove anything because people stopped will probably reflect the racial makeup of the community they are stopped in. They believe that instead of collecting data, all allegations of officers targeting minorities should be thoroughly investigated.
Another set of issues concerns *partial* racial profiling, where race or ethnicity is one of several factors. Many people support this type of profiling. They argue that it is an effective law-enforcement tool. Bernard Parks, chief of the Los Angeles Police Department, has stated: “We have an issue of violent crime against jewelry salespeople. . . . It's a collection of several hundred Colombians who commit this crime. If you see six in a car in front of the Jewelry Mart, and they're waiting and watching people with briefcases, should we play the percentages and follow them? It's common sense.” Parks is an African American. He sees nothing wrong with *partial* racial profiling.

Randall Kennedy, a law professor at Harvard, opposes using race as a factor in profiles. He doesn’t think that police necessarily use this practice because they have racist motives. He

thinks they may believe it is an effective law-enforcement tool, and Kennedy believes they may be right. But Kennedy points out that many innocent people get stopped by police using these profiles. And, he says, they often don't just get stopped once, but many times. This, he says, causes great anger and alienation. "Alienation of that sort gives rise to witnesses who fail to cooperate with the police, citizens who view prosecutors as 'the enemy,' . . . and jurors who yearn to 'get even' with a system that has, in their eyes, consistently mistreated them. For the sake of better law enforcement, we need to be mindful of the deep reservoir of anger toward the police that now exists within many racial minority neighborhoods. Racial profiling is a big part of what keeps this pool of accumulated rage filled to the brim."

For Discussion

1. A bank is robbed and the suspect is described as an Asian woman driving a red sports car. Police start looking for such a suspect. Is this a racial profile? Explain.

2. What is the difference between *partial* and *full* racial profiling?

3. Do you think profiling is an effective law-enforcement tool? If so, are its benefits worth its costs? Explain.

4. Should police ever be allowed to consider race when deciding whether to stop someone?

Class Activity: What Should Be Done About Profiling?

To find out more about racial profiling, some states have passed laws requiring police to collect data on the race and ethnicity of everyone they stop. Other states and the federal government are considering doing the same. Opponents of data collection support other measures such as police videotaping every traffic stop or police distributing their card to everyone they stop so that people can easily file complaints. In this activity, students role play advisers to a state governor who is considering introducing legislation on racial profiling.

1. Divide the class into small groups.

2. Each group should:

    a. Discuss the problem of racial profiling and various proposals for addressing it.

    b. Decide which proposal, if any, to support. (Students may create their own proposal.)

    c. Prepare to report its decision and the reason for it back to the class.

    d. Have the groups report back and discuss the various proposals. Conclude the activity by voting as a class on the proposals.

2001-2002 MOCK TRIAL COMPETITION

This packet contains the official materials required by student teams to prepare for the 21st Annual California Mock Trial Competition, and in preparation for their trials, participants may refer to all information included in *People v. Price*, including the classroom materials. The competition is sponsored and administered by Constitutional Rights Foundation. The co-sponsors of the competition are the California Department of Education, the State Bar of California, the California Young Lawyers Association, and the Daily Journal Corporation.

Each participating county will sponsor a local competition and declare a winning team from among the competing high schools. The winning team from each county will be invited to compete in the state finals in San Jose, March 22-March 24, 2002. In May 2002, the winning team from the state

competition will be eligible to represent California at the National High School Mock Trial Championship in St. Paul, Minnesota.

The Mock Trial is designed to clarify the workings of our legal institutions for young people. During Mock Trials, students portray each of the principals in the cast of courtroom characters, including counsel, witnesses, court clerks, and bailiffs. As student teams study a hypothetical case, conduct legal research, and receive guidance from volunteer attorneys in courtroom procedure and trial preparation, they acquire a working knowledge of our judicial system. Students also argue a pretrial motion. This year's motion has a direct bearing on the evidence allowed in the trial itself.

During all Mock Trials, students present their cases in courtrooms before actual judges and attorneys. As teams represent the prosecution and defense arguments over the course of the competition, the students must prepare a case for both sides, thereby gaining a comprehensive understanding of the pertinent legal and factual issues.

Because of the differences that exist in human perception, a subjective quality is present in the scoring of the Mock Trial, as with all legal proceedings. Even with rules and evaluation criteria for guidance, no judge or attorney scorer will evaluate the same performance in the same way. While we do everything possible to maintain consistency in scoring, every trial will be conducted differently, and we encourage all participants to be prepared to adjust their presentations accordingly. Please remember that the judging and scoring results in each trial are final.

CALIFORNIA MOCK TRIAL FACT SITUATION

Mountainville is a town in the Sierra Nevada mountains of northern California. The Mountainville Ski Lodge ("Lodge") recently began construction to expand its facilities. The new construction would extend into a neighboring wilderness area, and would involve clear-cutting some old growth redwood trees. This prompted a public debate between local environmentalists and pro-development townspeople. The debate was civil and leading to compromise on both sides.

On Friday, June 1, 2001, vandals damaged property at the Lodge's construction site. The owner of the Lodge reported to the Mountainville Police that the vandals had left graffiti on the trailer doors at the site reading "Let the Trees Live!" and had poured sugar into the gas tank of a truck, causing several thousand dollars in damage. The police questioned several local environmental activists, but had no evidence to suspect anyone.

On June 12, vandals did more damage. The construction superintendent found power

cables cut, a power generator and sections of the partial construction smashed, a tractor damaged, and numerous windowpanes broken. More anti-development graffiti covered the vandalized areas. Damage was estimated at thousands of dollars in materials and labor costs. The superintendent also received an anonymous phone call threatening arson. During the following week, similar phone calls alerted the Mountainville Police of the serious nature of the situation.

On Thursday, July 5, Officer Benares of the Mountainville Police Department ("MPD") was approached by Casey Ballard ("Ballard"), a student at Mountainville Community College ("MCC"). Ballard asked about Benares' investigation of the vandalism and told what Ballard had heard about a local group of students calling themselves the Earth Guerrilla Order ("EGO"). Officer Benares questioned Ballard further, but Ballard disavowed any personal knowledge of EGO's membership.

On the morning of Saturday, July 7, an MPD lieutenant called a meeting and directed an Officer Benares and another officer, to conduct a safety check between the hours of 5:00 and 9:00 p.m. on Boulder Road to check drivers' licenses and registration papers. Boulder Road leads past the Lodge and recreation areas and connects to Highway 80. The lieutenant informed the officers that Fourth of July weekend activities often result in a higher incidence of traffic accidents on Boulder Road. In previous years, the police had set up safety checkpoints on Boulder Road to monitor traffic. Due to the heavy holiday traffic, the lieutenant thought it was important to check to be sure that vehicles were in safe working condition and instructed the officers to stop every third car passing the Boulder Road checkpoint.

The lieutenant also reminded the officers that they were still looking for the "eco-terrorists" who had twice vandalized the Lodge and that the checkpoint could also serve as a means to detect evidence of their identity. The lieutenant supplied a profile of a potential eco-terrorist as someone who was "about college-age with a disheveled appearance, possibly wearing ragged, flannel shirts or t-shirts with political slogans, and combat boots or hiking shoes." Their cars "are often older models in visibly poor condition with political bumper stickers." The lieutenant assigned Officer Benares and another officer to administer the checkpoint.

At the checkpoint, Officer Benares stood five feet from the side of the road and about a car length behind the place where the other officer checked licenses and registrations of the stopped cars. Benares' responsibilities were to direct traffic and to give added police presence.

At around 8:30 p.m., a line of cars had backed up as traffic increased. It was twilight. Syd Price ("Price"), a student at MCC, was in line immediately behind a car that had been stopped at the checkpoint. Officer Benares observed that Price, college-age and wearing an environmental T-shirt, and Price's truck, a mid-sized, dark-blue 1985 Toyota pickup truck, both appeared to match the eco-terrorist profile. Using a flashlight, Benares approached the truck

and noticed a faded bumper sticker in the back window, which read “Go Solar.” Benares wrote a description of Price’s truck including license plate number in the police log.

[Benares then conducted a visual inspection of the truck from front to back and noticed a tool box, various auto parts, and a beach towel draped over a large object toward the back of the truck bed. Benares bent down, placed a hand on the truck’s bed rail and leaned into the truck bed. Benares shined the flashlight into the 12-inch gap between the edge of the towel and the sidewall of the truck bed. From that angle, Benares observed that the towel covered a large gas can resting in the bed of the pickup. Benares wrote a description of the gas can in the police log.] Because Price’s pickup was not the third vehicle in the line, Price was allowed to proceed through the checkpoint

At approximately 10:00 p.m. that evening, a fire at the Lodge caused damage totaling over $1,000,000, not only to the nearly finished construction, but also to the Lodge’s main structure as well. Officer Benares investigated the scene and determined that arson caused the fire.

The following day, Benares received a phone call from Ronnie Uderzo, a superintendent for the Lodge construction who had just heard about the fire. Uderzo had been at the Lodge the night before and had seen a mid-sized, dark-colored pickup truck parked amidst the trees, between Boulder Road and the lodge driveway. Uderzo informed Benares that the first three characters in the truck’s license number were “2WP.” Officer Benares then went to the spot Uderzo described, and found a pair of tire-tracks tracks in the mud, prompting Benares to take a plaster impression (“moulage”) of the tracks as evidence.

With the assistance of Alex Huffman, a consultant and retired crime-scene investigator, Benares found a faint shoeprint in an area of concrete that had been newly laid late in the afternoon of July 7 near the burned portion of the structure. Benares made a plaster moulage of the print, showing that it had been made by a hiking boot.

Benares tracked down Casey Ballard for further questioning, and Ballard admitted to having been a member of EGO but denied taking part in the arson. Ballard told Benares that arson plans had been discussed at EGO’s meetings and that Syd Price should be considered a suspect.

On Monday, July 9, Benares and Alex Huffman, compared the tire-track moulage to the rear tires of the pickup truck parked in front of Price’s home. Benares concluded that the tires matched the moulage. The license number on the truck was 2WPA345.

Benares obtained a search warrant for Price’s home and truck. At Price’s house, Benares found a pair of hiking boots with treads, that in Benares opinion, matched those in the moulage taken from the site of the arson. Benares also found instructions for arson downloaded from the Internet and a checklist. The instructions and checklist were attached to a diagram of the Lodge folded inside Price’s political science textbook. [Benares did not find the gas can from the bed of Price’s pickup.] Based on the evidence, Benares arrested Price on the charge of arson.

CHARGES

The prosecution charges Syd Price with one count:

Count - Arson (California Penal Code § 451)

EVIDENCE

Only the following evidence may be introduced at trial. The prosecution is responsible for bringing:

1. A faithful reproduction of the map of the Mountainville Ski Lodge, which appears in this packet. The reproduction should be no larger than 22 in. X 28 in.
2. A faithful reproduction of the map of the Mountainville Ski Lodge and Environs which appears in this packet. The reproduction should be no larger than 22 in. X 28 in.
3. A faithful reproduction of Syd Price's checklist, which appears in this packet. The reproduction should be no larger than 22 in. X 28 in.

STIPULATIONS

Prosecution and defense stipulate to the following:

1. There are no Fifth or Sixth Amendment issues.

2. Alex Huffman and E.J. Arnold are qualified expert witnesses.

3. Syd Price was properly Mirandized when arrested on July 9, 2001.

4. No Fourth Amendment arguments will be presented at pretrial or during the trial on matters related to Officer Benares' gathering of evidence of the tire-tracks.

5. Syd Price's choice of topic for the Contemporary Political Movements assignment was approved by the professor as a legitimate topic.

6. No Fourth Amendment arguments will be presented at pretrial or during the trial regarding Officer Benares' search warrant.

7. Syd Price had downloaded information from the Internet that described how to set a fire using a household timer and an accelerant such as gasoline.

8. The contents of Officer Benares' log are accurate and correspond to Benares' witness statement.

9. The lieutenant and "other officer" at the checkpoint are unavailable to testify.

10. All witness statements were taken in a timely manner.

11. Alex Huffman and Professor E.J. Arnold are qualified expert witnesses.

PRETRIAL MOTION AND CONSTITUTIONAL ISSUE

This section of the mock trial contains materials and procedures for the preparation of a pretrial motion on an important legal issue. The **judge's ruling** on the pretrial motion will have a **direct bearing** on the admissibility of certain pieces of evidence and the possible outcome of the trial. The pretrial motion is designed to help students learn about the legal process and legal reasoning. Students will learn how to draw analogies, distinguish a variety of factual situations, and analyze and debate constitutional issues. These materials can be used as a classroom activity or incorporated into a local mock trial competition.

In the area of criminal due process, the Fourth Amendment protects individuals from government intrusions on their privacy by prohibiting unreasonable searches and seizures. These rights are extended to the states by the due process clause of the 14th Amendment. Law enforcement officers often must search or seize persons or their property when investigating crimes or apprehending suspects. The tension between personal freedom and governmental power has created numerous debates and court decisions over the years. The key issues for both the defense and prosecution are (1) whether there was a search or seizure; and (2) whether the particular search or seizure was reasonable.

The pretrial motion challenges the admissibility of evidence that Syd Price transported a gas can near the Lodge on the night of the fire; this was acquired during the checkpoint traffic stop. The outcome of the pretrial motion will have a direct bearing on the admissibility of that evidence. If the presider excludes the evidence of the gas can, attorneys and witnesses may not refer to or discuss them during the subsequent trial.

Legal issues are matters exclusive to the pretrial hearing. For trials in which there is no pretrial hearing, evidence of the can is admissible. This pretrial motion is the only allowable motion for the purposes of the competition.

The text affected by this motion can be found in the witness statements of Officer Jan Benares, Dana Lem, and Syd Price, as well as the fact situation, within brackets, e.g. [text].

ARGUMENTS

The defense will argue that the checkpoint stop was unconstitutional and that the detention and inspection of Syd Price's truck was an unreasonable search and seizure in violation of the Fourth Amendment. The defense will contend that the checkpoint's purpose was pretextual, which means that its primary purpose actually was to detect evidence of criminal wrongdoing and not to check licenses and registrations. To search under the blanket on Syd's truck, the officer needed probable cause to believe Syd had either violated a traffic law or had done some criminal act. The towel itself meant (1) that Officer Benares had no plain view of the gas can, and (2) that Syd had a reasonable expectation that what was under the blanket was private. If the purpose was not pretextual, the defense will argue that proper balancing of public interest against the invasiveness of the traffic stop will demonstrate the illegality of the profile used to justify the search of the truck and the seizure of the evidence of the gas can.

The prosecution will argue that the checkpoint was not pretextual, and that the gas can was in Officer Benares' plain view. Public safety was the primary purpose of the checkpoint; criminal detection was only the secondary purpose. This is not forbidden by the case law. Moreover, the prosecution will argue that the profile was not illegal, but (1) was a legitimate way to deter further vandalism and possible arson, and (2) was based on sufficiently neutral criteria pursuant to guidelines from the Mountainville Police Department. Consequently, the public interest and non-intrusive means used to advance that interest outweighed the minimal invasiveness of Officer Benares' inspection of the truck.

SOURCES

The sources for the pretrial motion arguments consist of excerpts from the U.S. Constitution, the California Constitution, the California Penal Code, edited court opinions, and the Mock Trial Fact Situation.

The U.S. Constitution, U.S. Supreme Court holdings, and California Supreme Court and Appellate Court holdings are all binding and must be followed by California trial courts. In developing arguments for this mock trial, both sides should compare or distinguish the facts in the cited cases from one another and from the facts in *People v. Price*.

LEGAL AUTHORITIES

Constitutional

U.S. Constitution, Amendment IV
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment XIV
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I
Section 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Statutory

California Penal Code, Section 450
Arson: Definitions

In this chapter, the following terms have the following meanings:
(a) "Structure" means any building, or commercial or public tent, bridge, tunnel, or powerplant.
(b) "Forest land" means any brush covered land, cut-over land, forest, grasslands, or woods.
(c) "Property" means real property or personal property, other than a structure or forest land.
…
(e) "Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.
…

California Penal Code, Section 451
Arson
A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.
…

Federal Cases:

1. *Katz v. United States*, 389 U.S. 347 (1967)

Facts: FBI agents attached an electronic listening device to the outside of a public phone booth in order to hear the defendant's end of a conversation in which the defendant transmitted gambling information in violation of a statute.

Issue: Did the Government's eavesdropping technique violate the privacy upon which the defendant relied, thus constituting a "search and seizure" within the meaning of the Fourth Amendment?

Holding: Yes. The Government's activities in electronically listening to and recording the defendant's words constituted a search and seizure requiring a warrant. The fact that the device did not physically penetrate the phone booth "can have no constitutional significance." Justice Harlan's concurring opinion established an important two-part inquiry to determine what protection the Fourth Amendment gives to people. First, has the person shown an actual (subjective) expectation of privacy in the object searched or seized? Second, does society view that expectation as reasonable? "[O]bjects, activities, or statements that [a person] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."

2. *Arizona v. Hicks*, 480 U.S. 321 (1987)

Facts: Investigating a shooting, police legally enter an apartment looking for weapons and the shooter. While inside, an officer spots a high-priced stereo system that seems out of place in the rundown apartment. The officer picks it up, jots down the serial number, puts it down, calls headquarters, and finds out that the stereo is stolen.

Issue: Did the officer's actions violate the Fourth Amendment?

Holding: Yes. The officer's actions come within the purview of the Fourth Amendment. The mere recording of the serial numbers did not constitute a "seizure" because it did not meaningfully interfere with respondent's possession of either the numbers or the stereo equipment. But moving the stereo system was a "search" separate and apart from the search that was the lawful objective of entering the apartment. The fact that the search uncovered nothing of great personal value to respondent is irrelevant. It was a search because the serial numbers were not in plain view, and the search was invalid because the policeman did not have probable cause to believe that the stereo equipment was stolen.
Facts: After a bullet had been fired through the defendant's floor, police entered to look for the shooter, other victims, and for weapons. The officers then noticed expensive stereo equipment, which they suspected was stolen. They moved some of the equipment to record the serial numbers, later discovering that the equipment was indeed stolen in an armed robbery.

3. *Whren v. United States*, 517 U.S. 806 (1996)

Facts: Police officers in a "high drug area" observed a car with "youthful occupants" at a stop sign. The car did not move for an "unusually long time" before it turned suddenly and drove off at an "unreasonable" speed. The officers stopped it and observed two plastic bags of what appeared to be crack cocaine. Illegal drugs were retrieved from the car.

Issue: Does the reasonableness of a traffic stop depend on the actual motivations of the individual police officers involved?

Holding: No. The temporary detention of a motorist upon probable cause that he has violated a traffic law does not violate the Fourth Amendment protection against unreasonable searches and seizures. This is true "even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective." Temporary detention of individuals during a traffic stop by law enforcement officers constitutes a "seizure" subject to the "reasonableness" requirement of the Fourth Amendment. An arrest for a traffic violation cannot be made invalid merely because it was a "pretext" for a search for illegal drugs. Ulterior motives do not strip law enforcement officers of their legal justification. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Absence of probable cause merits a balancing analysis, but "[t]he making of a traffic stop out of uniform…is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."

4. *Indianapolis v. Edmond*, 531 U.S. 32 (2000)

Facts: Police in Indianapolis operated a drug checkpoint in which they stopped a predetermined number of vehicles. When each vehicle was stopped, the officers told the driver that it was a drug checkpoint and asked the driver for license and registration. The officer conducted a plain view observation of the car while a narcotics-detection dog walked around the vehicle.

Issue: Is a traffic checkpoint reasonable when its primary purpose is indistinguishable from the interest in crime control?

Holding: No. The checkpoint is not reasonable when its primary purpose is indistinguishable from the general interest in crime control. The court has never approved of a checkpoint program whose primary purpose was to detect ordinary criminal activity, such as illegal drug trafficking. The only exception is when a seizure at a checkpoint results from an individualized suspicion. Otherwise, the court "cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." In this case, the court "[does] not limit the purposes that may justify a checkpoint program to any rigid set of categories…." Moreover, the court specifically did not "decide whether the State may establish a checkpoint program with the primary purpose of checking licenses…and a secondary purpose of interdicting narcotics."

5. *Texas v. Brown*, 460 U.S. 730 (1983)

Facts: At a routine driver's license checkpoint, a police officer asked the defendant for his license, shined a flashlight into the car, and saw a green balloon fall from the defendant's hand. Based on his experience, the officer suspected the balloon was full of narcotics. When the defendant failed to produce a license, the officer had him step out of the car. The officer inspected the balloon, which was revealed to contain heroin.

Issue: Can the evidence of the balloon be suppressed on the grounds that the officer's flashlight search and subsequent seizure violated the "plain view" exception to the Fourth Amendment's requirement of a warrant?

Holding: No. Plain-view is simply "an extension of whatever the prior justification for an officer's 'access to an object' may be," and makes the requirement of a warrant a "needless inconvenience" when the police have obtained first-hand perception of incriminating evidence. The officer's "action in shining his flashlight to illuminate the interior of [the defendant's] car trenched upon no right secured to the latter by the Fourth Amendment." In addition, the fact that the officer bent down at an angle to see what was inside the car "is irrelevant to Fourth Amendment analysis." There is no legitimate expectation of privacy "shielding that portion of the

interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." The officer had probable cause to believe that the balloon contained an illicit substance based on his prior experience. Moreover, the circumstances of the meeting between the defendant and the officer "give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." There is no indication in the record that the officers at the roadblock had more than a generalized expectation that some of the cars they would halt would contain narcotics.

6. *Brown v. Texas*, 443 U.S. 47 (1979)

Facts: A pedestrian was stopped for questioning by police because he looked suspicious in an area of El Paso, Texas, which was known for its high rate of drug traffic. He was arrested for refusing to identify himself.

Issue: Can law enforcement officers detain a person without a reasonable suspicion to believe that that person was engaged or had engaged in criminal conduct?

Holding: No. Police officers must have a reasonable suspicion of criminal conduct to detain a person. When the officers detained the defendant, they performed a seizure subject to the Fourth Amendment's reasonableness requirement. The reasonableness of seizures depends on a weighing of these factors: (1) the gravity of public interest served, (2) the degree to which the seizure advanced the public interest, and (3) the severity of the intrusion on individual liberty. A seizure must be based on specific, objective facts indicating that society's interests are served by the seizure, or it must be done pursuant to a plan using explicit, neutral limitations on police conduct. The police officer said the defendant "looked suspicious," but could not indicate any facts to support that conclusion. In fact, "none of the circumstances preceding the officers' detention of [the defendant] justified a reasonable suspicion that he was involved in criminal conduct." Such a reasonable suspicion would have to be based on "objective facts." The officer only wanted to learn the defendant's identity. Therefore, the balance tilts in favor of freedom from police interference.

7. *Delaware v. Prouse*, 440 U.S. 648 (1979)

Facts: A patrol officer stopped the defendant's car solely to check the driver's license and registration. The patrol officer characterized the stop as "routine" and not pursuant to any guidelines from his department. The officer then smelled marijuana smoke and seized the marijuana in plain view in the car.

Issue: Is it a reasonable seizure to stop an automobile for the purpose of checking the driver's license and registration where there is neither probable cause nor reasonable suspicion that the car is being driven contrary to any law, or that the driver has violated any law?

Holding: No. Except in situations where there is an articulable and reasonable suspicion that a driver is unlicensed or that an automobile is unregistered, stopping a driver and checking license and registration is unreasonable under the Fourth Amendment. Stopping an automobile and detaining its occupants is a "seizure" within the meaning of the Fourth and 14th Amendments. States have a vital interest in ensuring that only qualified drivers operate vehicles, and that their vehicles are fit for safe operation. "The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best." Without probable cause to believe that a driver has violated a traffic regulation or an "articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered," a patrol officer cannot decide to "spot check" any driver. Unless the driver is "otherwise subject to seizure for violations of the law," stopping to check the driver's license is equally unreasonable. Furthermore, a driver "does not lose all reasonable expectation of privacy

simply because the automobile and its use are subject to government regulation."

8. *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992)

Facts: Police officers stopped a woman and her 7 year-old son at a roadblock in Socorro, New Mexico, and told her that the purpose of the roadblock was to check her driver's license, vehicle registration, and proof of insurance. One officer checked these documents, and another officer walked a trained narcotics-detection dog around the defendant's vehicle. One hundred and twenty-six pounds of marijuana were found in the trunk of her car.

Issue: Can the primary reason for a roadblock be to check a vehicle for drugs under the pretext that the roadblock is to check driver's licenses and registrations?

Holding: No. " In determining whether a particular stop is, or is not pretextual, an 'objective analysis' of the facts and circumstances, as opposed to a 'subjective analysis' is the proper test." Thus, even if the police officer had testified that the primary purpose of the roadblock was to check for a driver's license, "such testimony would not in itself resolve the pretextual issue." The presence of the narcotics-detection canine revealed the underlying purpose of the drug checkpoint. A roadblock "purportedly established to check drivers' licenses could be conducted in such a way as to indicate its 'principal purpose' was to detect crimes unrelated to licensing," in which case it infringes the defendant's Fourth Amendment rights. The actual discovery of criminal activity cannot erase the taint of the pretextual stop.

***9. Reid v. Georgia*, 448 U.S. 438 (1980)**

Facts: The defendant and a companion carrying identical shoulder bags arrived at the airport in Atlanta, Georgia on a flight from Ft. Lauderdale, Florida. A DEA agent suspected the defendant of carrying illegal narcotics because he fit a "drug courier profile" and approached him outside the terminal asking for identification. The agent asked the defendant and companion to consent to a search of the shoulder bags. Although they agreed, the defendant then tried to flee. The bag contained cocaine.

Issue: Can evidence of the cocaine be suppressed because it was obtained as a result of a seizure done without reasonable and articulable suspicion?

Holding: Yes. The court has recognized that people can be detained briefly without probable cause only when there is a reasonable and articulable suspicion that the person seized is engaged in criminal activity. In this case, the agent based suspicion of wrongdoing on a somewhat informal "drug courier profile." This included the facts that the defendant (1) arrived from Ft. Lauderdale, a place of origin of cocaine sales; (2) arrived early in the morning; (3) appeared to hide the fact that he had a traveling companion; and (4) had no other luggage but the shoulder bag. The court concluded that this information could not amount to a reasonable suspicion, but could only amount to an "inchoate and unparticularized suspicion or 'hunch'".

State Cases:

10. *Ingersoll v. Palmer*, 43 Cal. 3d 1321 (1987)

Facts: In 1984, the California Attorney General authorized the Highway Patrol and police departments to use sobriety checkpoints to detect and apprehend drunk drivers. In a taxpayer lawsuit, motorists petitioned to challenge the constitutionality of the checkpoints.

Issue: Does the operation of sobriety checkpoints require individualized suspicion of wrongdoing to justify detention of motorists?

Holding: No. The California Supreme Court concluded that "[i]f the primary purpose of the stop here were to detect crime or gather evidence of crime…individualized suspicion of wrongdoing is required." Without that individualized suspicion, a detention at a roadblock must meet three criteria to be constitutional. First, it must be for a purpose other than a criminal investigation. Second, the gravity of the governmental interest and the degree to which that interest is advanced both must outweigh the government's intrusiveness on individual liberty in any given stop. Finally, the stop must be done "pursuant to a plan embodying neutral limitations on the conduct of individual officers." In this case, the primary purpose of the checkpoint was to promote public safety. Therefore, the stop was a part of a regulatory scheme and not a criminal investigation. Deterring drunk driving is an important governmental interest. That interest is reasonably advanced by the checkpoint even if it "may result in no arrests at all." The means of investigation were not intrusive since the officers at the checkpoint "had a good record of 'driving under the influence' (DUI) detection and arrest" and used specified neutral criteria.

11. *People v. Alvarez*, 14 Cal. 4th 155 (1996)

Facts: The defendant was wanted for homicide in California and was stopped at a routine license and registration checkpoint in Mississippi. With the officer's permission, the defendant pulled off the road to look for his license. Seeing that the defendant appeared drunk, the officer asked him exit his car for a sobriety test. The defendant refused and drove away. The police gave chase and apprehended the defendant. The murder weapon was discovered in the car.

Issue: Should the court suppress evidence of a defendant's criminal activity when the evidence is discovered at a vehicle checkpoint whose purpose is unrelated to that criminal activity?

Holding: No. The stop of a vehicle by a law enforcement officer is a reasonable seizure under the Fourth Amendment, "if it is made at a checkpoint for routine license and registration inspection of all passing vehicles." The stop of the defendant was a reasonable seizure inasmuch as it was made at the checkpoint for routine license and registration inspection of all passing vehicles. Following dicta∗ in *Delaware v. Prouse*, such a "roadblock-type stop" does not become unreasonable simply because it was established on the initiative of an officer in the field.

12. *People v. Valenzuela*, 74 Cal.App. 4th 1202 (1999)

Facts: A police officer had made numerous drug arrests at a local bar. One night, the officer observed the defendant enter the bar from a taxicab and reenter the taxicab's passenger seat after a few minutes. The officer followed the cab, stopped it, and asked to see the driver's cab license and registration. Then the officer asked and received consent to search the defendant, who had a bag of cocaine.

Issue: Can a police officer use a pretext of a license and registration check in order to search for illicit drugs during a traffic stop?

Holding: No. The stop of the cab was not based on any criminal violation. The officer admitted that he stopped the cab based on his knowledge of drug activity in the local bar. Because the cab was not stopped for a vehicular violation it is distinguishable from *Whren.* The stop of the taxicab was an unreasonable seizure and evidence resulting from it must be suppressed.

∗ Dictum is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel…but that is not essential to the decision." BLACK'S LAW DICTIONARY 189 (Pocket ed. 1996).

1

PROCEDURES FOR THE MOCK PRETRIAL MOTION HEARING

The following procedures and recommendations provide a format for the presentation of a mock pretrial motion in the local and state competitions, as well as for a classroom setting.

1. Ask your coordinator if your county will present pretrial arguments before every trial of each round. We urge coordinators to require a pretrial motion hearing in as many rounds as possible, both for its academic benefits and to prepare the winning team for state finals, where it will be a required part of the competition. Performances will be scored according to the criteria included in this packet.

2. Prior to the opening of the pretrial motion arguments, the judge will have read the pretrial materials provided in the case packet.

3. Be as organized as possible in your presentation. Provide clear arguments so the judge can follow and understand your line of reasoning.

4. Arguments should be well substantiated with references to any of the pretrial sources provided with the case materials and/or any common sense or social-interest judgments. Do not be afraid to use strong and persuasive language.

5. Use the facts of *People v. Price* in your argument. Compare them to facts of cases in the pretrial materials that support your position, or distinguish the facts from cases that contradict the conclusion you desire.

6. Review the legal arguments to assist you in formulating your own arguments.

7. Your conclusion should be a very short restatement of your strongest arguments.

8. NOTE: The only motion allowed for the purposes of the competition is the pretrial motion outlined in this case packet, pages 15-23.

WITNESS STATEMENT – Prosecution witness: Officer Jan Benares

My name is Jan Benares. I am 42 years old and I have been in the Mountainville Police Department since 1996. Prior to that, I worked 10 years for the Sacramento Police Department as a patrol officer and investigated over a hundred cases of arson.

On Friday, June 1, 2001, I received a call from the Ronnie Uderzo, construction superintendent at the Mountainville Ski Lodge, saying that there had been some vandalism at the Lodge. I proceeded there to investigate and found graffiti and some sugar poured into a truck's fuel tank. A message spray-painted on the truck and on the trailer said, "Let the Trees Live!" On June 12, I got a second call from Uderzo about more severe vandalism. When I arrived at this scene, it looked like vandals had smashed a couple of power generators and fuse boxes. They had also cut power cables in several places. There was more graffiti on the site trailer. Ronnie also informed me about the threatening phone call in which someone mentioned "burning" the Lodge. I informed my superiors about it.

On Thursday, July 5, Casey Ballard came up to me on Main Street. Casey told me that there were rumors going around that a group of Mountainville Community College students calling themselves the Earth Guerilla Order, or EGO, had claimed responsibility for the vandalism. I asked Casey for more information, but Casey declined to continue the interview.

On Saturday, July 7, my lieutenant in the Mountainville Police held a meeting at the station with all the officers. Another officer and I were assigned to administer the checkpoint that evening.

At the checkpoint, the other officer stopped every third car to check licenses and registrations. I positioned myself about 15 feet south of that point and about five feet from the road. I directed traffic and just added a police presence to the scene.

A line of about five cars was backed up at 8:30 p.m. At that time I noticed someone about college-age wearing a shirt that said "Defend Mother Earth" in a dark-blue pickup truck immediately behind the car stopped at the checkpoint. The truck looked like a make and model of Toyota from the mid-1980s. These factors fit the eco-terrorist profile, so I turned on my flashlight, walked toward the truck, and noticed a faded bumper sticker in the window, which read "Go Solar." I wrote a description of the truck including license plate number in the police log.

[I placed a hand on the bed rail of the truck to steady myself, and shined the light into the bed. I saw a toolbox, engine hoses, and other auto parts. After leaning further into the bed, I noticed a gas can under an opening in a towel. It was in plain view. It looked to be the size of a five-gallon plastic gas can, which I thought was a little odd. Ordinarily, people carry around one-gallon or two-gallon cans. I also wondered why it was under a towel as if hidden. I made a note in my log about the gas can.] I then waved the vehicle on.

At around 10:30 p.m., I received a call at the station from the Mountainville Fire Department that there was a fire at the Lodge. I immediately proceeded to the scene. Once the fire had been extinguished, I found a melted kitchen egg timer and a charred, exploded gas can, which in my opinion was evidence of a homemade, timer-activated fire starter designed to give the arsonist up to an hour to get away before the fire starts. I cordoned off the area.

On the morning of July 8, I received a phone call from Ronnie Uderzo. Ronnie had seen a dark-colored pickup truck matching a description of Price's truck parked near the Lodge at about 9:20 p.m. Ronnie also identified the first three characters in the license number of the truck which were "2WP." Based on this information, at 12:30 p.m. I went to the place Ronnie identified. There I found a pair of tire-tracks in the mud. I carefully made a plaster impression (also called a "moulage") of the tracks.

I called Alex Huffman to assist me with the investigation of the scene of the fire one more time. In doing so, we uncovered a shoeprint in an area of freshly laid cement adjacent to the burned structure. I then made a plaster moulage of the shoeprint. It was made by a size-10 hiking boot with a well-worn sole.

I suspected more eco-terrorism and visited Casey Ballard at home on Muir Drive on the morning of July 9. I asked Casey for more information about EGO. Casey admitted to involvement in the EGO group. Casey told me that Syd Price had discussed setting fire to the

Lodge and telephoned to talk about the fire. Casey gave me Syd's home address.

On that same morning, I cleaned the dirt off the tire moulage at the station's lab, and Alex Huffman and I went to Syd Price's home. There I saw Price's pickup truck parked on the dirt shoulder of the road in front of Price's house. This was public property so I just held the plaster moulage next to the tires, and with Alex Huffman's help made a visual comparison. Price's rear tire treads had the same wear as those on the moulage.

With the evidence of the tire match and Casey's and Ronnie's statements, I got a warrant on July 9 to search Syd Price's home and truck for evidence related to the arson at the Lodge. When I arrived at Price's home, I recognized Price as the same person I had seen at the checkpoint on July 7. In the house, I found a printout from an Internet source called "How to Set Fires with Timers and Wires." It described how to commit arson with a can of gas and a homemade egg-timer device. This was attached with a paperclip to a diagram of the Lodge's expansion and to a handwritten checklist on legal-size paper and dated July 2 that indicated "Task One – DONE! Task Two – DONE! Task Three—DONE! It's a Go!" These materials were folded inside a book on Price's desk. I also found a pair of size-10 hiking boots whose tread pattern matched the impression I took from the location of the arson. I did not notice, however, any concrete residue on the boots. [The gas can and towel I had seen the night before were no longer in the bed of the truck or anywhere in sight.]

Based on this evidence, I Mirandized Price and arrested Price for the arson of the Lodge.

WITNESS STATEMENT – Prosecution witness: Casey Ballard

My name is Casey Ballard, and I live in Mountainville at 369 Muir Drive. I am 20 years old and a full-time student at Mountainville Community College.

I first met Syd Price when we worked together in the campus ecology organization on the campaign to stop the ski lodge expansion. This organization mostly presented petitions against the Lodge to the city council as well as organized boycotts of the Lodge and protest rallies. I would say Syd and I were strongly against cutting down trees, so when Syd wanted to form a more militant group, I thought that was interesting.

A group of us first met at Syd's place on June 25th and called ourselves EGO. I brought up ideas for nonviolent civil disobedience, and most everyone seemed eager to plan that kind of thing. Then Syd said, "It would be a lot easier if the Lodge just didn't exist anymore at all." I asked Syd what that meant. Syd replied, "I think we should just burn it down and move on." Everyone laughed, but it was nervous laughter. I changed the subject but Syd kept bringing it up again. Then I heard others in the group talking more seriously with Syd about it, saying things like, "A fire's a good idea." I sarcastically told Syd about an Internet site that I had heard about which had how-to instructions on arson. Finally, the meeting ended, but did not seem to have accomplished anything.

The next week when we met, Syd showed us all the arson instructions downloaded from the Internet. I could not believe Syd actually got that information. That is when I realized that Syd might be really serious about the idea of setting a fire to the lodge. I stood up and said, "I don't want any part of this." Then I left before the meeting was over.

On Thursday, July 5, I saw Officer Benares on duty walking down on Main Street. I had a feeling something bad was going to happen at the Lodge. I stopped the officer and said that I had heard of a group of radical environmentalists at the college called "EGO" who were claiming responsibility for the vandalism I had read about. Benares started asking me more about it, and I guess I froze because I did not want the officer to wrongly suspect me of anything. I feel bad about it now, but I told the officer that I did not know who was in the group, just that I had heard some students on campus talking about it.

I did not hear from Syd for almost two weeks after that last meeting. I figured Syd resented me because I would not support Syd's more radical ideas. Then late in the morning on July 8, Syd called me to say, "How do you like those fireworks last night?" I actually did not know what that meant, because I had not yet heard there was a fire. Syd's voice sounded happy and gloating. Syd continued, "It sure beat July 4th, I'm proud to say." Then Syd hung up. Because I had gone to bed early the night before, I didn't hear about the arson until later that afternoon. I believe Syd's comments were a confession to the arson.

The next day, Officer Benares came by my home with more questions about EGO. Officer Benares told me to be on the level and not dodge around the facts. I was really nervous, but I told Officer Benares the truth. I described how Syd brought up arson at both of the EGO meetings, and how Syd showed us the Internet information about starting fires. I described Syd's truck. I also mentioned Syd's phone call from the day before about " fireworks." I was not surprised, however, that Syd went off the deep end.

WITNESS STATEMENT – Prosecution witness: Ronnie Uderzo

My name is Ronnie Uderzo, and I live with my family at 401 Brower Way in Peak City. I am 37 years old. I have worked as a construction superintendent in Peak City for six years. Basically, I oversee the foremen on a general building contractor's larger projects.

I was hired to work as the superintendent for the renovation and expansion of the Mountainville Ski Lodge in September, 2000. We began construction on the building itself soon thereafter. By the time of the fire, we had the foundation and the basic structure in place. We still needed to finish the roofing as well as to add glass, plumbing, electrical wiring, and all the fixtures. No trees had yet been cut down, because we had not yet started building the added recreation area or paving the expanded parking lot to accommodate the new Lodge facility. I was at the Lodge site almost daily, checking on its progress, helping revise plans, and directing the foremen and workers.

On June 1, I was shocked to find the graffiti and the damaged truck at the construction site. It really irked me because this kind of thing makes it more difficult to finish the job on schedule. I notified the police and the Lodge owner hired a security patrol company to check up on the Lodge on a regular basis, and especially at night. I had heard all about the tensions in town between the environmentalists and the pro-development people and I knew the job I was doing was not the most popular one in town. But I still could not believe it when on June 12, there was thousands of dollars worth of damage done again, with the smashed areas and window glass and generator, and the cut power cables. That kind of thing would set us back weeks while repair crews worked and more supplies were ordered. I was irate.

On that same day I received a disturbing phone call. It was not a voice I recognized, and whoever it was on the other end was obviously disguising their voice, making it sound very husky. The voice said, "There's a stiff price to pay for slaughtering trees, my friend. We'll never let you kill one tree, you butcher! Your lodge is going to burn!" Similar calls followed that week in which the caller continued to talk about "toasting" or "roasting" the Lodge.

On Saturday, July 7, I directed some workers to pour concrete in a portion of the site designated for a sidewalk. They poured the concrete around 4:00 p.m. I stayed late that day. I was in the trailer, double-checking the blueprints. We were a little behind schedule in the building process, and so I felt pressure to get everything in order when the workers showed up again on Monday. But it was also my eldest daughter's birthday that day. She was turning 15, and it was really important to her that I get home. Already I was late, and it would take me another hour to drive back down to Peak City. So I rushed out of the trailer and into my car.

I left the Lodge at 9:15 p.m. and drove down the long driveway toward Boulder Road. At about that time I noticed the back end of a truck parked off the side of the driveway among the trees, about 20 feet or so from where I was. As I drove past it, I stopped to look at it from my car. I was worried about the vandalism that had been done to the Lodge, and my first thought was that this could be a vandal. It was a mid-sized, dark-colored pickup truck, maybe black. I could see there was a sticker in the window but I could not make out what it said. The license plate number began with 2WP, that's all I could remember. I then wondered if it might be out of gas. But folks often pull over to the side of the road when there's car trouble, though I have never seen them drive into the trees. I did not see anybody in the truck or near it, and I figured the security patrol would take care of it whenever they showed up. I decided not to give it much thought and just drove on home.

Around 10:30 a.m. the next day, I listened to the local radio news and learned about the fire that had nearly burned down the Lodge. When the announcer said it must have started around 10:00 p.m., I immediately remembered the truck I had seen, and I had a sinking feeling that whoever had that truck could have set the fire.

At that time I called the Mountainville Police Department and talked with Officer Benares. I told the officer about the truck I had seen. I described the truck and mentioned the part of the license plate number. I told the officer exactly where I had seen it off the road.

WITNESS STATEMENT – Prosecution witness: Alex Huffman

My name is Alex Huffman. I have lived in Peak City all my life. I am a retired Sergeant in charge of the Crime-scene Unit for the Placer County Sheriff's Office where I worked for 23 years. I received my B.S. in Criminology, specializing in criminalistics, from Peak City University in 1970. I am certified by the National Association of Investigators as a Senior Crime-scene Analyst. In 1993, I founded my own private investigations firm, Huffman and Associates, and frequently serve as a crime-scene consultant to various law enforcement agencies. Since 1995, I have been an instructor at Peak City University in crime-scene investigations and evidence processing.

In my many years of experience in the field, I have investigated thousands of crime-scenes, both as my primary job and as a consultant. Officer Jan Benares called me in as a consultant to help the investigation of this arson case on July 8. It was the first day off I had in a long time, but I was interested and drove to Mountainville to assist. I arrived at around 2:00 p.m. on that Sunday. I always approach a crime-scene carefully so as not to disturb any evidence. The first thing I noticed was that Officer Benares had cordoned off the area and had posted a lookout officer to guard the road up to the Lodge. According to the officer, no one had entered the crime-scene since the fire had been put out the night before. I mainly observed as Officer Benares searched the area. Officer Benares had already uncovered the evidence of the timer device the night before. I was there when Officer Benares discovered the shoeprint.

The process of making a moulage, or impression of a footprint is simple but delicate. The procedure is as follows. Talcum powder must be lightly sprinkled into the footprint. A form like a big shoe-sized cookie cutter must then be placed around the print. The plaster mixture must be mixed properly in a big, zip-lock plastic bag, and then it must be poured into the impression. Usually, some reinforcement material like pieces of wire must be added to the plaster as it is poured in. Officer Benares followed the moulage procedure.

It is true that dental stone is the material most commonly used these days instead of plaster of paris. However, plaster worked fine for countless years of criminal investigation beforehand. Besides, many law-enforcement agencies still use plaster either when they run out of dental stone or are on a tight budget. The point is plaster is still effective when used skillfully as Officer Benares did.

I played a part in the crime lab analysis on the following day, July 9. I examined the tire-track moulage taken from the place where Uderzo saw the truck. It positively matches the treads on the rear tires of Syd Price's pickup. Every tire has what are called "elements," which are small designs repeated over the entire surface of the tire tread. High quality tires have as many as nine elements, and Syd Price's tire tread had seven. The moulage taken by Officer Benares revealed seven elements as well. In addition, each tire wears differently after some use, revealing such factors as axle alignment on the automobile and debris wedged into the grooves on the tire tread. The wear on Syd Price's rear tires matched the wear revealed in the moulage.

The moulage of the footprint found at the site came from a size-10 hiking boot that matched the same size and make as Syd Price's boots. In fact, the manufacturer's logo was still visible in the footprint in the cement, which was the same logo as that on Syd's boot. Like tire treads, boots wear differently on different people according to the way they walk and what they walk on. It is not as unique as a fingerprint, but it is very close. Here, the wear on Syd's boot matched the wear revealed in Officer Benares' moulage impression. Any concrete residue on the boots could easily have been washed off.

The footprint had to be made sometime on Saturday night, on July 7. The concrete used nowadays usually has a high ammonia content to allow fast drying. It is also known as "quick-dry" concrete. It would have most likely been dry about eight hours or so after it was poured, but would still have been relatively soft enough for a boot impression six hours after it was poured.

It is my expert opinion that the tire-track and shoeprint belong to Syd Price.

WITNESS STATEMENT – Defense witness: Syd Price

My name is Syd Price. I am 19 years old and I live with my parents at 1968 Boulder Road in Mountainville. I have always lived in Mountainville, and I love the outdoors. Since I was a kid, I have hiked almost every week in areas on the mountain and around the Lodge. I have

spent many winters skiing with my family at the Lodge, as well. I knew it had been closed for a few weeks during the construction and renovation.

In recent years, I have been more interested in environmental conservation and activism. Some friends and I were in a campus ecology group that was opposed to the expansion of the Lodge. A few of us formed our own group as a kind of joke called the Earth Guerrilla Order, just to make activism more fun. We had two EGO meetings, on June 25 and on July 2. The group discussed nonviolent, direct actions such as sit-ins and chaining ourselves to trees to stop the expansion.

I might have joked about setting a fire. But I knew as much as anybody there that a fire would endanger the trees, which were what we wanted to save in the first place. Any talk of arson was done in jest, but Casey would just look at me with a straight face and say it was a "good idea." As a matter of fact, Casey had always complained that the group was not serious enough. Casey also said, "Let me lead the next meeting." But no one else in the group really liked Casey, and we certainly did not want any specific leader.

I could not take too much of Casey's stubbornness and overly serious attitude. In fact, Casey was a real downer to be around. Casey spoke out against every suggestion I made to the group even if it was something trivial like what time to meet. Casey wanted to control EGO no matter what the rest of us thought. It always seemed that Casey was power-mad, because Casey had always talked about taking revenge against the Lodge and making a statement to the world.

Casey also told me about the eco-terrorist website where I could find information about how to set fires. Casey knew I was writing a paper for the class called Contemporary Political Movements. Around June 4, during the first week of class, I chose radical environmentalism for my research topic.

During the meeting on July 2, Casey just sat quietly. I told the others about this paper I was writing. I showed them all the crazy downloaded stuff I had gotten from the Internet about making fires and explained that this was the extreme end of radical environmentalism. We laughed some more about it. I guess Casey did not think it was funny, because Casey then left without a word. We did not schedule another EGO meeting after the second meeting, since everyone was busy and EGO was only half-serious anyway. I guess we did not get anything done like I had hoped.

On July 7, around 8:30 p.m., I approached the checkpoint on Boulder Road. I was not worried because my Toyota pickup truck was in good condition, because I work as an assistant auto mechanic part-time and fix the truck myself. At the checkpoint, I saw an officer check every third car in the line of cars ahead. When I was immediately behind the car that was stopped, I was surprised to see Officer Benares turn on a flashlight and look at my truck. I saw the officer stare at my T-shirt, which said "Defend Mother Earth" next to a picture of a globe as well as glance at my window sticker. I was annoyed because Mountainville cops have given me funny looks for years. I admit I am political, and I definitely do not conform, but since when is that a crime?

[I do not remember having a gas can in the bed of my truck on July 7. But bringing fuel to cars stranded on the roads and highways near Mountainville was often part of my job, so a gas can back there is not surprising. I often had to drive out on the highway in that same pickup to assist disabled cars, and having gas readily available is part of that task.] After the car ahead of me proceeded, I was waved through the checkpoint.

I got home where my friend Sandy was waiting out front for me. My parents were out of town at the time. We studied for a while. I was really engrossed in the textbook, and I think Sandy dozed off. I must have been in that chair reading until about 10:00 p.m. when Sandy awoke. Then I made us some coffee and we studied for a couple of hours more. I never left the house.

The next morning, I thought about trying to schedule another EGO meeting. I called Casey about it. Casey was really gruff with me on the phone. When I tried to make some small talk about the college's July 4th fireworks from a few days before, Casey did not respond. It seemed Casey just wanted to hang up. I felt sorry for Casey because, in a way, I was trying to make amends. Casey is just always angry, I guess.

I was shocked to learn about the fire later that day. All the downloaded material and the checklist Officer Benares retrieved from my house was related to the research paper I was writing. That is the only reason I had that stuff. I download all sorts of stuff from the Internet. I was using the checklist to keep track of my progress on the research paper. Also, I had a diagram of the lodge because it was a current example of eco-terrorism.

WITNESS STATEMENT – Defense witness: Sandy Lopez

My name is Sandy Lopez. I am 19 years old and I live in Mountainville. I am a full-time student at Mountainville Community College.

I have known Syd Price since January 2001 when I joined the campus ecology organization in the campaign to stop the ski lodge expansion. Syd and Casey were very dedicated to environmentalism. When the two of them wanted to start a direct action group called EGO, I was not interested at first. But I took Contemporary Political Movements at the college, and I decided to get involved with the group.

We had a meeting at Syd's house on June 25. The group discussed nonviolent direct actions such as sit-ins in front of the Lodge or at city council meetings. Syd brought up arson jokingly, and I laughed right along with everybody. Casey seemed to take it more seriously, though. I think Casey was jealous of Syd because Syd really has a way with words. Syd is a very persuasive speaker, and we all basically felt that Syd should be the leader of the group. During that first meeting, Casey told Syd about a website with some eco-terrorist information. I do not know why Casey did that, but I assumed it was for Syd's term paper.

During the second meeting, Casey seemed to get fed up with us or something and halfway through said, "I've had enough of this." Before I knew it, Casey was gone. That was too bad because Casey is a really smart person and maybe could have gotten us to be more serious.

On July 7, I went to meet Syd at Syd's house to study for our exam in Contemporary Political Movements. I drove through the police checkpoint and arrived there at about 8:20 p.m. I waited in my car, and I remember Syd showing up a little while after 8:30 or so. Syd seemed irritated and told me about the checkpoint. Syd was sick and tired of police harassment and said so.

We began studying right away. Syd sat in a large chair across the room from me. Syd was not a good study partner. Syd just sat quietly reading the whole time and did not say much, which is unusual for Syd. I started feeling sleepy because I had worked all day at the local movie theater and had been up late the night before. I looked at the clock in the room, which said 8:45 p.m. Just after that I fell asleep. When I woke up, the clock said it was a little after 10:00 p.m. Syd was still sitting in that chair, reading, but had started brewing some coffee. Syd was also more talkative and we studied for hours after that. I got an "A" on that exam later.

I took Route 80 back to my home in Mountainville from Syd's house and so did not go past the Lodge. I was shocked the next day to hear about the fire. It happened while Syd and I were studying just a few miles away and that freaked me out.

WITNESS STATEMENT – Defense witness: Dana Lem

My name is Dana Lem. I am the owner of Dana's Auto Repair in Mountainville. I have had this business for 20 years. I am 55 years old.

Syd Price is an assistant auto mechanic in my shop and has been for almost two years. First, let me say that Syd is a great worker and model employee. Syd has never been late to work even during final exams when I know Syd is stressed. I know this because Syd talks about school all the time and does homework during breaks. I have two other full-time mechanics and another apprentice who work there and we all like to listen to Syd comment on current events.

I am pretty conservative and I must admit I was not at all bothered by the proposed ski lodge expansion. I thought it would have been good for Mountainville's tourist revenue. But Syd changed my mind about that. Syd impressed upon me the importance of preservation of the trees and Mountainville's natural beauty. Syd especially liked this summer session class about political movements. Syd was writing about "radical environmentalists" and explained to me that it was very self-defeating to go around blowing up dams and logging companies. Syd did not believe in violence.

Syd spoke passionately and was very convincing in discussing the nonviolent passive resistance philosophy of Martin Luther King Jr., Cesar Chavez, and Gandhi. Syd said, "I think people can protect the forests using their methods." I said to Syd, "You should be in politics someday." I remember Syd replied, "When I finish college I think I'd like to run for city council and hopefully do some good for this town."

On July 7, Syd worked until 7:30 p.m. [Syd might have had a gas can on that particular evening. Once in a while I have Syd take a gas can in case I need to call Syd to help a stranded driver somewhere on Boulder Road or out Highway 80. Anyway, employees who are as trustworthy as Syd can borrow some tools from the shop, including gas cans, to work on cars at home anytime they want. There are a lot of gas cans around the shop. I can never tell if one is missing or not.]

WITNESS STATEMENT – Defense witness: Professor E.J. Arnold

My name is E.J. Arnold, and I have been Associate Professor for the Criminal Justice Department at Eastern California University for 10 years. I direct the masters program for forensics in that department. Before that, I received my B.S. in chemistry in 1983 from Peak City University and my M.S. in forensic science in 1985 from Eastern California University with a concentration in advanced investigation. I earned my J.D. from Superior Law School in 1988. I worked for three years as a deputy district attorney in Sacramento County before joining the faculty of the masters program in 1991. I have written many articles for professional and academic journals on the subject of crime-scene investigations.

There is a basic series of steps law enforcement officers need to take when investigating a crime scene. Generally speaking, these are securing the scene, searching the scene, photographing the scene, and collecting evidence. Mistakes made at any one of these stages can adversely affect all the following stages. It appears that Benares searched and photographed the scene properly. But I am hesitant to verify Benares methods of security and collection. I would like to recount each of the pertinent stages for the evidence Officer Benares collected regarding the tire-track and the shoeprint.

The area of the tire-track was not secured from the night of the fire on July 7 at approximately 9:15 p.m. when Ronnie Uderzo saw the truck until 12:30 p.m. on July 8 when Officer Jan Benares made the impression. It is possible that the tracks could have been contaminated with other objects.

The cast ("moulage") of the tire-tracks made by Officer Benares has a high probability of being flawed. Officer Benares used plaster of paris to make the moulage, which was an acceptable technique many years ago. Nowadays, dental stone is the standard material for making such impressions. It is the same substance dentists use to make molds of our teeth, and it is perfect for tire-track and shoeprint evidence gathering.

For plaster casts, 15 ounces of water must be added for every five pounds of plaster. These measurements must be accurate. If the plaster is too moist, it takes much longer to dry and can be distorted slightly if handled. I examined the cast and, in my professional judgment, Officer Benares made the mistake of adding too much water. Often mud or soil will adhere to the cast when it is lifted from the ground, and it seems clear that Officer Benares cleaned this cast too soon, believing it to be dry enough. Although it might have felt solid, it should have air-dried for 48 hours before cleaning. I believe the plaster cast of the tire's treads is not reliable. It appears to be damaged by an overly vigorous cleaning with water.

As for the shoeprint, similar problems arise that make me doubt its accuracy and authenticity. First, I am not sure why Officer Benares, experienced working with crime-scenes, waited until daylight to closely inspect the scene. One of the major concerns we forensic scientists have about crime-scene analysis, and which I have written extensively about, is authenticity of the evidence. Investigations must be done promptly and thoroughly in a controlled environment. It is a science, after all. The more time that passes between the crime and the investigation, the more variables are added to the situation, which allow scientists to ask whether the evidence was altered. The lag in time might mean valuable evidence was lost or changed.

Officer Benares has indicated that the area where the print was found was cordoned off, which is an important part of the investigation. However, the guard was watching the road but not necessarily for hikers who may have entered the scene furtively. Teenagers are especially curious to enter crime-scenes and perhaps tamper with evidence. In addition, Alex Huffman's investigation could have contaminated the scene.

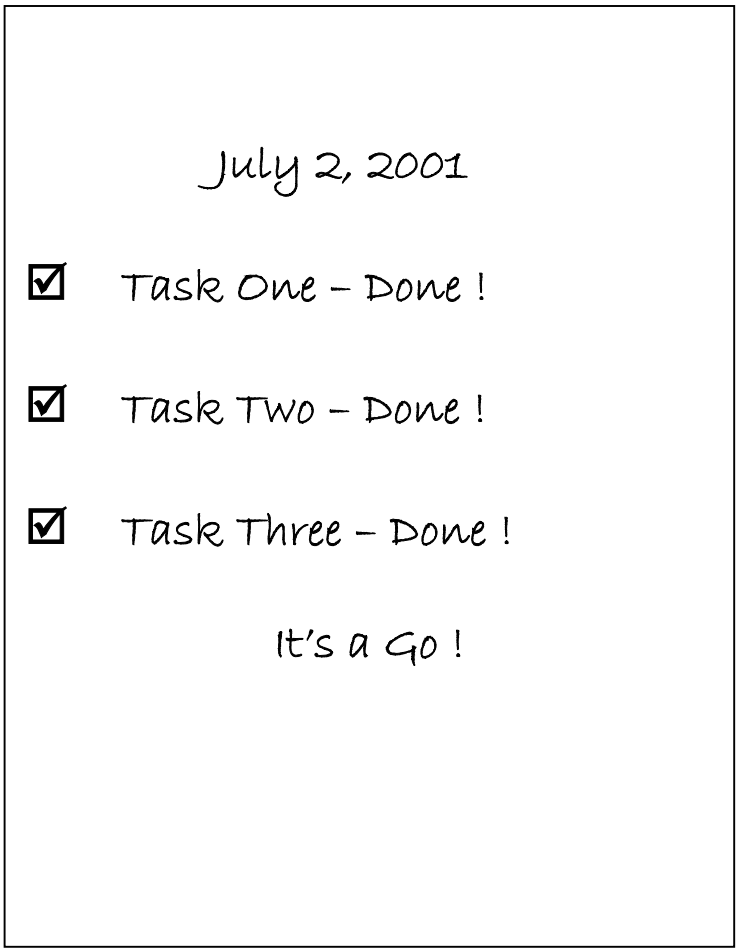
The print could also have been made much more recently than Benares assumed. Usually, concrete has to set for at least 24 hours before we can consider it to be thoroughly dried, or "cured." The workers poured the concrete during the afternoon of July 7. It could have been moist enough for anyone at the fire scene with the firefighters to leave a faint print there. Or Huffman could have left a faint print on July 8. Huffman wears a size-10 shoe and could have had on hiking boots at the time. Many people living in Mountainville are adventurers and outdoors people, most of whom probably wear hiking boots. And though the tread in the

moulage may match Syd's boots, no trace of cement was found on Syd's boots at the time of the arrest on July 9.

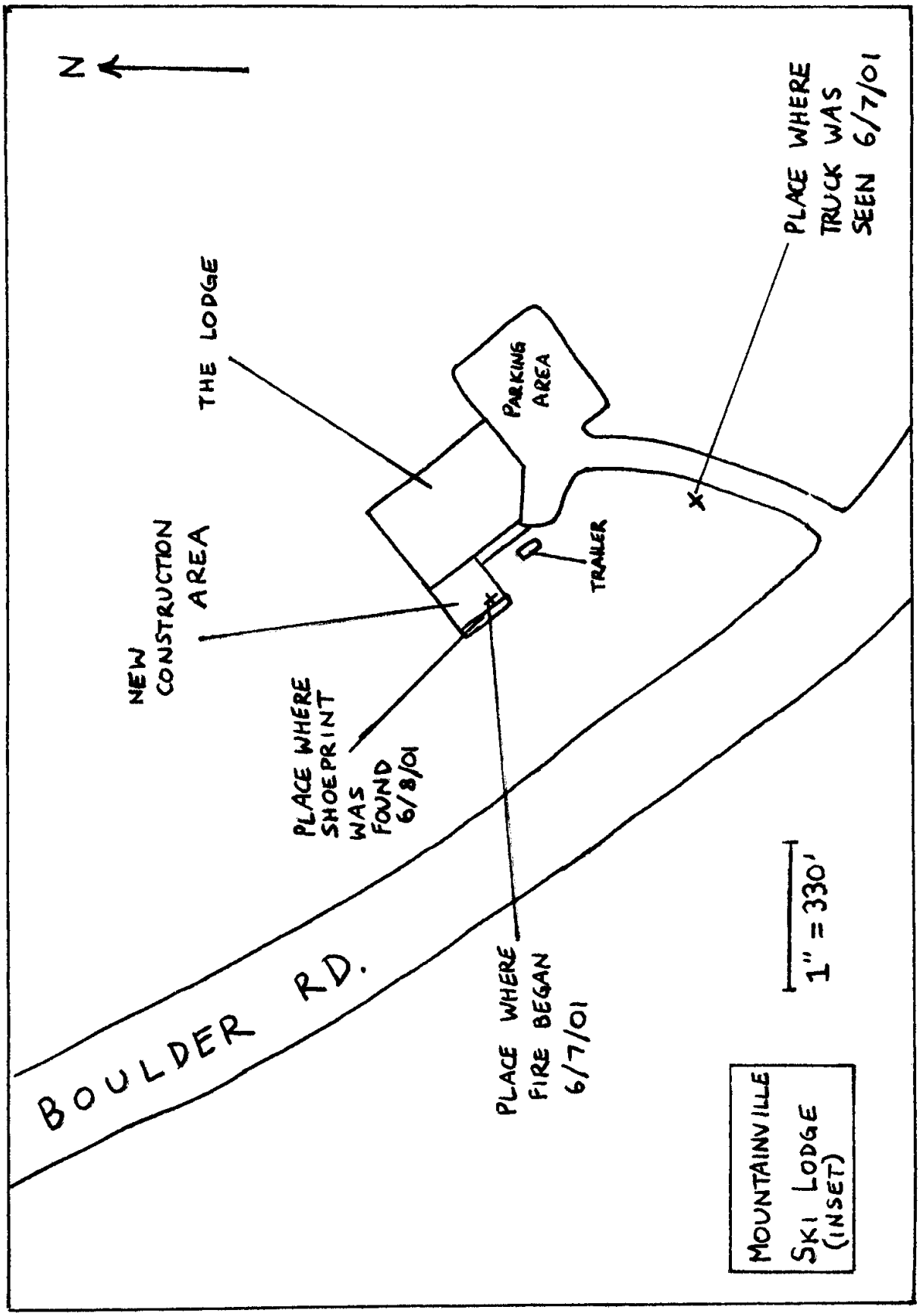
I also disagree with Huffman that the print was all that clear to begin with. The so-called "logo" impression that Huffman alleges appeared in the footprint is too vague. I cannot say with any scientific certainty that that is the manufacturer's logo.

Therefore, in my expert opinion, Officer Benares' methods of gathering evidence of the tire-tracks and shoeprint were flawed. They do not conclusively demonstrate that the shoeprint and tire track belong to Syd Price.

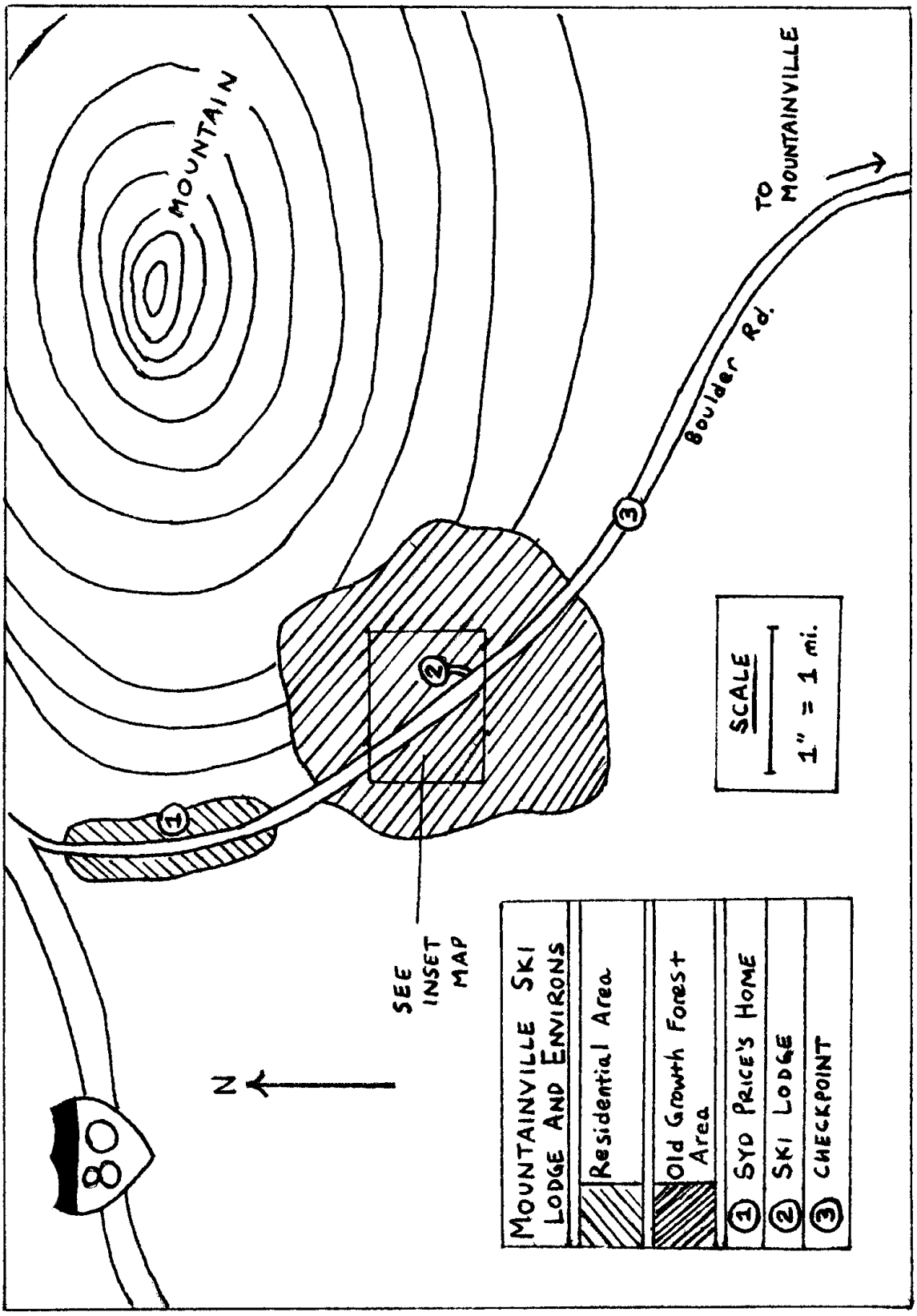
OFFICIAL DIAGRAM
CHECKLIST WRITTEN BY SYD PRICE



OFFICIAL DIAGRAM
MOUNTAINVILLE SKI LODGE



OFFICIAL DIAGRAM
MOUNTAINVILLE SKI LODGE AND ENVIRONS



THE FORM AND SUBSTANCE OF A TRIAL

The Elements of a Criminal Offense

The penal (or criminal) code generally defines two aspects of every crime: the physical aspect and the mental aspect. Most crimes specify some physical act, such as firing a gun in a crowded room, and a guilty, or **culpable**, mental state. The intent to commit a crime and a reckless disregard for the consequences of one's actions are examples of a culpable mental state. Bad thoughts alone, though, are not enough. A crime requires the union of thought and action.

The mental state requirement prevents the conviction of an insane person. Such a person cannot form **criminal intent** and should receive psychological treatment rather than punishment. Also, a defendant may justify her/his actions by showing a lack of criminal intent. For instance, the crime of burglary has two elements: (1) breaking and entering (2) with the intent to steal. A person breaking into a burning house to rescue a baby has not committed a burglary.

The Presumption of Innocence

Our criminal justice system is based on the premise that allowing a guilty person to go free is better than putting an innocent person behind bars. For this reason, defendants are presumed innocent. This means that the prosecution bears a heavy burden of proof; the prosecution must convince the judge or jury of guilt beyond a **reasonable doubt**.

The Concept of Reasonable Doubt

Despite its use in every criminal trial, the term "reasonable doubt" is very hard to define. The concept of reasonable doubt lies somewhere between probability of guilt and a lingering possible doubt of guilt. A defendant may be found guilty "beyond a reasonable doubt" even though a possible doubt remains in the mind of the judge or juror. Conversely, triers of fact might return a verdict of not guilty while still believing that the defendant probably committed the crime. Reasonable doubt exists unless the trier of fact can say that she/he has an abiding conviction, to a moral certainty, of the truth of the charge.

Jurors must often reach verdicts despite contradictory evidence. Two witnesses might give different accounts of the same event. Sometimes a single witness will give a different account of the same event at different times. Such inconsistencies often result from human fallibility rather than intentional lying. The trier of fact (in the Mock Trial competition, the judge) applies her/his own best judgment to the evaluation of inconsistent testimony.

A guilty verdict may be based upon circumstantial (indirect) evidence. However, if there are two reasonable interpretations of a piece of circumstantial evidence, one pointing toward guilt of the defendant and another pointing toward innocence of the defendant, the trier of fact is required to accept the interpretation that points toward the defendant's innocence. On the other hand, if a piece of circumstantial evidence is subject to two interpretations, one reasonable and one unreasonable, the trier of fact must accept the reasonable interpretation even if it points toward the defendant's guilt. It is up to the trier of fact to decide whether an interpretation is reasonable or unreasonable.

ROLE DESCRIPTIONS

ATTORNEYS

The **pretrial motion attorney** presents the oral argument for (or against) the motion brought by the defense. You will present your position and answer questions by the judge, as well as try to refute the opposing attorney's arguments in your rebuttal.

Trial attorneys control the presentation of evidence at trial and argue the merits of their side of the case. They do not themselves supply information about the alleged criminal activity. Instead, they introduce evidence and question witnesses to bring out the full story.

The **prosecutor** presents the case for the state against the defendant(s). By questioning witnesses, you will try to convince the judge or jury (juries are **not** used at state finals) that the defendant(s) is guilty beyond a reasonable doubt. You will want to suggest a motive for the crime and will try to refute any defense alibis.

The **defense attorney** presents the case for the defendant(s). You will offer your own witnesses to present your client's version of the facts. You may undermine the prosecution's case by showing that the prosecution witnesses are not dependable or that their testimony makes no sense or is seriously inconsistent.

Trial attorneys will:

- Conduct direct examination.
- Conduct cross-examination.
- Conduct re-direct examination, if necessary.
- Make appropriate objections. Please note Rule Section IV, #10:
  > "Only the direct and cross-examination attorneys for a particular witness may make objections during that testimony."
- Conduct the necessary research and be prepared to act as a substitute for any other attorneys.
- Make opening statements and closing arguments.

Each student attorney should take an active role in some part of the trial.

WITNESSES

You will supply the facts in the case. As a witness, the official source of your testimony, or Record, is comprised of your witness statement, all stipulations and exhibits, and any portion of the Fact Situation of which you reasonably would have knowledge. The Fact Situation is a set of indisputable facts that all witnesses and attorneys may refer to and draw reasonable inferences from. The witness statements contained in the packet should be viewed as signed statements made to the police by the witnesses as identified.

You may testify to facts stated in or reasonably inferred from your Record. If an attorney asks you a question, and there is no answer to it in your official testimony, you can choose how to answer it. You can either reply, "I don't know" or "I can't remember," or you can infer an answer from the facts you do officially know. Inferences are only allowed if they are *reasonable* (see Rule Section V). Your inference cannot contradict your official testimony, or else **you can be impeached** using the procedures outlined in this packet. Practicing your testimony with your attorney coach and your team will help you to fill in any gaps in the official materials.

It is the responsibility of the attorneys to make the appropriate objections when witnesses are asked to testify about something that is not generally known or that cannot be reasonably inferred from the fact situation or a signed witness statement.

COURT CLERK, COURT BAILIFF, UNOFFICIAL TIMER

We recommend that you provide two separate people for the roles of clerk and bailiff, but if you assign only one, then that person **must** be prepared to perform as clerk or bailiff in any given trial. As outlined in the rules, the unofficial timer may also be a defense attorney, the bailiff, or the defense team's clerk.

The clerk and bailiff have individual scores to reflect their contributions to the trial proceedings. This does NOT mean that clerks and bailiffs should try to attract attention to themselves; rather, scoring will be based on how professionally and responsibly they perform their respective duties as officers of the court.

The court clerk and the bailiff aid the judge in conducting the trial. In an actual trial, the court clerk calls the court to order and swears in the witnesses to tell the truth. The bailiff watches over the defendant to protect the security of the courtroom. For the purpose of the competition, the duties described below are assigned to the roles of clerk and bailiff.

Before each round of competition, the court clerks, bailiffs, and unofficial timers may meet with a competition staff person at the courthouse about 15 minutes before the trial begins. At this time, any questions about their duties will be answered and time sheets will be available for distribution. **Prosecution teams will be expected to provide the clerk for the trial; defense teams are to provide the bailiff.**

Duties of the Court Clerk
When the judge arrives in the courtroom, introduce yourself and explain that you will assist as the court clerk.

In the Mock Trial competition, the court clerk's major duty is to time the trial. **You are responsible for bringing a stopwatch to the trial. Please be sure to practice with it and know how to use it when you come to the trials.**

An experienced timer (clerk) is critical to the success of a trial.

INTERRUPTIONS IN THE PRESENTATIONS DO NOT COUNT AS TIME. For direct, cross and re-direct examination, record only time spent by attorneys asking questions and witnesses answering them. Do not include time when:

- witnesses are called to the stand.
- attorneys are making objections.
- judges are questioning attorneys or witnesses or offering their observations.

When a team has two minutes remaining in a category, call out "Two"; when one minute remains, call out "One." Always speak loud enough for everyone to hear you. When time for a category has run out, announce "Time!" and **insist the students stop**. There is to be **no allowance for overtime under any circumstance**. This will be the procedure adhered to at the state finals. After each witness has completed her/his testimony, mark down the exact time on the time sheet. **Do not round off the time.**

Duties of the Bailiff
When the judge arrives in the courtroom, introduce yourself and explain that you will assist as the court bailiff.

In the Mock Trial Competition, the bailiff's major duties are to call the court to order and to swear in witnesses. Please use the language below. When the judge has announced that the trial shall begin, say:

"All rise, Superior Court of the State of California, County of_____, Department _____, Judge _____ presiding, is now in session. Please be seated and come to order."

When you have brought a witness to testify, you must swear in the witness as follows:

"Do you solemnly affirm that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth?"

In addition, the bailiff is responsible for bringing to trial a copy of the "Rules of Competition." In the event that a question arises and the judge needs further clarification, the bailiff is to provide this copy to the judge.

Duties of the Unofficial Timer

One defense attorney at the counsel table, the bailiff, or the defense team's clerk may serve as an unofficial timer. This unofficial timer must be identified before the trial begins and may check time with the clerk twice during the pretrial (once during the defense argument and once during the prosecution argument) and twice during the trial (once during the prosecution's case-in-chief and once during the presentation of the defense's case).

Any objections to the clerk's official time must be made by this unofficial timer during the trial, before the verdict is rendered. The judge shall determine if there has been a rule violation and whether to accept the clerk's time or make a time adjustment. Only official team members in the above-stated roles may serve as unofficial timers.

To conduct a time check, request one from the presider and ask the official timekeeper how much time she/he has recorded in every completed category for both teams. Compare the times with your records. If the times differ significantly, notify the presider and ask for a ruling as to the time remaining. If the presider approves your request, consult with the attorneys and determine if you want to add or subtract time in any category. If the judge does not allow a consultation, you may make any requests for adjustments. You may use the following sample questions and statements:

"Your honor, before bringing the next witness, may I compare time records with the official timekeeper?"

"Your honor, there is a discrepancy between my records and those of the official timekeeper. May I consult with the attorneys on my team before requesting a ruling from the court?"

"Your honor, we respectfully request that ___ minutes/seconds be subtracted from the prosecution's (direct examination/cross examination/etc.)."

"Your honor, we respectfully request that ___ minutes/seconds be added to the defense (direct examination/cross examination/etc.)."

Be sure not to interrupt the trial for small time differences; your team should determine in advance a minimum time discrepancy to justify interrupting the trial. Be prepared to show your records and defend your requests.

TEAM MANAGER

Your team may also select a member to serve as **team manager**. Any team member, regardless of her/his official Mock Trial role, may serve as team manager. As a manager, she/he should be responsible for keeping a list of phone numbers of all team members and ensuring that everyone is informed of the schedule of meetings. In case of illness or absence, the manager should also keep a record of all witness testimony and a copy of all attorney notes so that another team member may fill in if necessary.

PROCEDURES FOR PRESENTING A MOCK TRIAL CASE

Introduction of Physical Evidence
Attorneys may introduce physical exhibits, if any are listed under the heading "Evidence," provided that the objects correspond to the description given in the case materials. Below are the steps to follow when introducing physical evidence (maps, diagrams, etc.). All items are presented prior to trial.

1. Present the item to an attorney for the opposing team prior to trial. If that attorney objects to use of the item, the judge will rule whether it fits the official description.

2. When you first wish to introduce the item during trial, request permission from the judge: "Your honor, I ask that this item be marked for identification as Exhibit # ___."

3. Show the item to the witness on the stand. Ask the witness if she/he recognizes the item. If the witness does, ask her/him to explain it or answer questions about it. (Make sure that you show the item to the witness; don't just point!)

4. When you finish using the item, give it to the judge to examine and hold until needed again by you or another attorney.

Moving the Item Into Evidence
Exhibits must be introduced into evidence if attorneys wish the court to consider the items themselves as evidence, not just the testimony about the exhibits. Attorneys must ask to move the item into evidence at the end of the witness examination.

1. "Your honor, I ask that this item (describe) be moved into evidence as People's (or Defendant's) Exhibit #___, and request that the court so admit it."

2. At this point, opposing counsel may make any proper objections she/he may have.

3. The judge will then rule on whether the item may be admitted into evidence.

The Opening Statement
The opening statement outlines the case as you intend to present it. The prosecution delivers the first opening statement. A defense attorney may follow immediately or delay the opening statement until the prosecution has finished presenting its witnesses. A good opening statement should:

- Explain what you plan to prove and how you will prove it.
- Present the events of the case in an orderly sequence that is easy to understand.
- Suggest a motive or emphasize a lack of motive for the crime.

Begin your statement with a formal address to the judge:
"Your honor, my name is _____ (full name), the prosecutor representing the people of the state of California in this action;" or
"Your honor, my name is _____ (full name), counsel for _____ (defendant) in this action."

Proper phrasing includes:
"The evidence will indicate that..."
"The facts will show…"
"Witness _____ (full name) will be called to tell…"
"The defendant will testify that . . ."

Direct Examination

Attorneys conduct direct examination of their own witnesses to bring out the facts of the case. Direct examination should:

- Call for answers based on information provided in the case materials.
- Reveal all of the facts favorable to your position.
- Ask the witness to tell the story rather than using leading questions, which call for "yes" or "no" answers. (An opposing attorney may object to the use of leading questions on direct examination. See "Leading Questions," page 52.)
- Make the witness seem believable.
- Keep the witness from rambling about unimportant matters.

Call for the witness with a formal request:
"Your honor, I would like to call _____ (name of witness) to the stand."

The witness will then be sworn in before testifying.

After the witness swears to tell the truth, you may wish to ask some introductory questions to make the witness feel comfortable. Appropriate inquiries include:

- The witness's name.
- Length of residence or present employment, if this information helps to establish the witness's credibility.
- Further questions about professional qualifications, if you wish to qualify the witness as an expert.

Examples of proper questions on direct examination:
"Could you please tell the court what occurred on _____ (date)?"
"What happened after the defendant slapped you?"
"How long did you see...?"
"Did anyone do anything while you waited?"
"How long did you remain in that spot?"

Conclude your direct examination with:
"Thank you, Mr./Ms. _____ (name of witness). That will be all, your honor." (The witness remains on the stand for cross-examination.)

Cross-Examination
Cross-examination follows the opposing attorney's direct examination of her/his witness. Attorneys conduct cross-examination to explore weaknesses in the opponent's case, test the witness' credibility, and establish some of the facts of the cross-examiner's case whenever possible. Cross-examination should:

- Call for answers based on information given in Witness Statements or Fact Situation.
- Use leading questions which are designed to get "yes" and "no" answers.
- Never give the witness a chance to unpleasantly surprise the attorney.

In an actual trial, cross-examination is restricted to the scope of issues raised on direct examination. Because Mock Trial attorneys are not permitted to call opposing witnesses as their own, the scope of cross-examination in a Mock Trial is not limited in this way.

Examples of proper questions on cross-examinations:
"Isn't it a fact that...?"
"Wouldn't you agree that...?"

"Don't you think that...?"
"When you spoke with your neighbor on the night of the murder, weren't you wearing a red shirt?"

Cross-examination should conclude with:
"Thank you, Mr./Ms. _____ (name of witness). That will be all, your honor."

Impeachment During Cross-Examination
During cross-examination, the attorney may want to show the court that the witness should not be believed. This is called impeaching the witness. It may be done by asking questions about prior conduct that makes the witness's credibility (truth-telling ability) doubtful. Other times, it may be done by asking about evidence of certain types of criminal convictions.

A witness also may be impeached by introducing the witness's statement and asking the witness whether she/he has contradicted something in the statement (i.e. identifying the specific contradiction between the witness's statement and oral testimony).

Example: (Prior conduct)
"Is it true that you beat your nephew when he was six years old and broke his arm?"

Example: (Past conviction)
"Is it true that you've been convicted of assault?"

(NOTE: These types of questions may only be asked when the questioning attorney has information that indicates that the conduct **actually** happened.)

Examples: (Using signed witness statement to impeach)
"Mr. Jones, do you recognize the statement I have had the clerk mark Defense Exhibit A?"
"Would you read the third paragraph aloud to the court?"
"Does this not directly contradict what you said on direct examination?"

Re-Direct Examination
Following cross-examination, the counsel who called the witness may conduct re-direct examination. Attorneys conduct re-direct examination to clarify new (unexpected) issues or facts brought out in the immediately preceding cross-examination **only**. They may not bring up any issue brought out during direct examination. Attorneys may or may not want to conduct re-direct examination. If an attorney asks questions beyond the issues raised on cross, they may be objected to as "outside the scope of cross-examination." It is sometimes more beneficial not to conduct re-direct for a particular witness. To properly decide whether it is necessary to conduct re-direct examination, the attorneys must pay close attention to what is said during the cross-examination of their witnesses.

If the credibility or reputation for truthfulness of a witness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to "save" the witness through re-direct. These questions should be limited to the damage the attorney thinks has been done and should enhance the witness's truth-telling image in the eyes of the court.

Work closely with your attorney coach on re-direct strategies.

Closing Arguments
A good closing argument summarizes the case in the light most favorable to your position. The prosecution delivers the first closing argument. The closing argument of the defense attorney concludes the presentations. A good closing argument should:

- Be **spontaneous**, synthesizing what **actually happened in court** rather than being "pre-packaged." **NOTE: Points will be deducted from the closing argument score if concluding remarks do not actually reflect statements and evidence presented during the trial.**
- Be emotionally charged and strongly appealing (unlike the calm opening statement).
- Emphasize the facts that support the claims of your side, but not raise any new facts.
- Summarize the favorable testimony.
- Attempt to reconcile inconsistencies that might hurt your side.
- Be well organized. (Starting and ending with your strongest point helps to structure the presentation and gives you a good introduction and conclusion.)
- **The prosecution** should emphasize that the state has proven guilt beyond a reasonable doubt.
- **The defense** should raise questions that suggest the continued existence of a reasonable doubt.

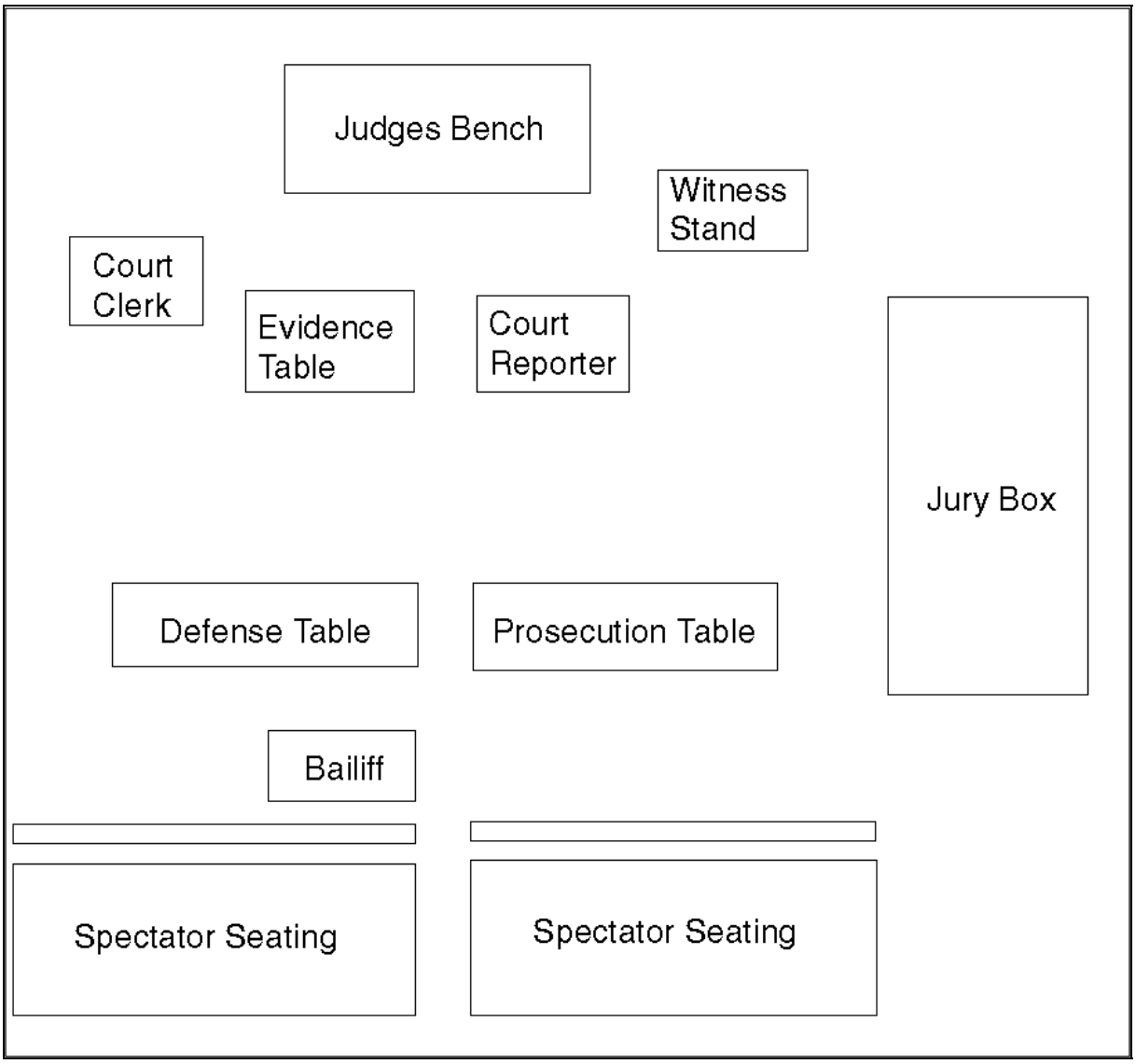
Proper phrasing includes:

"The evidence has clearly shown that . . . "
"Based on this testimony, there can be no doubt that . . . "
"The prosecution has failed to prove that . . . "
"The defense would have you believe that . . . "

Conclude the closing argument with an appeal to convict or acquit the defendant.

An attorney may use up to one minute of closing argument time for rebuttal. Only issues that were addressed in an opponent's closing argument may be raised during rebuttal.

DIAGRAM OF A TYPICAL COURTROOM



MOCK TRIAL SIMPLIFIED RULES OF EVIDENCE

Criminal trials are conducted using strict rules of evidence to promote fairness. To participate in a Mock Trial, you need to know about the role that evidence plays in trial procedure. Studying the rules will prepare you to make timely objections, avoid pitfalls in your own presentations, and understand some of the difficulties that arise in actual cases. The purpose of using rules of evidence in the competition is to structure the presentations to resemble an actual trial.

Almost every fact stated in the materials will be admissible under the rules of evidence. All evidence will be admitted unless an attorney objects. Because rules of evidence are so complex, you are not expected to know the fine points. To promote the educational objectives of this program, students are restricted to the use of a select number of evidentiary rules in conducting the trial.

Objections

It is the responsibility of the party opposing the evidence to prevent its admission by a **timely and specific objection**. Objections not raised in a timely manner are waived. **An effective objection is designed to keep inadmissible testimony, or testimony harmful to your case, from being admitted. *A single objection* may be more effective than several objections.** Attorneys can and should object to questions that call for improper answers before the answer is given.

For the purposes of this competition, teams will be permitted to use only certain types of objections. The allowable objections are summarized on page 55. **Other objections may not be raised at trial.** As with all objections, the judge will decide whether to allow the testimony, strike it, or simply note the objection for later consideration. **Judges' rulings are final**. You must continue the presentation even if you disagree. A proper objection includes the following elements:

1) attorney addresses the judge,
2) attorney indicates that she/he is raising an objection,
3) attorney specifies what she/he is objecting to, e.g. the particular word, phrase or question, and
4) attorney specifies the legal grounds that the opposing side is violating.

Example: (1) "Your honor, (2) I object (3) to that question (4) on the ground that it is compound."

Allowable Evidentiary Objections

1. Facts Outside the Record (FOR)

This objection is specific to the competition and is not an ordinary rule of evidence. The FOR objection applies if a witness creates new facts not included in and which cannot be reasonably inferred from her/his official Record. See Rule Section V for a more detailed explanation.

Form of Objection: **"Objection, your honor. The answer is creating a material fact that is not in the record," or "Objection, your honor. The question seeks material testimony that goes beyond the scope of the record."**

2. Relevance

Relevant evidence makes a fact that is important to the case more or less probable than the fact would be without the evidence. To be admissible, any offer of evidence must be relevant to an issue in the trial. The court may exclude relevant evidence if it is unfairly prejudicial, confuses the issues, or is a waste of time.

Either **direct** or **circumstantial** evidence may be admitted in court. Direct evidence proves the fact asserted without requiring an inference. A piece of circumstantial (indirect) evidence is a fact (Fact 1) that, if shown to exist, suggests (implies) the existence of an additional fact (Fact 2), (i.e. if Fact

1, then probably Fact 2). The same evidence may be both direct and circumstantial depending on its use.

Example: Eyewitness testimony that the defendant shot the victim is **direct** evidence of the defendant's assault. Testimony establishing that the defendant had a motive to shoot the victim, or that the defendant was seen leaving the victim's apartment with a smoking gun, is **circumstantial** evidence of the defendant's assault.

Form of Objection: **"Objection, your honor. This testimony is not relevant to the facts of this case. I move that it be stricken from the record." or**

"Objection, your honor. Counsel's question calls for irrelevant testimony."

3. Laying a Proper Foundation
To establish the relevance of circumstantial evidence, you may need to **lay a foundation**. Laying a proper foundation means that, before a witness can testify to certain facts, it must be shown that the witness was in a position to know about those facts.

Sometimes when laying a foundation, the opposing attorney may object to your offer of proof on the ground of relevance, and the judge may ask you to explain how the offered proof relates to the case.

Example: If attorney asks a witness if he saw X leave the scene of a murder, opposing counsel may object for a lack of foundation. The questioning attorney should ask the witness first if he was at or near the scene at the approximate time the murder occurred. This lays the foundation that the witness is legally competent to testify to the underlying fact.

Form of Objection: **"Objection, your honor. There is a lack of foundation."**

4. Personal Knowledge
A witness may not testify about any matter of which the witness has no personal knowledge. Only if the witness has directly observed an event may the witness testify about it. Witnesses will sometimes make inferences from what they actually did observe. An attorney may properly object to this type of testimony because the witness has no personal knowledge of the inferred fact.

Example: From around a corner, the witness heard a commotion. Upon investigating, the witness found the victim at the foot of the stairs, and saw the defendant on the landing, smirking. The witness cannot testify over the defense attorney's objection that the defendant had pushed the victim down the stairs, even though this inference seems obvious.

Form of Objection: **"Objection, your honor. The witness has no personal knowledge to answer that question." or**

"Your honor, I move that the witness's testimony about...be stricken from the case because the witness has been shown not to have personal knowledge of the matter." (This motion would follow cross-examination of the witness that revealed the lack of a basis for a previous statement.)

5. Character Evidence
Witnesses generally cannot testify about a person's character unless character is an issue. Such evidence tends to add nothing to the crucial issues of the case. (The honesty of a witness, however, is one aspect of character always at issue.) In criminal trials, the defense may introduce evidence of

the defendant's good character and, if relevant, show the bad character of a person important to the prosecution's case. Once the defense introduces evidence of character, the prosecution can try to prove the opposite. These exceptions are allowed in criminal trials as an extra protection against erroneous guilty verdicts.

Examples:

1. The defendant's minister testifies that the defendant attends church every week and has a reputation in the community as a law-abiding person. This would be admissible.

2. The prosecutor calls the owner of the defendant's apartment to testify. She testifies that the defendant often stumbled in drunk at all hours of the night and threw wild parties. This would probably not be admissible unless the defendant had already introduced evidence of good character. Even then, the evidence and the prejudicial nature of the testimony might outweigh its probative value making it inadmissible.

Form of Objection: **"Objection, your honor. Character is not an issue here," or**

"Objection, your honor. The question calls for inadmissible character evidence."

6. Opinion of Lay Witness (non-expert)

Opinion includes inferences and other subjective statements of a witness. In general, lay witness opinion testimony is inadmissible. It is admissible where it is (a) rationally based upon the perception of the witness AND (b) helpful to a clear understanding of the testimony. Opinions based on a common experience are admissible. Some common examples of admissible lay witness opinions are speed of a moving object, source of an odor, appearance of a person, state of emotion, or identity of a voice or handwriting.

Example: A witness could testify that, "I saw the defendant who was elderly, looked tired, and smelled of alcohol." All of this statement is proper lay witness opinion testimony as long as there is personal knowledge and a proper foundation.

Form of Objection: **"Objection, your honor. The question calls for inadmissible opinion testimony on the part of the witness. I move that the testimony be stricken from the record."**

7. Expert Witness and Opinion Testimony

An expert witness may give an opinion based on professional experience. A person may be qualified as an expert if she/he has special knowledge, skill, experience, training, or education. Experts must be qualified before testifying to a professional opinion. A qualified expert may give an opinion based upon personal observations as well as facts made known to her/him outside the courtroom. The facts need not be admissible evidence if it is the type reasonably relied upon by experts in the field. Experts may give opinions on ultimate issues in controversy at trial. In a criminal case, an expert may **not** state an opinion as to whether the defendant did or did not have the mental state in issue.

Example: A doctor bases her opinion upon (1) examination of the patient and (2) medically relevant statements of patient's relatives. Personal examination is admissible because it is relevant and based on personal knowledge. The statements of the relatives are inadmissible hearsay but are proper basis for opinion testimony because they are reasonably relevant to a doctor's diagnosis.

Form of Objection: **"Objection, your honor. There is a lack of foundation for opinion testimony," or**

"Objection, your honor. The witness is improperly testifying to defendant's mental state in issue."

8. Hearsay
Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is considered untrustworthy because the speaker of the out-of-court statement is not present and under oath and therefore cannot be cross-examined. Because these statements are very unreliable, they ordinarily are not admissible.

Testimony not offered to prove the truth of the matter asserted is, by definition, *not* hearsay. For example, testimony to show that a statement was said and heard, to show that a declarant could speak in a certain language, or to show the statement's effect on a listener is admissible.

Examples:

1. Joe is being tried for murdering Henry. The witness testifies, "Ellen told me that Joe killed Henry." If offered to prove that Joe killed Henry, this statement is hearsay and probably would not be admitted over an objection.

2. However, if the witness testifies, "I heard Henry yell to Joe to get out of the way," this could be admissible. This is an out-of-court statement, but is not offered to prove the truth of its contents. Instead, it is being introduced to show that Henry had warned Joe by shouting.

Form of Objection: **"Objection, your honor. Counsel's question calls for hearsay." or**

"Objection, your honor. This testimony is hearsay. I move that it be stricken from the record."

Out of practical necessity, courts have recognized certain general categories of hearsay that may be admissible. Exceptions have been made for certain types of out-of-court statements based on circumstances that promote greater reliability. **The exceptions listed below and any other proper responses to hearsay objections may be used in the Mock Trial. Work with your attorney coach on the exceptions that may arise in this case.**

a. **Admission by a party opponent**—a statement made by a party to the legal action (or someone identified with her/him in legal interest) of the existence of a fact relevant to the cause of her/his adversary. (An admission is not limited to words, but may also include the demeanor, conduct and acts of a person charged with a crime.)

b. **Excited utterance**—a statement made shortly after a startling event, while the declarant is still excited or under the stress of excitement.
c. **State of mind**—a statement that shows the declarant's mental, emotional, or physical condition.

d. **Declaration against interest**—a statement that puts declarant at risk of civil or criminal liability.

e. **Records made in the regular course of business**

f. **Official records and writings by public employees**

g. **Past recollection recorded**—something written by a witness when events were fresh in that witness's memory, used by the witness with insufficient recollection of the event and read to the trier of fact. (The written material is not admitted as evidence.)

h. **Statements for the purpose of medical diagnosis or treatment**

i. **Reputation of a person's character in the community**

j. **Dying declaration -** a statement made by a dying person respecting the cause and circumstances of her/his death, which was made upon that person's personal knowledge and under a sense of immediately impending death.

k. **Co-conspirator's statements** - (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Allowable Objections for Inappropriately Phrased Questions

9. Leading Questions

Attorneys may not ask witnesses leading questions during **direct examination**. A leading question is one that suggests the answer desired. Leading questions are permitted on cross-examination.

Example:

Counsel for the prosecution asks the witness, "During the conversation, didn't the defendant declare that he would not deliver the merchandise?"

Counsel could rephrase the question, "Will you state what, if anything, the defendant said during this conversation, relating to the delivery of the merchandise?"

Form of Objection: **"Objection, your honor. Counsel is leading the witness."**

10. Compound Question

A compound question joins two alternatives with "and" or "or," preventing the interrogation of a witness from being as rapid, distinct, or effective for finding the truth as is reasonably possible.

Example: "Did you determine the point of impact from conversations with witnesses and from physical marks, such as debris in the road?"

Form of Objection: **"Objection, your honor, on the ground that this is a compound question."**

The best response if the objection is sustained on these grounds would be, "Your honor, I will rephrase the question," and then break down the question accordingly. Remember that there may be another way to make your point.

11. Narrative

A narrative question is one that is too general and calls for the witness in essence to "tell a story" or make a broad-based and unspecific response. The objection is based on the belief that the question seriously inhibits the successful operation of a trial and the ultimate search for the truth.

Example: The attorney asks A, "Please tell us all of the conversations you had with X before X started the job."

The question is objectionable, and the objections should be sustained.

Form of Objection: **"Objection, your honor. Counsel's question calls for a narrative."**

Other Objections

12. Argumentative Question
An argumentative question challenges the witness about an inference from the facts in the case. A cross-examiner may, however, legitimately attempt to force the witness to concede the historical fact of a prior inconsistent statement.

Questions such as "How can you expect the judge to believe that?" are argumentative and objectionable. The attorney may argue the inferences during summation or closing argument, but the attorney must ordinarily restrict her/his questions to those calculated to elicit facts.

Form of Objection: **"Objection, your honor. Counsel is being argumentative." or**

"Objection, your honor. Counsel is badgering the witness."

13. Asked and Answered
Witnesses should not be asked a question that has previously been asked and answered. This can seriously inhibit the effectiveness of a trial.

Examples: 1. **On Direct Examination**— Counsel A asks B, "Did X stop for the stop sign?" B answers, "No, he did not." A then asks, "Let me get your testimony straight. Did X stop for the stop sign?"

Counsel for X correctly objects and should be sustained.

BUT: 2. **On Cross-Examination**— Counsel for X asks B, "Didn't you tell a police officer after the accident that you weren't sure whether X failed to stop for the stop sign?" B answers, "I don't remember." Counsel for X then asks, "Do you deny telling him that?"

Counsel A makes an **asked and answered objection**. The objection should be **overruled**. **Why?** It is sound policy to permit cross-examining attorneys to ask the same question more than once in order to conduct a searching probe of the direct examination testimony.

Form of Objection: **"Objection, your honor. This question has been asked and answered."**

14. Vague and Ambiguous Questions
Questions should be clear, understandable, and as concise as possible. The objection is based on the notion that a witness cannot answer a question properly if she/he does not understand the meaning of that question.

Example: "Does it all happen at once?"

Form of Objection: **"Objection, your honor. This question is vague and ambiguous as to what 'it' refers to."**

15. Non-Responsive Witness
Sometimes a witness's reply is too vague and doesn't give the details the attorney is asking for, or she/he "forgets" the event in question. This is often purposefully used by the witness as a tactic to prevent some particular evidence from being brought forth.

Form of Objection: **"Objection, your honor. The witness is being non-responsive."**

16. Outside the Scope of Cross-Examination

Re-direct examination is limited to issues raised by the opposing attorney on cross-examination. If an attorney asks questions beyond the issues raised on cross, opposing counsel may object to them.

Form of objection: **“Objection, your honor. Counsel is asking the witness about matters that did not come up in cross-examination.”**

SUMMARY OF ALLOWABLE EVIDENTIARY OBJECTIONS FOR THE 2001-2002 CALIFORNIA MOCK TRIAL

1. **Facts in Record:** "Objection, your honor. The answer is creating a material fact which is not in the record," or "Objection, your honor. The question seeks testimony which goes beyond the scope of the record."

2. **Relevance:** "Objection, your honor. This testimony is not relevant to the facts of this case. I move that it be stricken from the record," or "Objection, your honor. Counsel's question calls for irrelevant testimony."

3. **Foundation:** "Objection, your honor. There is a lack of foundation."

4. **Personal Knowledge:** "Objection, your honor. The witness has no personal knowledge to answer that question," or "Your honor, I move that the witness's testimony about _____ be stricken from the case because the witness has been shown not to have personal knowledge of the matter."

5. **Character:** "Objection, your honor. Character is not an issue here," or "Objection, your honor. The question calls for inadmissible character evidence."

6. **Opinion:** "Objection, your honor. The question calls for inadmissible opinion testimony (or inadmissible speculation) on the part of the witness."

7. **Expert Opinion:** "Objection, your honor. There is lack of foundation for opinion testimony," or "Objection, your honor. The witness is improperly testifying to defendant's mental state in issue."

8. **Hearsay:** "Objection, your honor. Counsel's question calls for hearsay," or "Objection, your honor. This testimony is hearsay. I move that it be stricken from the record."

9. **Leading Question:** "Objection, your honor. Counsel is leading the witness."

10. **Compound Question:** "Objection, your honor, on the ground that this is a compound question."

11. **Narrative:** "Objection, your honor. Counsel's question calls for a narrative."

12. **Argumentative Question:** "Objection, your honor. Counsel is being argumentative," or "Objection, your honor. Counsel is badgering the witness."

13. **Asked and Answered:** "Objection, your honor. This question has been asked and answered."

14. **Vague and Ambiguous:** "Objection, your honor. This question is vague and ambiguous as to _____."

15. **Non-Responsive:** "Objection, your honor. The witness is being non-responsive."

16. **Outside Scope of Cross:** "Objection, your honor. Counsel is asking the witness about matters that did not come up in cross examination."

– NOTES –

– NOTES –

– NOTES –

– NOTES –

– NOTES –

– NOTES –

– NOTES –

– NOTES –

CONSTITUTIONAL RIGHTS FOUNDATION 2001 MAJOR DONORS

Amy Phillips Charitable Foundation
Apollo Management L.P. & Ares Management L.P.
ARCO
Arden Realty, Inc.
Bank of America
The Boeing Company
California Community Foundation
Christensen Miller Fink Jacobs Glaser Weil & Shapiro, LLP
City of Los Angeles
Carol and Jerome L. Coben
Irma and Louis L. Colen
Countrywide Home Loans, Inc.
Creative Kids Foundation
Gibson, Dunn & Crutcher LLP
The J. Paul Getty Trust
KPMG LLP
Latham & Watkins
Los Angeles Unified School District
Loyld M. Smith Fund
Mayer, Brown & Platt
Morrison & Foerster LLP
Munger, Tolles & Olson LLP
O'Melveny & Myers LLP
Orrick, Herrington & Sutcliffe LLP
Paul, Hastings, Janofsky & Walker LLP
Pillsbury, Madison & Sutro LLP
PricewaterhouseCoopers LLP
Proskauer Rose LLP
The Maurice R. Robinson Fund, Inc.
The Rose Hill Foundation
Sempra Energy
Sheppard, Mullin, Richter & Hampton LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Stutman, Treister& Glatt
Surdna Foundation, Inc.
Times Mirror Company
Toyota Motor Sales U.S.A., Inc.
Troop Steuber Pasich Reddick & Tobey, LLP
Trust Company of the West
Tuttle & Taylor
Union Bank of California
United Way, Inc.
University of California, Los Angeles
J.B. and Emily Van Nuys Charities
The Walt Disney Company
Wells Fargo

Constitutional Rights Foundation gratefully acknowledges the Daily Journal Corporation for its generous contribution of the printing of the Official Materials for the California Mock Trial Program.

Constitutional Rights Foundation
601 South Kingsley Drive ♦ Los Angeles, CA 90005
(213) 487-5590 ♦ http://www.crf-usa.org