

Checklist of Points to Be Covered for Complete Answers
FSM Bar Examination March 7, 2002

[Citations to statutes, rules, and the like are included in brackets as an aid to those reviewing the exam; a test taker is not expected to memorize and repeat the numbers so long as the legal principles are cited and discussed.]

General

(70 points)

I. (12 points)

A. (8 points)

1. (4 points) was warrantless search reasonable? search (and seizure) with warrant is presumed reasonable, search without warrant the burden is on the gov't to show that search was reasonable - exception to warrant requirement [see, e.g., FSM v. Joseph, 9 FSM Intrm. 66, 69 (Chk. 1999)]; if seized as result of illegal search evidence is inadmissible [12 F.S.M.C. 312]

a. gov't will argue

- (1) traffic stop lawful because of Deimos's expired license plate
- (2) handgun seizure lawful because was contraband (all handguns are illegal in FSM) in Phobos's plain view
- (3) gov't will argue search was consensual because Deimos voluntarily gave Phobos the keys

b. Deimos will argue warrantless search of vehicle trunk unlawful

- (1) because Phobos only had right to conduct warrantless search of car where Deimos might be able to reach concealed weapon, which would not include locked trunk where marijuana was found;
- (2) Deimos might argue that he really had no choice to give Phobos keys because she would've taken them anyway
- (3) gov't might also argue that such discovery was inevitable result of lawful arrest for handgun because car would have been towed to police station where it was their practice to do thorough inventory search of all impounded vehicles

2. (4 points) Deimos will contend

- a. that his statements were inadmissible because he had not been advised of his right to remain silent or to an attorney when he

shrugged and handed Phobos the keys (contending that these are non-verbal statements), but was in custody because he was not free to leave even though Phobos hadn't "arrested" him yet;

- b. that Phobos's cursory attempt to inform him of his rights after he was arrested did not adequately inform him of his rights, and if it did he had not indicated that he understood those rights and therefore made a voluntary knowing and intelligent waiver of his rights when he made his statement about saving a child's life
- c. gov't will contend that Deimos was properly informed of his rights; even if he wasn't, he blurted out his comment about the child not in response to any question and before Phobos could've stopped him

B. (4 points)

- 1. can contend that trial court ruled incorrectly on suppression motion
- 2. raise issue of mens rea
 - a. whether had requisite mental state
 - b. gov't will counter that possession is strict liability crime - requires no mens rea
- 3. raise application of defense of necessity
 - a. Deimos will contend he's not guilty of possession of firearm because taking possession of it prevented a greater harm - the child playing with it
 - b. gov't will argue that the defense doesn't apply because once Deimos took possession of handgun in order for defense to apply Deimos must put the handgun out of his possession as quickly as reasonably possible, and he didn't do that - he was still driving around with it a day later

II. (17 points)

- A. (4 points) might survive equal protection challenge [FSM Const. art. IV, § 4] because since police have duty to enforce the state's laws, the state may reasonably require that those enforcing its laws owe allegiance to it, thus serving a substantial governmental purpose
- B. (3 points) probably violates equal protection clause of Constitution [FSM Const. art. IV, § 4] and possibly, right of FSM citizens to travel and migrate within the FSM [FSM Const. art. IV, § 12]
- C. (3 Points) only nat'l gov't has authority to regulate interstate commerce [FSM Const. art. IX, § 2(g)] and

this law only affects interstate commerce because state does not ban importation from foreign country or domestic possession

- D. (4 points) 10% tax, if paid by hotel is an income tax & therefore unconstitutional because income tax is power, reserved to nat'l gov't [FSM Const. art. IX, § 2(e)], but if paid by the guest may be constitutional as a sales tax [see Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117 (App. 1995)]; flat \$50 on motel rooms is not an income tax, thus okay; possibly some equal protection claim for differing tax rates for hotels and motels when there's no definition and if there's no rational reason for difference
- E. (3 points) "inventory tax" is not an income tax because it is not based on retail business's income (retail sales); does not appear to be an import tax because it is not triggered by the act of importation and would tax only those imports (plus non-imports) in inventory on one week of year; does not appear to burden interstate trade; appears not to violate FSM Constitution

III. (15 points)

- A. (7 points)
1. written "subscription agreement" contract - did terms include that the Filipino language programs were included?
 - a. San Miguel represented they were part of "special cable service"
 - b. "special cable service" was term in contract
 2. San Miguel's promise to personally cancel service if dissatisfied
 - a. did San Miguel have actual authority to make such a promise and bind Cable, Inc.?
 - (1) principals are bound by the acts of their agents with real or apparent authority who act within the scope of their agency [see, e.g., Sigrah v. Timothy, 9 FSM Intrm. 48, 52 (Kos. S. Ct. Tr. 1999)]
 - (2) if San Miguel didn't have actual authority he had apparent authority;
 - b. was there consideration for this new agreement? argue
 - (1) yes, the Tsingtaos would not have let the service be hooked up (that is cancel it on time) without promise
 - (2) no, Tsingtaos were already obligated to let service be hooked up
 - c. subsequent oral agreement may modify original written contract even though under parol

evidence rule a prior or contemporaneous oral agreement cannot modify a written one; San Miguel's agreement to personally cancel was a subsequent agreement

B. (8 points) remedies for FSM Dev. Bank

1. against Tsingtaos

a. sue for

(1) breach of contract, but may not prevail

(a) Tsingtaos' contract calls for "special cable service"

(b) since no Filipino language channels they didn't get "special cable service"

(2) unjust enrichment - sue for value of cable service Tsingtaos actually received (and used)

b. have cable service cut off

2. against Cable, Inc.

a. FSM Dev. Bank entitled to be paid on loan

b. Cable, Inc. gave Tsingtaos' account as payment when it wasn't worth the \$80/month
Cable, Inc. represented it to be

(1) argue Cable must pay deficiency, or

(2) Cable not liable for deficiency because assignment was only part payment on Cable's loan, and it just means

IV. (14 points)

A. continuance to May is not proper; under the Administrative Procedures Act the hearing must be held within 30 calendar days of the submission of the petition unless the petitioner requests a delay [17 F.S.M.C. 109(4)]

B. Board must hold hearing on Quito's petition within 30 days of its submission [17 F.S.M.C. 109(4)]; it must hold public hearing [17 F.S.M.C. 109(5)]; it must prepare full written statement of its findings of fact and its decision within 15 days of the hearing's conclusion [17 F.S.M.C. 109(6)]

C. relief in other forum(s)

1. Quito may appeal a final adverse Board decision to the trial court which will conduct a de novo trial [17 F.S.M.C. 111(2)], court may compel any Board action unlawfully withheld or unreasonably delayed [17 F.S.M.C. 111(3)(a)] and set aside any Board decision that was arbitrary, capricious, an abuse of discretion or not in accordance with applicable law, contrary to constitutional rights or privileges, exceeded statutory jurisdiction, denied legal rights, was without

substantial compliance with procedures required by law, or unwarranted by the facts [17 F.S.M.C. 111(3)(a)]; any decision there may be appealed to the appellate division [17 F.S.M.C. 112]; but continuance to May is not a final decision

2. the lack of a ruling by the Board within the statutory time limit may be considered a denial triggering the right to appeal to the court [see Willander v. Mallarme, 7 FSM Intrm. 152, 158 (App. 1995)]; or
3. Quito could file suit in state or FSM court asking that the court enjoin the Board from revoking his permit until he has had a hearing; or ask the court for a writ of mandamus ordering the Board to hold a prompt hearing
 - a. all these actions would be subject to Board's defense that Quito must exhaust his administrative remedies before resorting to court action
 - b. but not required to exhaust administrative remedies if it would be futile [see, e.g., Dorval Tankship Pty, Ltd. v. department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997)]
 - c. suit in FSM court would be based on Board's violation of Quito's constitutional right to due process which deprived him of a property interest (for process due see the APA above) [see, e.g., Etpison v. Perman, 1 FSM Intrm. 405 (Pon. 1984)]

V. (12 points)

- A. (3 points) ship collision cases, and suits in which vessels are named as defendants are admiralty or maritime cases; FSM Supreme Court has exclusive jurisdiction in then FSM over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]; admiralty court in Singapore could exercise jurisdiction over case against S.S. *Pride of Walvis Bay* if vessel is arrested there
- B. (9 points)
 1. S.S. *Pride of Walvis Bay* - any action against a vessel is an *in rem* action and court has no jurisdiction in an *in rem* case when the property is not present in the jurisdiction (or a substitute for it, such as a bond put up so the vessel can leave); vessel is in Singapore, therefore no jurisdiction, S.S. *Pride of Walvis Bay* could be dismissed until found in FSM and arrested
 2. William Beagle - allegedly operated vessel within territorial waters of the FSM [6 F.S.M.C. 131(2)]

- & committed tortuous act in FSM [6 F.S.M.C. 131(4)], therefore subject matter jurisdiction under long-arm statute; and served personally in Singapore; no apparent defect in service, court has personal jurisdiction over W. Beagle under long-arm statute [6 F.S.M.C. 132] and has jurisdiction over the subject matter; no dismissal
3. George Beagle - allegedly operated vessel within territorial waters of the FSM [6 F.S.M.C. 131(2)] & committed tortuous act in FSM [6 F.S.M.C. 131(4)], therefore subject matter jurisdiction under long-arm statute; service is okay (assuming that leaving the copies with W. Beagle constitutes leaving copies at George's usual place of business or of abode, probably true if W. Beagle served while on vessel) if that manner of service is proper in Singapore in its courts [FSM Civ. R. 4(i)(1)(A)], or follow FSM rules for service [6 F.S.M.C. 136]
 4. McDuck Corp. - if the mail service was accomplished by registered or certified mail requiring a signed return receipt, service by mail was proper [FSM Civ. R. 4(d)(8); FSM Civ. R. 4(i)(1)(D)]; if sent regular mail service was defective [FSM Civ. R. 4(e)], then could be dismissed without prejudice or re-served
 5. Pacific Nat'l Ins. Co. - FSM doesn't have a direct action statute, therefore insurance co. is not a real party in interest (at least until such time as its insured is found liable) [see Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001); Wilson v. Pohnpei Headstart Program, Inc., 7 FSM Intrm. 411, 413 (Pon. 1996)]; dismissal proper
 6. Capt. Noah Ahab - was served personally while present in jurisdiction; service was proper; court has subject matter jurisdiction over case; no ground for dismissal
 7. F/V Marie Celeste - vessel is in rem defendant, was seized and served in the jurisdiction; in in rem action the complaint must be a verified complaint [FSM Mar. R. C(2)] (facts don't state either way); if verified complaint was served then no defect in process & no dismissal
 8. Peripatetic Pelagic Piscatorial Co. - service through registered agent is proper (that's hat they're appointed for); no dismissal
 9. Nantucket Marine Ins. Co. - service probably proper, but because no direct action statute, insurance co. isn't a real party in interest (at least until such time as its insured is found

liable); therefore dismissal proper

Evidence

VI. (20 points)

- A. (4 points) Pluto could assert the marital privilege to stop Charon from testifying against him if Pohnpei state law recognizes the marital privilege because in a civil suit in which state law provides the rule of decision a witness's privilege is determined by that state's law [FSM Evid. 501]; if no privilege or Pluto doesn't assert the privilege, his statement, if considered an admission, is not hearsay and is admissible as an admission of a party-opponent [FSM Evid. R. 801(d)(2)]; if not an admission, it is hearsay, but may be admissible under the excited utterance exception [FSM Evid. R. 803(2)] or as state of mind [FSM Evid. 803(3)]
- B. (3 points) even if some of Charon's proposed testimony wouldn't be hearsay, Grandmother's testimony is hearsay; hearsay is an out-of-court statement made by someone other than the witness offered to prove the truth of the matter asserted [FSM Evid. R. 801(b)], and is not admissible [FSM Evid. R. 802] unless it falls within one of the exceptions to the rule [FSM Evid. R. 802]; hearsay within hearsay isn't admissible unless each part of the combined statement's conforms to an exception to the hearsay rule [FSM Evid. R. 805]; Grandmother's testimony is hearsay within hearsay, not within any exception, thus inadmissible
- C. (4 points)
 - 1. Pluto's conviction can be proven by a certified copy of his conviction [FSM Evid. R. 803(22)], but is admissible only if Pluto testifies [FSM Evid. R. 609(a)] and only if he was convicted or released from confinement in the last ten years [FSM Evid. R. 609(b)] (Note: since this is a civil case Triton can call him as witness, but Pluto might decline to testify citing his right against self-incrimination)
 - 2. generally known to be violent - evidence of Pluto's character is generally not admissible to show that he acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]
- D. (3 points) Neptune's testimony is inadmissible - evidence of other crimes not admissible to show that Pluto acted in conformity therewith, but may be used for other purposes, e.g., motive opportunity, intent [FSM Evid. R. 404(b)] (also are they relevant?)
- E. (3 points) inadmissible because evidence of a person's

peacefulness is admissible only to rebut claim victim in homicide was the first aggressor [FSM Evid. R. 404(a)(2)]

- F. (3 points) admissible as non-hearsay admission of party opponent [FSM Evid. R. 801(d)(2)] or as hearsay exception for excited utterance [FSM Evid. R. 803(2)]

Ethics

VII. (5 points) Legolas has a duty not to disclose his client's confidential information [FSM MRPC R. 1.6]; but also has a duty not to knowingly make false statement of material fact to third person (Gimli) but no duty to disclose a material fact to third party unless disclosure needed to avoid assisting client's criminal or fraudulent act (unless prohibited by Rule 1.6) [FSM MRPC 4.1]; since no inquiry made about current sales, no duty to disclose unless Rivendell is engaging in fraud, then maybe

VIII. (5 points)

- A. continuing to work in a law office not under supervision of anyone admitted to the FSM bar and drafting complaints to be filed "pro se" - recommend disciplinary action for unauthorized practice of law in the FSM [FSM MRPC R. 5.5]
- B. drafting statutes - argue whether practice of law (congressmen do it and don't have to be admitted; but Gideon not congressman and was paid by someone who sought his legal expertise); if practice of law recommend disciplinary action, otherwise not