

ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

Abel, Charlie, and Baker were playing videogames and hanging out one Sunday night. While Charlie was playing a game, Abel and Baker began talking about the new gas pipeline. Abel was angry because the pipeline blocked access to a favorite fishing hole. Abel said that they should blow the pipeline up. Baker agreed and said he had some dynamite at his mine. Abel turned to Charlie and asked what he thought about the plan. Charlie just grunted. Abel asked, "Well, are you in?" Charlie replied, "Yeah, whatever" without looking up from the game he was playing. Baker left to get the dynamite.

After Baker came back with the dynamite, Abel loaded it and some other equipment in his truck. Baker said that he needed to get some gas and that he would meet them at the pipeline. Abel said, "Ok. Hurry though. It will only take me about 25 minutes to get to the pipeline." Abel told Charlie that they were leaving. Charlie said, "I'm on a streak. I want to continue playing." Abel and Baker then left.

As Baker got into his car, he tossed his cell phone up on the dashboard. Baker then headed to a gas station about 20 minutes away. Baker saw a police car at the gas station. Baker walked over and told the officer that Abel was on his way to blow up the pipeline.

The officer reported Baker's story and 30 minutes later the police department sent several officers to the pipeline. But the dynamite blew up just as they arrived. Abel had placed the dynamite on the pylons holding up the pipeline. The explosion caused \$130,000 worth of damage by blowing the insulation off the pipeline and bending the pylons. But the explosion did not rupture the pipeline or cause any disruption in the delivery of the gas.

The officers saw Abel, and Officer Smith placed him under arrest and in the back of his patrol car. Officer Smith asked Abel why he tried to blow up the pipeline. Abel said, "How do I get a lawyer." Officer Smith told him that he didn't have a phone book but that Abel could call one if he knew the number. Abel said, "But it's Sunday night." Officer Smith waited about 30 seconds and then repeated his original question. Abel didn't respond, so Officer Smith said, "You need to tell me who the others are. It will be a lot worse for you if they cause more damage." Abel responded by saying that he, Charlie, and Baker did not like the way the pipeline blocked the fishing hole.

The state charged Abel, Baker, and Charlie with Criminal Mischief in the First Degree and Conspiracy. According to Alaska Statute 11.46.475,

(a) A person commits the crime of criminal mischief in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) the person intentionally damages an oil or gas pipeline or supporting facility;

(2) with intent to cause a substantial interruption or impairment of a service rendered to the public by a utility or by an organization that deals with emergencies involving danger to life or property, the person damages or tampers with property of that utility or organization and causes substantial interruption or impairment of service to the public;

(3) with intent to damage property of another by the use of widely dangerous means, the person damages property of another in an amount exceeding \$100,000 by the use of widely dangerous means.

1. Discuss Charlie and Baker's liability for Criminal Mischief in the First Degree and Conspiracy.

2. Discuss whether the facts raise any possible affirmative defenses for Baker.

3. Discuss any arguments that Abel might have for the suppression of his statement to Officer Smith.

GRADERS' GUIDE
***** QUESTION NO. 1 *****
CRIMINAL LAW

I. Offenses With Which Baker and Charlie Could be Charged – 40%

Alaska Statute 11.46.475(a) is ambiguous because it contains three subsections describing different conduct, but it does not state whether the three subsections are elements of one offense or three different ways to commit the offense:

(1) the person intentionally damages an oil or gas pipeline or supporting facility;

(2) with intent to cause a substantial interruption or impairment of a service rendered to the public by a utility or by an organization that deals with emergencies involving danger to life or property, the person damages or tampers with property of that utility or organization and causes substantial interruption or impairment of service to the public;

(3) with intent to damage property of another by the use of widely dangerous means, the person damages property of another in an amount exceeding \$100,000 by the use of widely dangerous means.

AS 11.46.475. The correct interpretation of the statute is that it sets out three different ways to commit the offense. See Commentary, Senate Journal Supp. No. 47, at 48-49 (June 12, 1978). Nonetheless, the statute is ambiguous because it could be read either way.

The question calls for the examinee to discuss Charlie and Baker's liability for Criminal Mischief in the First Degree and Conspiracy. The ambiguity in the statute does not affect the analysis for their liability for Conspiracy. But the ambiguity does affect the analysis for their liability for Criminal Mischief in the First Degree. If the three subsections are elements of a single offense, then neither Charlie nor Baker is liable because the facts state that the explosion did not rupture the pipeline or cause any disruption in service

Even though neither Charlie nor Baker were anywhere near Abel when he exploded the dynamite, both could face criminal liability. First, the facts suggest that both could be charged with Conspiracy, albeit the case against Baker is much stronger than the case against Charlie. And second, Baker could be charged with Criminal Mischief in the First Degree for aiding and abetting Abel if the subsections of AS 11.46.475 define separate ways of committing the offense. Again, in contrast to Baker, the facts supporting a charge that Charlie aided or abetted Abel are very weak.

A. Conspiracy – Baker

Under AS 11.31.120(a), a person commits Conspiracy if the person (1) acts with intent to promote or facilitate a serious felony offense, (2) agrees with at least one other person to commit the offense, and (3) one of the conspirators commits an overt act in furtherance of the conspiracy. Criminal Mischief in the First Degree is a serious felony offense. AS 11.31.120(b)(2)(C).

The facts support a conclusion that Baker intended to promote or facilitate the commission of Criminal Mischief in the First Degree by blowing up the pipeline. Abel suggested that they blow up the pipeline, and Baker “agreed.” Baker then stated that he could obtain the dynamite, and he subsequently went to his mine, picked some up, and brought it back.

Baker’s intent to “blow up” the pipeline is arguably sufficient to support the inference that Baker intended to (1) damage the pipeline; (2) cause a substantial disruption or impairment in the delivery of gas; and (3) damage property by means of widely dangerous means. As a result the ambiguity in AS 11.46.475 should not affect Baker’s liability for Conspiracy.

Similarly, these facts also support the conclusion that Baker and Abel made an agreement to blow up the pipeline.

Baker committed an overt act in furtherance of the conspiracy by getting the dynamite. Procuring the explosive was an essential step in the furtherance of the agreement to blow up the pipeline. Abel, of course, committed an overt act in furtherance of the conspiracy by placing and exploding the dynamite.

B. Conspiracy – Charlie

The facts are much weaker regarding Charlie’s culpability for conspiracy. As noted above, Charlie was playing a videogame while Abel and Baker planned the offense. He did not appear to take any part in the planning, but he did say, “Yeah, whatever” when Abel asked him whether he was in on the plan or not. Abel told the police that Charlie agreed to the conspiracy, but the statement itself was more ambiguous. As noted above, it is not clear that Charlie was actually cognizant of Abel and Baker’s plan. Since he was playing the video game continuously, he might not have been aware of what they were talking about and only said, “Yeah, whatever” to discourage Abel from distracting him.

As with Baker, the ambiguity in AS 11.46.475 should not affect the analysis of Charlie’s liability for Conspiracy.

C. Criminal Mischief in the First Degree - Baker

Alaska Statute 11.46.475(a) provides that a person can commit the crime of Criminal Mischief in the First Degree by intentionally damaging an oil or gas pipeline or supporting facility, by causing a substantial interruption or impairment of a service by a utility, and by intentionally damaging the property of another by widely dangerous means and causing more than \$100,000 worth of damage.

Abel intentionally damaged the pipeline or a supporting facility when he placed the dynamite on the pipeline's pylons and exploded the dynamite. The explosion damaged the pipeline by blowing the insulation off and by bending the pylons holding the pipeline.

Abel also intentionally damaged the property of another by widely dangerous means and caused more than \$100,000 worth of damage. Alaska Statute 11.46.495(8) defines "widely dangerous means" as "any difficult-to-confine substance, force, or other means capable of causing widespread damage, including ... explosion...." Abel's use of dynamite to cause an explosion meets the definition of "widely dangerous means." And Abel caused more than \$100,000 in damage because the explosion caused \$130,000 in damage to the pylons and the insulation.

But Abel did not cause a substantial interruption or impairment of the delivery of the gas. The facts provide that the explosion did not rupture the pipeline or cause any disruption in the delivery of the gas.

Whether Abel committed Criminal Mischief in the First Degree depends on the interpretation of the statute. If the three subsections of AS 11.46.475 are elements of a single offense, then Abel is not liable because he did not impair the delivery of the gas. In contrast, if the three subsections are different ways of committing the offense, then Abel is liable because he damaged the pipeline's supporting pylons and because he caused more than \$100,000 in damage by widely dangerous means.

Although Baker did not commit the Criminal Mischief, he could be held accountable for Abel's conduct under Alaska Statute 11.16.110(2)(B) which provides that a person is liable for the conduct of another if the person, with the intent to promote or facilitate the offense, aids or abets the other person in the planning and commission of the offense. The terms "aid" and "abet" refer to conduct "calculated to incite, encourage, or assist in the perpetration of the offense." *Andrew v. State*, 237 P.3d 1027, 1044 (Alaska App. 2010). "At common law, the act of abetting encompassed conduct such as counseling or encouraging the other person's criminal act by words or gestures." *Id.*

Baker both aided and abetted Abel. Baker encouraged Abel by agreeing with him and telling Abel that he could get the dynamite necessary to carry out

the plan. Baker then fetched the dynamite from his mine and brought it back to Abel.

D. Criminal Mischief in the First Degree – Charlie

Assuming that Abel is liable for Criminal mischief in the First Degree, the facts supporting a charge that Charlie aided or abetted Abel are very weak. Charlie did not take any action that aided Abel, and during the planning phase of the offense, Charlie was playing a video game. He does not appear to have participated in the planning at all. When Abel first asked him about the plan, Charlie merely grunted. And when Abel followed up by asking Charlie if he was in, Charlie stated “Yeah, whatever” and continued playing the game without looking up. In this case, the phrase “yeah, whatever” is ambiguous. It’s not clear that Charlie processed what Abel was talking about. The argument that Charlie’s comment counseled or encouraged Abel is rather weak. Similarly, the argument that Charlie acted with the intent to promote or facilitate the offense is weak. It’s just as likely that Charlie spoke with the intent to end the conversation so that Abel would quit distracting him from the game.

II. Baker’s Affirmative Defenses – 30%

A. Renunciation – Conspiracy

Alaska Statute 11.31.120(f) provides that “it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant’s criminal intent, either (1) gave timely notice warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy.” According to the court of appeals, a person must inform the police of the criminal enterprise before its commencement or make reasonable efforts to prevent the commission of the offense. *Hale v. State*, 764 P.2d 313 315 (Alaska App. 1988). Renunciation is an affirmative defense, and Baker bears the burden to prove it by a preponderance of the evidence. *Id.* at 316.

Baker’s conduct indicates that he renounced his criminal intent. He went over to the police officer at the gas station and informed him of the plan. The facts are more ambiguous, however, on whether he notified the police before the commencement of the offense or otherwise made reasonable efforts to prevent the commission of the offense. Baker notified the officer about 20 minutes after he and Abel left. But Abel said that it would take him 25 minutes to get to the pipeline. The Police Department then took another 30 minutes before it sent officers to respond. The explosion occurred as the officers arrived. It is not clear at what point the offense commenced. Because it took Abel 25 minutes to get to the pipeline and Baker 20 minutes to get to the gas station, it is possible that Abel had not commenced the offense by placing the dynamite at the time that Baker informed the police of the plan. It

is also possible that Abel was already in the process of setting the charges at that time. The facts are similarly ambiguous as to whether Baker's conduct amounted to a reasonable effort to prevent the commission of the offense. On one hand, Baker gave the police about 30 minutes warning. If the police had acted immediately upon receiving his information, they might have been able to stop Abel before he set off the explosion. On the other hand, he had a cell phone and could have called as soon as he left. He did not seek out the police. He only contacted the officer after he saw the officer at the gas station.

B. Renunciation – Aiding and Abetting

Alaska Statute 11.16.120 (a)(1) provides that it is an affirmative defense to an aiding and abetting charge if the defendant, under circumstances manifesting a voluntary and complete renunciation of criminal intent, (1) terminates his complicity before the commission of the offense; (2) wholly deprives the defendant's complicity of its effectiveness in the commission of the offense; and (3) gave timely warning to the police, or if timely warning could not be made by reasonable efforts, otherwise made a reasonable effort to prevent the commission of the offense.

Baker's conduct demonstrated a voluntary and complete renunciation of his criminal intent. He went over to the officer at the gas station and informed him that Abel was on his way to blow up the pipeline. Baker terminated his complicity before Abel completed the offense by setting off the dynamite. But it is not clear that he terminated his complicity before Abel commenced the offense by placing the dynamite. It is also unclear whether his act of informing the police officer of Abel's intentions was sufficient to wholly deprive Abel of the benefit of his complicity. Since Baker provided Abel with the dynamite, he could only deprive his complicity of its effectiveness if he took the dynamite back or otherwise prevented the crime. As with renunciation for conspiracy, the facts are ambiguous as to whether Baker gave the police a timely warning or otherwise made reasonable efforts to prevent the commission of the offense.

III. Suppression of the Confession - 30%

Abel made an admission to Officer Smith when he told the officer that he, Baker, and Charlie didn't like the way the pipeline blocked the fishing hole. But Officer Smith violated Abel's Miranda rights by questioning Abel without giving him the Miranda warnings and by ignoring Abel's invocation of his right to counsel.

A. *Miranda*

The Alaska Supreme Court requires *Miranda* warnings be given as a matter of state constitutional law. *Munson v. State*, 123 P.3d 1042, 1047-1049 & n. 48 (Alaska 2005). The failure to provide proper warnings or to obtain a

waiver of the rights described in the warnings will generally result in the exclusion of the statement. *Id.* at 1047

An officer must give a person the *Miranda* warnings if the officer questions the person while the person is in custody. *Id.* A person is in custody if a reasonable person in the same circumstances would not feel free to break off the interrogation and leave. *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979). A person may invoke his right to remain silent and end the interrogation in any manner and at any time during questioning. *Munson*, 123 P.3d at 1048. The invocation does not require any ritualistic formula or talismanic phrase. *Id.* All that is necessary is a statement sufficiently clear that a reasonable police officer in the circumstances would understand it as an invocation of the suspect's rights. *Id.*

Abel should argue that there were two separate *Miranda* violations. First, Officer Smith began the interrogation without giving Abel *Miranda* warnings. On these facts, there is no question that Abel was in custody. Officer Smith placed Abel under arrest and put Abel in the back of his patrol car. Officer Smith also interrogated Abel because he asked Abel why he tried to blow up the pipeline. Because Officer Smith interrogated Abel while Abel was in custody, Officer Smith should have given Abel the *Miranda* warnings before questioning him.

Abel should also argue that Officer Smith violated his *Miranda* rights when he ignored his invocation of his right to counsel. In response to Officer Smith's question, Abel initially asked how to get a lawyer. Under *Hampel v. State*, 706 P.2d 1173, 1179-82 (Alaska App. 1985), this was an equivocal invocation of the right to counsel, and Officer Smith could only continue the interrogation as necessary to clarify Abel's position. But Officer Smith did not seek clarification. Instead, he told Abel that he could call a lawyer if he knew the number. Abel then stated that it was Sunday night, indicating that he knew he couldn't contact a lawyer. Officer Smith's comment is similar to the officer's comment in *Hampel v. State*, 706 P.2d 1173 (Alaska App. 2008), in which the court held that the officer violated the suspect's *Miranda* rights when he emphasized the obstacles to obtaining a lawyer and pressed on with the interrogation. Officer Smith essentially told Abel that he wasn't going to get a lawyer and then pressed on with the interrogation. Officer Smith should have stopped the interrogation or clarified Abel's request once Abel asked about a lawyer.

Alaska Statute 12.25.150(b) and Alaska Criminal Rule 5(b) provide that an arrestee has the right to immediately contact a lawyer. *Copelin v. State*, 659 P.2d 1206, 1209-14 (Alaska 1983). Violation of the right results in suppression of the evidence. *Id.* at 1214-15. However, the right to counsel under AS 12.25.150(b) is more restricted than the right to counsel under *Miranda*. *Saltz*

v. State, Department of Public Safety, 942 P.2d 1151, 1153 (Alaska 1997). Under the facts of this problem, the constitutional protection subsumes the statutory protection. If Abel's statements were sufficient to trigger the statutory right, then they were sufficient to trigger his constitutional right to counsel. In any event, The court of appeals held in *Wardlow v. State*, 2 P.3d 1238, 1249-50 (Alaska App. 200) that the right does not attach until the person is brought to place of detention like a jail or police station.

B. *Beavers*

A confession is not admissible unless it is voluntary. *Beavers v. State*, 998 P.2d 1040, 1044 (Alaska 2000). The court must evaluate the totality of the circumstances to determine whether a particular confession is the product of free will or of a mind overborne by coercion. *Id.* A non-exhaustive list of the circumstances relevant to the court's determination includes "the age, mentality, and prior experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Id.*

The right to remain silent includes the right to terminate an interrogation at any time. *Id.* at 1045-46. A police officer's threat of harsher treatment conveys that the suspect will be punished for remaining silent or refusing to answer any other questions. *Id.* at 1046. Threats of harsher treatment are, therefore, presumptively coercive, and the court will consider the confession involuntary unless the state can affirmatively show that the confession was voluntarily made. *Id.*

The voluntariness of Abel's confession hinges upon Officer Smith's failure to clarify Abel's equivocal invocation of his right to counsel and whether his final question threatened Abel with harsher treatment. By pressing on with the interrogation as if Abel had not said anything about a lawyer, Officer Smith conveyed to Abel that the *Miranda* rights, including the right to counsel, didn't mean anything. And then when Abel still refused to answer, Officer Smith raised the specter of harsher treatment. He told Abel that it would be a lot worse for Abel if his co-conspirators caused more damage. This conduct was arguably coercive.