



*July 2001 MPTs
and Point Sheets*

State v. White

True Values Television Network, Inc.

Petition of Mona St. John



The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in July 2001 in twenty-seven jurisdictions: Alaska, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, West Virginia, Guam, and the Northern Mariana Islands.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a “model answer.” Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at **www.ncbex.org**.

July 2001 Multistate Performance Tests and Point Sheets

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may also include some facts that are not relevant.
4. The Library contains the legal authorities needed to complete the task, and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

State v. White

Office of the Public Defender

Felony Trial Division

TO: Applicant
FROM: Carlos Espinoza, Assistant Public Defender
DATE: July 24, 2001
RE: *State v. James White*

Our client, James White, has been arrested for the knife-murder of his brother, Stephen White, and his indictment is pending before the Grand Jury. Last year we represented this client on a charge of aggravated assault, also involving a knife and Stephen. During the course of that representation, we referred him to Grace Peterson, one of the social workers on our staff. She interviewed him, wrote a report for me, and ultimately was instrumental in getting him released from jail and admitted to a hospital for psychiatric treatment. Even though I did not reveal the report or its contents to the court, I was able to persuade the court to release him to the hospital for treatment.

The aggravated assault case is still unresolved because both the prosecutor and the judge agreed to several three-month continuances while the client was in treatment. I had hoped to convince White's brother to help me reach an agreement with the prosecutor to drop those charges. Now, of course, everything is changed, and the prosecutor will, no doubt, try to use whatever he can from the assault case to help prove the murder case.

There was never a trial in the assault case and the only witness to the alleged assault (other than James) is now dead. The prosecutor wants to present, as evidence in the murder case, statements made by James concerning the alleged assault. Accordingly, as part of its case before the Grand Jury, the State has subpoenaed the records of conversations that Peterson had with our client and the report she prepared for me in the assault case. Ms. Peterson has left our office and moved to Italy.

We will file a Motion to Quash the Subpoena with the judge presiding over the Grand Jury. I have drafted the Motion so that it refers only obliquely to what is contained in Peterson's report. I need you to draft a persuasive brief in support of the Motion to Quash to be submitted to the judge *in camera*, along with the social worker's report, to persuade her that the contents of that report are privileged and may not be seen or used by the prosecutor in this case. As you know, in an *in camera* submission, the judge reviews the claimed privileged material outside the presence of the lawyer for the party seeking disclosure of the material. Neither the brief nor the report attached to the brief will be served on opposing counsel. You should bring the specific confidential information in the report to the judge's attention so that the judge will focus on the specific points you have directed her to. Prepare the brief in accordance with the guidelines set forth in the attached office memorandum.

Office of the Public Defender
Felony Trial Division

MEMORANDUM

September 8, 1995

TO: Attorneys
FROM: Maurice Abelard
RE: Persuasive Briefs

All persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately; however, emphasis should be placed on the material facts that best support our client's position. The Statement of Facts need not be exhaustive but it must contain key facts sufficient to inform the court of the essence of the dispute and the relief sought.

Our office follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading must succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: The Police Did Not Have Probable Cause to Arrest Defendant. Proper: The Fact That Defendant Was Walking Alone in a High-Crime Area at Night Without Photo Identification Was Insufficient to Establish Probable Cause for His Arrest.

The body of each argument should identify and analyze applicable legal authority and persuasively argue how the facts and law support our client's position. It is important to use the facts in the argument. Authority supportive of our client's position should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

IN THE SUPERIOR COURT FOR MONTGOMERY COUNTY
STATE OF FRANKLIN

SUBPOENA DUCES TECUM

State of Franklin

Criminal Case Number 01-7703

vs.

James White, Defendant

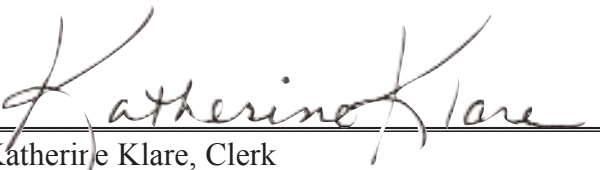
TO:

Custodian of Records
Rehabilitation Services Division
Office of the Public Defender
22 Twin Peaks Blvd.
Galewood, Franklin 33988

YOU ARE COMMANDED TO APPEAR before the Grand Jury duly empaneled in the above captioned case at the Montgomery County Courthouse, Room 346, on July 27, 2001, at 10:00 a.m. YOU ARE COMMANDED TO PRODUCE all reports, notes and any documents regarding the defendant, James White, prepared during the period from September 27, 2000, to date by Grace Peterson, MSW.

Subpoena requested by the Montgomery County State's Attorney's Office.

DATE ISSUED: July 23, 2001


Katherine Klare, Clerk

NOTICE: You are liable to Body Attachment and Fine for Failure to Obey This Subpoena.

IN THE SUPERIOR COURT FOR MONTGOMERY COUNTY

STATE OF FRANKLIN

State of Franklin

Criminal Case Number 01-7703

vs.

MOTION TO QUASH SUBPOENA

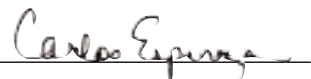
James White, Defendant

Defendant James White moves this Court to quash the subpoena duces tecum issued by the Montgomery County State's Attorney's Office to Custodian of Records, Rehabilitation Services Division, for notes and records of conversations and interviews pertaining to him and prepared by Grace Peterson, MSW. In support of this motion Defendant states:

1. at the time of Defendant's conversations with her, Grace Peterson
 - a. was a social worker duly licensed to practice in the State of Franklin;
 - b. was employed by the Office of the Public Defender in its Rehabilitation Services Division; and
 - c. was assisting his attorney, Carlos Espinoza, in preparing to defend him in a pending criminal case.
2. all communications between Defendant and Grace Peterson were believed by Defendant to be privileged and confidential.
3. all communications between Defendant and Grace Peterson were privileged under both §§ 835 and 952 of the Franklin Evidence Code and, therefore, cannot be divulged.
4. Defendant has at no time waived any privilege applicable to the communications.

WHEREFORE, Defendant requests that this Court grant this motion to quash. This motion is supported by an accompanying brief and records filed concurrently under seal for *in camera* review.

Respectfully Submitted,
Office of the Public Defender

By 
Carlos Espinoza
Counsel for the Defendant

July 24, 2001

Office of the Public Defender

Felony Trial Division

MEMORANDUM

TO: File of James White
FROM: Carlos Espinoza, Assistant Public Defender
DATE: September 27, 2000
RE: Notes from Interview with James White at Montgomery Jail

Client charged with aggravated assault of his older brother, Stephen, and arraigned this morning. I was appointed as his Public Defender and met with him several hours later. Client has been in jail since arrest last night. Bail set at \$25,000.

Client says charge arose from a fight he had with his brother in the house they share. Says he doesn't remember the incident. The police told him that Stephen was cut with a knife and had to be rushed to the hospital for "more than 100 stitches." The noise from the fight was loud enough to alarm some neighbor (he doesn't know which neighbor), who then called the police. It is not the first time the police have come to the house because of fighting between the brothers nor is it the first time client has been arrested. Client says he doesn't remember any of the fights.

Client says he loves his brother and doesn't know why he would fight with him. Says brother is his best friend.

Client is 39-year-old Army veteran who receives disability compensation from the Veteran's Administration (VA) for "a nervous condition." Says he never recovered mentally from his combat experience in the Gulf War and that the VA rates him as 25% disabled. He says he doesn't get enough to live on but that he can't work. Brother Stephen is trustee for a small inheritance left by their parents to support client. Sometimes there is conflict between the brothers over Stephen's decisions about "my money." Client's share of the household expenses in Stephen's house comes from the inheritance. Client says it is unfair that his parents left Stephen in charge of his life but that he also appreciates the many things "my brother does for me." Client admits to heavy drinking when he is depressed. Says he often blacks out. Sometimes he has "episodes" and only learns about them later from others.

Asked client about Stephen's statement to police that says client started argument over Stephen's refusal to provide money for booze, and that as the argument got louder client began throwing things at him and then lunged at him with the knife. Client says he doesn't remember, but that he wouldn't do something like that to his brother. Explained lawyer-client confidentiality to client. Client revealed he owns large knife he brought home from Gulf War. He keeps the knife hidden under the floor boards in his bedroom, but he insists he never used knife to harm his brother.

Client agrees to meet with Grace Peterson, our social worker, who will help us prepare for a bail reduction motion to get him released on own recognizance. Complicated because brother won't let him return home. Might be willing to accept psychological treatment if it will help him get out of jail.

Called Peterson and she will see him tomorrow morning.

Office of the Public Defender
Rehabilitation Services Division
22 Twin Peaks Blvd.
Galewood, Franklin 33988

TO: Carlos Espinoza
FROM: Grace Peterson, MSW
DATE: September 29, 2000
RE: Report on James White

Client was interviewed for two hours on September 28, 2000, and for one hour on September 29, 2000, after being referred by Assistant Public Defender Carlos Espinoza for evaluation for purposes of preparing a bail reduction motion and possibly for disposition.

Mr. White, 39 years old, has a history of psychiatric disorder. The precise prior diagnosis was not ascertainable, and the client either did not know it or would not reveal it. All of his prior treatment was done at the local VA hospital. Client's history includes military service in a combat situation, so a possible diagnosis is Post Traumatic Stress Disorder, but the interview situation and the amount of time available did not permit a full assessment. Client says he left psychotherapy several years ago "because those VA shrinks are a bunch of quacks and they don't make me feel any happier." He stopped taking medication because "I don't feel like myself when I am taking those head pills." Client was advised of my recommendation that he needed to get back into treatment since he had now apparently injured his brother.

Mr. White's response to being confronted with the allegations against him evolved over the course of the three hours we spent together. He was in deep denial at first, claiming to have no memory of any fight with his brother. As I continued to ask him about his relationship with his brother, he said he was sure he didn't do what his brother said he did.

Later, when I told him that his brother would no longer permit him to live in the same house with him, he became enraged. He yelled, "He is lucky I didn't kill him. He makes me so mad! Why does he get to control my life and my money? I wanted to teach him a lesson, to convince him to let me live as I want to, to make my own decisions." I then asked him what made him lose his temper. His answer, full of profanities and shouting, was to claim that his brother was

responsible for everything that was wrong, to deny that his temper was an issue, and to say, “I hope these things I’ve done to him have taught him his lesson!”

I asked him whether he had ever done anything else to teach his brother a lesson. He said that he had once tried to poison his brother by putting rat poison in some mashed potatoes. He said that his effort failed because Stephen spit out the potatoes after one taste and assumed that the food was spoiled. It is not clear whether this story was truthful and could possibly have been said for the shock value. It is clear that he has fixated on his brother as a perceived persecutor. Without further tests I am unable to express a reliable opinion on whether there is paranoia present, but I would not be surprised to learn that the client is in the early stages of schizophrenia.

My recommendation at this stage is that we try to get him out of jail as soon as possible and into an inpatient facility at the Veterans Administration Hospital. It is clear that he cannot be returned to the living situation that led him to wound his brother, at least until he is properly diagnosed and commits himself to staying on the medication that could control his rage. He said he is willing to voluntarily commit himself to such a facility if it would mean he could get out of jail. I will go to work immediately to secure him a bed in the Anger Management Treatment Program at that facility.

LIBRARY

State v. White

Franklin Evidence Code

§ 835. Confidentiality of communications with social workers; exceptions

No licensed social worker may disclose any information acquired from persons consulting the social worker in a professional capacity except:

(a) with the written consent of the person or, in the case of death or disability, of the person's own personal representative, other person authorized to sue, or the beneficiary of an insurance policy on the person's life, health, or physical condition;

(b) that a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act;

(c) that communications and records may be disclosed when a social worker determines that there is a substantial risk of imminent physical injury by the person to the person or others, and the person refuses explicitly to voluntarily accept further appropriate treatment;

(d) when the person waives the privilege by bringing charges against the social worker; or

(e) in any child custody case in which, upon a hearing in chambers, the judge, in the exercise of the judge's discretion, determines that the social worker has evidence bearing significantly on the person's ability to provide suitable custody and that it is more important to the welfare of the child that the information be disclosed than that the relationship between the person and social worker be protected.

* * * *

§ 952. Confidential communication between client and lawyer

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and the client's lawyer in the course of that relationship and in

confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. “Confidential communication between client and lawyer” also includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

§ 953. Lawyer-client privilege

The client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. A lawyer cannot, without the consent of the client, be examined as to any communication made by the client to the lawyer, or the lawyer’s advice given in the course of professional employment; nor can a lawyer’s secretary, stenographer, or clerk be examined, without the consent of the lawyer, concerning any fact the knowledge of which has been acquired in such capacity.

§ 954. When lawyer required to claim privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever the communication is sought to be disclosed.

§ 955. Crime or fraud

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

§ 956. Disclosure necessary to prevent criminal act likely to result in death or bodily harm

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

State v. Guthrie

Franklin Supreme Court (1988)

The defendant is charged with murder in the second degree. At a pretrial hearing, the State moved to compel a licensed social worker to disclose communications made to her in her professional capacity by the defendant and other persons. The social worker asserted a social worker's privilege pursuant to Franklin Evidence Code § 835. The judge ordered the social worker to disclose "all of the alleged communications" to the judge and to the prosecutor at a pretrial *in camera* hearing. The order also provided that, following this disclosure, the prosecutor was to "inform the judge as to the necessity for the disclosure of any or all of the communications in the case to be tried; that thereafter the judge shall rule as to which of the communications he shall order the social worker to disclose at the trial." The judge subsequently amended his order to permit the defense attorney to be present at the *in camera* hearing. We granted the social worker's application for direct appellate review.

The social worker's brief additionally raises the issue of whether the *in camera* hearing violated Evidence Code § 835.

Betsy Diznoff, the social worker involved in this case, is employed by a hospital. The victim, a seven-month-old child, was brought to the hospital on July 9, 1981. She died one week later from her injuries. Shortly after the child was admitted to the hospital, Diznoff

was assigned to treat the victim's family. She interviewed the victim's mother as well as the defendant, who was the mother's boyfriend. At the pretrial hearing, the State moved that Diznoff be required to disclose various communications the defendant made to her in which he admitted hitting the child. The State also seeks certain statements made by the defendant allegedly denying any wrongdoing.

Evidence Code § 835 prohibits disclosure by a licensed social worker of information acquired from persons consulting the social worker in a professional capacity. This case is concerned with the exception embodied in subsection (b), which states that "a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act."

1. *Statutory purpose.* The privilege established by § 835 is a legislative recognition that the confidentiality of a person's communications to a social worker is a necessity for successful social work intervention. Whether the protected relationship involves physicians, psychologists, or certified social workers, all share the common purpose of encouraging patients or clients to disclose fully the nature and details of their illnesses or their emotions without fear of later revelation by one in whom they placed their trust

and confidence. The purpose of enacting a social worker-client privilege is to prevent the chilling effect that routine disclosures may have in preventing those in need of help from seeking that help. The Legislature has determined that, while the preservation of the confidential relationship is an important objective, under certain circumstances this goal must give way in favor of other societal interests. Therefore, the Legislature has carved out exceptions to the statutory privilege.

2. *Scope of exception.* The pertinent language of the exception embodied in subsection (b) provides that a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act.

The social worker has testified before the grand jury concerning statements made by the defendant that fall into this category and is prepared to do so at trial. The social worker testified that, during her interview with the defendant, he admitted that he hit the victim on the night she went to the hospital and also had hit her in the past. It is clear that these statements reveal the commission of a crime or harmful act and are not privileged. The State contends that exception (b) not only encompasses admissions of guilt but also extends to communications that are evidence of consciousness of guilt, such as denials or false statements, and in addition any information that has any bearing upon crim-

inal activity. Diznoff contends that the exception must be construed much more narrowly and that the State's interpretation of the exception would effectively nullify the statute.

The intended scope of the phrase "communication that reveals the contemplation or commission of a crime or a harmful act" is not readily ascertainable from the language used. While it is clear that admissions of a crime or harmful act are intended to be covered by this phrase, it is not clear whether the additional communications that the State seeks are intended to fall within the statutory exception.

The State's reading of subsection (b) is too broad. It would require social workers to disclose all of the information they receive in a professional capacity whenever a crime is involved. It would negate the privilege under this circumstance. We think that the Legislature evidenced two aims by the enactment of the statute and exception (b). The first objective is to encourage individuals in need of help from a social worker to seek that help by ensuring the confidentiality of their communications. The second objective, embodied in subsection (b), is to serve the interests of society in prosecuting those who are guilty of criminal conduct. In enacting subsection (b), the Legislature attempted to balance these two objectives. Exception (b) should be narrowly construed to require disclosure by a social worker of subpoenaed communications that relate directly to the

fact or immediate circumstances of a crime. The exception does not extend to all information that might be relevant in the prosecution of a person for a crime. The exception is not intended to allow the State a “fishing expedition” or a convenient discovery device.

In the case before us, the court may compel the social worker to reveal the defendant’s admissions of criminal activity. However, the defendant’s alleged denials of wrongdoing and false statements to the social worker do not reveal the commission of a crime. While such denials may show a “consciousness of guilt,” they do not “reveal” the commission of a crime.

3. *In camera hearing.* The statute does not set forth any procedure by which the trial judge can determine whether communications fall within exception (b). The *in camera* hearing is the proper procedure to allow the judge to determine whether or not the privilege applies to communications made to the social worker.

The State argues that the parties should exchange briefs and that the prosecutor and defense counsel should be present at the *in camera* hearing because the judge may require their assistance in determining the relevance of the communications. The defendant argues that the prosecutor should not receive the defendant’s brief in support of his motion nor be present because the disclosure in the presence of the prosecutor is a violation of the client’s confidentiality. He argues also that even if the judge rules that certain

testimony may not be used at trial, the prosecutor may indirectly use such evidence against the defendant.

We agree that disclosure of the confidential information to the prosecutor or the defense attorney in the *in camera* hearing would frustrate the purpose of the statute unless it falls within one of the statutory exceptions. In most cases, the judge will be able to make the decision whether or not the information is privileged without the parties’ assistance. However, if questions arise, the judge may require the assistance of the parties, but must do so without revealing the content of the confidential communications.

Remanded for further proceedings.

Shea Cargo Company v. Wilson

Franklin Court of Appeal (1951)

James Wilson brought an action for personal injuries against Shea Cargo Company. He alleged that he suffered a brain concussion and nervous shock. At the request of Wilson's attorneys, a physician specializing in nervous and mental diseases, Dr. Joseph Chavkin, twice gave Wilson a neurological and psychiatric examination. In his deposition, Dr. Chavkin testified that there was no physician-patient relationship between him and Wilson; that he did not advise or treat Wilson; that the sole purpose of the examination was to aid Wilson's attorneys in the preparation of a lawsuit for Wilson; and that he was the agent of the attorneys. He refused to answer questions regarding Wilson's condition on the ground that the information sought was privileged under Franklin Evidence Code § 952, et seq., Lawyer-Client Privilege. Wilson's counsel also claimed that the information was privileged.

The Superior Court granted Wilson's motion for a protective order and now defendant filed this interlocutory appeal.

The Physician-Patient Privilege

Dr. Chavkin testified that "there was no physician-patient relationship in the sense that I was examining him for the purpose of giving him advice or treatment . . . nor did I at any time give him any such advice or treatment; so that there wasn't that usual physician-patient relationship." He also filed

an affidavit in which he averred that he "has not at any time prescribed for or treated the said James Wilson as a patient or otherwise." Under such circumstances there is no physician-patient privilege under Evidence Code § 920.¹ That privilege cannot be invoked when no treatment is contemplated or given. The confidence that is protected is only that which is given to a professional physician during a consultation with a view to curative treatment; for it is that relation only which the law desires to facilitate.

Even if there had been a physician-patient relationship, the privilege would be waived under § 920 by Wilson's bringing the action for personal injuries.

The purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege.

¹ § 920 says, "*Physician and patient.* A licensed physician cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient;... provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify...."

The Lawyer-Client Privilege

Although Dr. Chavkin can invoke no privilege of his own and there was no physician-patient privilege in this case, we have concluded that Dr. Chavkin was an intermediate agent for communication between Wilson and his lawyers and that Wilson may therefore invoke the lawyer-client privilege under § 953 of the Evidence Code.² This privilege is strictly construed, since it suppresses relevant facts that may be necessary for a just decision. It cannot be invoked unless the client intended the communication to be confidential, and only communications made to a lawyer in the course of professional employment are privileged.

The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his lawyer. Unless the client makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading, and much useless litigation may result. Given the privilege, a client can disclose unfavorable facts without

² § 953 reads, *Lawyer-client privilege* “...A lawyer cannot, without the consent of the client, be examined as to any communication made by the client to the lawyer or the lawyer’s advice given in the course of professional employment; nor can a lawyer’s secretary, stenographer, or clerk be examined, without the consent of the lawyer, concerning any fact the knowledge of which has been acquired in such capacity.”

fear that the lawyer may be forced to reveal the information confided to the lawyer. The absence of the privilege would convert the lawyer into a mere informer for the benefit of the opponent.

Petitioner contends that under the express terms of § 953 only the lawyer and the lawyer’s secretary, stenographer, or clerk cannot be examined and that, since Dr. Chavkin was not engaged in any of these capacities, he cannot withhold the information requested.

The statute specifically extends the client’s privilege to preclude examination of the lawyer’s secretary, stenographer, or clerk regarding communications between lawyer and client to rule out the possibility of their coming within the general rule that the privilege does not preclude the examination of a third person who overhears communications between a client and the client’s lawyer. It does not follow, however, that intermediate agents of the lawyer and client may be freely examined. Had Wilson himself described his condition to his lawyers there could be no doubt that the communication would be privileged. It is no less the client’s communication to the lawyer when it is given by the client to an agent for transmission to the lawyer. A communication, then, by any form of agency employed or set in motion either by the client or the lawyer is within the privilege.

This, of course, includes communications through an interpreter, through a messenger

or any other agent of transmission, as well as communications originating with the client's agent and made to the lawyer. It follows, too, that the communications of the lawyer's agent to the lawyer are within the privilege because the lawyer's agent is also the client's sub-agent and is acting as such for the client. Thus, when communication by a client to the client's lawyer regarding the client's physical or mental condition requires the assistance of a physician to interpret the client's condition to the lawyer, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed.

Affirmed.

FILE

True Values Television Network, Inc.

Grohman, Marty-Nelson, Kalevitch & Gilmore, P.A.

Attorneys and Counselors at Law

The Meadows Corporate Center

Suite 200-300

Easton, Franklin 33333

MEMORANDUM

TO: Applicant
FROM: Joe Grohman
RE: TVTV Hostile Takeover
DATE: July 24, 2001

We serve as outside corporate counsel for True Values Television Network, Inc. (TVTV), a Franklin entity that owns and operates television stations in major and minor media markets throughout the U.S.

A short time ago, TVTV received a hostile offer from Metro Communications Corporation (Metro) to buy all of TVTV's assets. Rudy Braccia, founder, chairman of the board, and primary shareholder of TVTV, is adamantly opposed to this takeover. In his attempt to thwart Metro's planned takeover, Braccia has stepped up merger discussions with the Family Friendly Publishing Company (Friendly).

As you can see from the materials in the File, there are various shareholder groups with differing interests, some of whom favor the deal with Metro and some of whom might be better off with the Friendly deal.

For example, Corporate Resources Investment Fund (CRIF), a major institutional investor in TVTV, is demanding, on behalf of itself and other shareholders, that TVTV abandon its attempt to reach an agreement with Friendly and instead cooperate with Metro's acquisition efforts.

On the other hand, the TVTV Board is not at all sure that it is in the best interests of the corporation or other shareholder groups to accept either offer. If there is going to be a transaction, however, the Board favors a deal with Friendly.

Section 103(c) of the Franklin Corporations Code refers to various other groups, in addition to the corporation and its shareholders, whose interests the Board is entitled to consider when making a decision regarding the best interests of the corporation and its shareholders.

To help me in counseling the Board about its options, please draft a memo that:

- 1) Describes what are the conflicting interests of the corporation, each shareholder group, and each of the other groups identified in Section 103(c); and**
- 2) Analyzes whether and how, consistent with its fiduciary duty, the Board can justify a decision to negotiate exclusively with Friendly in spite of the various conflicting interests.**

In structuring part one of your memo, please identify and discuss the interests of the corporation and each of the shareholder groups and other groups *separately*. Write part two of your memo in straight narrative form.

Zanetti Kaufman Ono & Krause

One Lauderdale Plaza - Suite 400
Davie, Franklin 33212
555/777-5555

July 10, 2001

Rudolph Braccia, Chairman of the Board
True Values Television Network, Inc.
100 TVTV Drive
Dania, Franklin 33113

Dear Mr. Braccia:

Corporate Resources Investment Fund (CRIF) is an institutional investor with significant holdings of True Values Television Network, Inc. (TVTV) stock. CRIF's Board of Directors has directed me to inform you of its strong objections to the TVTV Board's de facto rejection of the recent offer by Metro Communications Corporation (Metro) to buy all of TVTV's assets. The CRIF Board is similarly concerned with the TVTV Board's reported intention to pursue a possible merger with the Family Friendly Publishing Company (Friendly).

CRIF understands that Metro has offered to purchase all of TVTV's assets at a price that is the equivalent of \$47 per share. CRIF also understands that the Friendly merger offer that is being favorably viewed by the TVTV Board can be fairly valued at only \$38 per share, almost 20% below the Metro proposal.

The reason the TVTV Board is continuing the discussion with Friendly is the belief that Friendly is committed to the "family friendly" programming philosophy that marks the operation of TVTV. In contrast, the Board has rejected the Metro offer apparently because it is unlikely Metro will continue to follow the current TVTV programming format.

The CRIF Board wants to maximize immediate financial return to investors. The CRIF Board, therefore, holds strongly to the position that, if the TVTV Board were to act in the fashion and for the reasons described above, it would amount to a breach of the duty owed to the stockholders, including CRIF and the three other institutional investors. See *Cole Corporation v. Nord, Inc.*, Franklin Supreme Court (1992).

If the TVTV Board fails to carry out its legal obligations, CRIF will sue to block the TVTV Board from pursuing a business relationship with Friendly and to obtain other appropriate relief.

Sincerely,



Reu C. Shotland, Esq.

For the Firm

cc: Members of the TVTV Board of Directors

Richard Schwartz, Chairman of the CRIF Board of Directors

Metro Communications Corporation

World Headquarters

MC Boulevard
Metro, Columbia 11115

July 9, 2001

Rudolph Braccia, Chairman of the Board
True Values Television Network, Inc.
100 TVTV Drive
Dania, Franklin 33113

Dear Mr. Braccia:

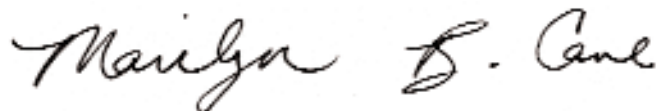
On behalf of Metro Communications Corporation (Metro), I extend to True Values Television Network, Inc. (TVTV) and its shareholders Metro's offer to purchase all of TVTV's assets for \$282 million, which is equivalent to \$47 per share. TVTV shares closed yesterday at \$34 per share.

Metro offers this premium price because of the value of these assets and the positive fit between Metro and TVTV. Metro and TVTV have crossover operations in 49 markets that could be owned by a single company under FCC regulations. Because 42 of our crossover stations are located in the 50 largest markets in the nation, TVTV's broadcast license assets are valuable to Metro.

Metro's expertise in operating television stations across the country allows it to determine which minor market outlets should be sold and which stations will be operated by Metro's personnel rather than by TVTV's personnel. Metro will close any TVTV stations that cannot be profitably operated or sold.

Metro's formal proposal is being sent under separate cover. Failure to respond positively to our offer within 45 days will cause irreparable injury to Metro and force us to take remedial legal action against the TVTV Board.

Sincerely,



Marilyn B. Cane, President

Excerpts from Confidential Report to TVTV from
Goldman, Morgan, Smith & Barney
Investment Bankers
New York, New York

True Values Television Network, Inc. (TVTV)
May 29, 2001

TVTV owns 80 television stations (42 located in the 50 largest U.S. markets), down from 90 a year ago. TVTV broadcasts a variety of family-oriented programs, including syndicated reruns of popular network shows (e.g., *Touched by an Angel*; *Highway to Heaven*), as well as a few original programs produced exclusively for TVTV (e.g., *Happy Island*; *Adventures of Louis the Saint*) and made-for-TV movies (G or PG rated). In the past year, the Company sold its 10 best stations in the minor media market to raise much-needed capital.

The outstanding shares of TVTV stock total 6 million:

- Rudy Braccia, founder and Board chairman, and the Board members who do not represent institutional shareholders—2.5 million shares (about 42%)
- Institutional investors, led by CRIF—1.5 million shares (25%)
- Individual investors—the remaining 2 million shares (33%) (See below for breakdown as between *Good Times* subscribers and others.)

Trading in TVTV shares is light, an average of 70,000 shares a day, slightly more than 1% of the stock. In the last year, the price of TVTV stock has ranged from a low of \$25 a share to a high of \$39 a share.

A stock ownership anomaly is the large number of shares owned by TVTV's dedicated viewers. At the time of the launch of the TVTV network, management promoted the sale of shares through places of worship within its broadcast areas. Those who purchased five shares of TVTV stock were entitled to receive the Company's monthly program guide, *Good Times*, at a deeply discounted rate.

Almost 250,000 individuals bought at least five shares. While some of those who originally bought Company stock in response to this promotion (primarily those who live in the markets where TVTV sold its stations) have sold their shares, a remarkable percentage of the Company's stock is held by those who, according to a year-2000 marketing survey, appear to be committed to TVTV's broadcasting philosophy. Today, more than 200,000 individuals, who own at least 1 million shares of TVTV stock (about 17%), subscribe to *Good Times* at the special stock ownership rate.

* * * *

It is difficult to place a value on TVTV. The Company has not met its goals. It has performed poorly and continues to decline. It has lost an increasing amount of money each year since its creation three years ago, and last year it lost \$69 million. The Company's declining viewership translates into weak advertising sales, effectively capping income while production and other expenses continue to rise.

On the other hand, TVTV controls valuable assets. Despite its modest viewership, the Company's assets have risen in value as a result of the Federal Communications Commission's ruling that allows one company to own two stations in a single market. Inevitably, TVTV will be the target of takeover attempts by other broadcast companies or those who wish to enter the field.

Taking all of these factors into consideration, it is the judgment of the firm that the present value of TVTV is \$309 million (or \$50 per outstanding share).

Grohman, Marty-Nelson, Kalevitch & Gilmore, P.A.

Attorneys and Counselors at Law

The Meadows Corporate Center

Suite 200-300

Easton, Franklin 33333

INTEROFFICE MEMORANDUM

TO: TVTV File
FROM: Joe Grohman
RE: NOTES OF INTERVIEW WITH RUDY BRACCIA
DATE: July 20, 2001

Braccia reviewed status of offers from Metro and Friendly.

- Metro's offer is to pay TVTV \$282 million for all of the Company's assets (broadcast licenses, station equipment, etc.), the equivalent of \$47 per share. If TVTV accepted this offer, it would become a mere shell company with cash to distribute to shareholders.
- Friendly has upped offer to equivalent of \$40 per share. TVTV shareholders would not get cash but would receive 2 shares of Friendly stock for each TVTV share held (Friendly presently trading at \$20/share). Braccia believes Friendly will increase offer to \$45 (2.25 shares of Friendly for each share of TVTV) if it appears Metro is likely to be successful. When pressed, Braccia admitted Metro may up its merger offer to the equivalent of \$50, the "fair value" projected by Goldman, Morgan, but doubts Friendly will go over \$45 per share.
- Friendly will absorb TVTV's broadcast operations, has committed to follow the "family friendly" broadcast philosophy of TVTV, and has agreed to make that commitment an element of the merger agreement. Friendly's president also gave assurance that stations in smaller markets would be retained; most of those are in the heartland of America where Friendly's present products sell well.
- Braccia questioned Friendly president, Mark Dobson, about Friendly's ability to carry out its commitment because Friendly has no experience in broadcasting. Dobson said Friendly will depend heavily on TVTV's experienced personnel to manage and to implement Friendly's broadcast plan. Emphasized that Friendly's successful implementation of the

same philosophy in other media can be carried over to broadcasting. Dobson will continue TVTV's efforts to support the production of "family friendly" programming.

- Braccia firmly believes Friendly has the resources and the business strategy to make "family friendly" broadcasting financially successful. Friendly shares have quadrupled in value over the last three years (from \$5 to \$20 per share). By merging with Friendly, TVTV shareholders are likely to benefit from what Braccia believes will be Friendly's growth as it branches into broadcasting. Of course, Braccia acknowledges there is a real risk that Friendly will be unsuccessful in implementing the "family friendly" television philosophy.
- Braccia is worried about what's going to happen to the 400 TVTV employees who work in 30+ small market stations. He is also concerned that the people in these small communities will be denied access to "family friendly" programming and that the producers of such programs will lose their outlet.

INDUSTRY ANALYSIS by **SIMON SCOTT****Will TVTV's Braccia Dance with the Media Devils?**

Rudy Braccia, the "angel" behind TVTV, had hoped that "feel good" programming would be the answer to the network's financial prayers. It doesn't appear, however, that those prayers have been answered. TVTV continues to wallow in low viewer numbers despite the wide geographic reach of its 80 stations (42 of the top 50 markets).

But Braccia may be "saved" by a miracle, so to speak. An FCC rule change allowing broadcasters to own two outlets in a single market has made smaller networks, like TVTV, attractive takeover targets.

The word on the street is that media giant Metro has made a bid to capture TVTV. How will Braccia and a board dominated by fans of "family friendly" programming react to the broadcast "heathens"? If Metro gets its hands on TVTV's juicy stations, you can be sure "Touched by an Angel" will be replaced by Metro's brand of "sex, crime and rock 'n' roll." The FCC has handed Rudy Braccia a gift, a chance to share ownership in his struggling operation or even sell all of his company to a competitor, like Metro. What will Braccia decide? And will it be just a matter of money?

Braccia, who recently referred to the network he created as "the most eligible bachelor at the media dance," is said to have initiated discussions with an unlikely partner, the Family Friendly Publishing Company. Friendly is not involved in television in any way. Its business is limited to book publishing, greeting cards, and Internet communications. Successful, cash-rich, and family-friendly, Friendly is an ideological match for Braccia and TVTV, but one wonders if it can compete in the dog-eat-dog world of broadcasting.

It won't be long before we learn whether Braccia will "dance with the media devils." As usual, stay tuned!

LIBRARY

True Values Television Network, Inc.

Franklin Corporations Code

§ 103. Board of directors

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, whose duty is to promote the best interests of a corporation and its stockholders.

(b) A member of the board of directors shall, in the performance of such member's fiduciary duties, be fully protected in relying in good faith upon the corporate records and upon such information, opinions, reports, or statements presented to the corporation by any of the corporation's officers or employees or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

(c) A director may, in considering the best interests of a corporation and its stockholders, consider the effects of any action on employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent.

(d) A director shall not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that this provision shall not eliminate or limit the liability of a director (1) for any breach of the director's duty of loyalty to the corporation or its stockholders, and (2) for acts or omissions not in good faith.

* * * *

§ 251. Merger; sale of corporate assets

(a) The board of directors of each corporation that desires to merge shall adopt a resolution approving an agreement of merger and declaring its advisability. The agreement shall state the terms and conditions of the merger. This agreement shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Approval requires a majority vote by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon at a meeting duly called.

(b) Every corporation may at any meeting of its board of directors sell all or substantially all of its property and assets upon such terms and conditions and for such consideration as its board of directors deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon at a meeting duly called.

Cole Corporation v. Nord, Inc.

Franklin Supreme Court (1992)

This case involves the attempted hostile corporate takeover of Nord, Inc. (Nord) by Cole Corporation (Cole) and the intervention of a “white knight,” Wright Co. (Wright), favored by Nord’s board of directors. In an action filed by Cole, the District Court concluded that Nord’s directors had breached their fiduciary duty by making certain concessions to facilitate Wright’s takeover and granted a preliminary injunction.

In this permissive interlocutory appeal we consider two issues: (1) the validity of the defensive measures taken by the Nord board in the face of an active bidding contest for corporate control; and (2) the power of the directors to take into consideration the impact of the takeover on a constituency other than the shareholders.

The Takeover Battle and the Defensive Measures Undertaken by the Nord Board: The controversy began when Cole made an unsolicited tender offer of \$45 per share for the outstanding shares of Nord. At the time, Nord’s shares were trading on the New York Stock Exchange for \$38 per share. Upon analysis of the offer, Nord’s investment bankers advised the board that \$45 was a grossly inadequate price; that Nord had a value of \$55 per share; and that the likelihood was that, upon acquisition, Cole intended to sell off all of Nord’s assets rather than operate the company intact. The board expressed its opposition to any such sell-off

and rejected Cole’s offer.

The board implemented two defensive measures: (1) it began repurchasing its shares to bolster the share price; and (2) it issued debt in the form of bonds, which contained covenants limiting the sale of any of Nord’s assets while the debt was outstanding, provided, however, that the board could waive the covenants. Soon thereafter, Wright appeared on the scene, and the board agreed to negotiate exclusively with Wright.

A bidding war ensued. Nord’s board rejected a new offer of \$48 per share from Cole, asserting as its principal ground for rejection the fact that Cole intended to sell off all of Nord’s assets. Reconciling itself to an eventual sale of the company, the board accepted an offer of \$55 from Wright. Under this proposal, Wright would assume liability for the bonds that had been issued to fend off Cole’s takeover attempt, and Nord would waive the covenants against the sale of any of Nord’s assets. In Wright’s offer, it promised that it would sell off only two of Nord’s divisions to generate cash to pay for the acquisition.

When the waiver of the debt covenants became known, the market value of the bonds fell by 15%. The bondholders immediately threatened to sue Nord and the directors individually.

Cole then offered \$56 per share, subject to

the waiver of the debt covenants. Wright made a new offer in which it agreed to pay \$57 per share and to guarantee the value of the debt. The board unanimously accepted Wright's offer on the grounds that it was for a higher price than Cole's and it protected the bondholders.

Cole raised its bid to \$58 per share, again conditioned on waiver of the debt covenants. Nord rejected the offer, and Cole sued to enjoin the sale to Wright. The District Court granted the injunction on the ground that the Nord directors had breached their fiduciary duty by making concessions to Wright out of concern for their personal liability to the bondholder constituency rather than maximizing the price to be paid to their principal constituency, the shareholders.

Discussion: To obtain a preliminary injunction, the plaintiff must demonstrate both a likelihood of success on the merits and irreparable harm if the injunction is not issued.

First, we conclude that Cole has a likelihood of success on the merits. The directors are responsible for managing the affairs of the corporation, Franklin Corp. Code § 103(a), and, under the business judgment rule, they are ordinarily given wide latitude. However, the business judgment rule does not absolve directors of their fiduciary duty. In making business decisions to implement anti-takeover measures, the board is especially vulnerable to the charge that the measures will serve the board's financial interests rather than those of the shareholders. Accordingly,

the directors bear the burden of proving that the defensive measures taken were in the best interests of the shareholders, that they had reasonable grounds for believing there was a danger to the corporate policy and effectiveness, and that the measures were reasonable in relation to the threat posed.

Repurchase of Nord Shares: The board acted in the best interests of the shareholders by preventing a takeover at a price below the stock's intrinsic value. The effect of the repurchase program was to increase the market price of the shares and was a factor that caused Cole and Wright to raise their bids substantially. It was therefore a reasonable measure in relation to the threat that the early offers were too low.

Issuance of the Bonds: Initially, the board acted in good faith and on an informed basis with reasonable grounds to believe that Cole's intention to break up the corporation and sell off the assets was a threat to the corporate enterprise. The issuance of the bonds with the restrictive sale-of-assets covenants was a proper exercise of the directors' legal powers, duties, and responsibilities to ward off what they saw as a threat to the continued existence of the corporation.

However, by the time Cole offered \$56 per share, the board had already accepted an offer from Wright, it was clear that the company was for sale, and it was inevitable that there would be a breakup of Nord. The board's duty then changed from preserving Nord as a corporate entity to obtaining the best price for the shareholders.

The threat of litigation that arose when the board waived the sale-of-assets covenants in response to Wright's first offer then became a major factor influencing the board's actions. It was no longer justifiable for the directors to deal selectively and to favor Wright's offer on the grounds that it would guarantee the debt. In doing so, they improperly preferred the bondholder interests, whose rights were fixed by contract, and their own interests to avoid personal liability. Their sole focus should have been on obtaining the highest possible price for the shareholders.

The directors correctly point out that Franklin law permits them to consider the interests of constituencies other than the shareholders, Franklin Corp. Code § 103(c), and they argue that their decision to protect the bondholder interests was a reasonable exercise of this power. In the abstract, that is a correct assertion, but not on the facts of this case. A significant by-product of Wright's offer to guarantee the value of the debt was to absolve the directors of personal liability to the bondholders. By ending the bidding once they were assured of protection against personal liability for consequences flowing from the adoption of previous defensive measures, they breached the fiduciary duty they owed to the shareholders.

Exclusive Negotiation with Wright: It is not inherently unlawful for the Nord board to have favored a white knight to the total exclusion of a hostile bidder. It is, however, impermissible when a board's primary duty is to auction the company to the highest bid-

der. When, as here, the competing bidders make relatively similar offers and the dissolution or breakup of the company becomes inevitable, market forces must be allowed to operate freely to bring the best price available for the shareholders' equity. The board's decision to negotiate exclusively with Wright prevented that from happening.

Accordingly, we conclude that Cole is likely to prevail on the merits of its suit.

Irreparable Harm: The District Court correctly ruled that Cole's opportunity to bid for Nord would be lost unless the preliminary injunction issued. Given the conclusion that the board's obligation was to obtain the highest price for the shareholders, issuance of the injunction outweighs any harm to the defendants.

Conclusion: Initially, the directors' defensive measures were justified because they prevented a hostile takeover at an inadequate price. But, once the sale and break-up became inevitable and the prices offered became realistic, their duty shifted. They were no longer justified in seeking to protect the interests of the bondholder constituency. Moreover, in limiting the scope of negotiations and waiving the asset sale restrictions only after assurances that they would be protected from personal liability, the directors allowed their own financial welfare to override their consideration of shareholder profit. Because the business judgment rule offers no safe harbor under these circumstances, we affirm.

FILE

Petition of Mona St. John

Adlam, Colona & Walters
1735 Lagoon Street
South Keansburg, Franklin 33345
(555) 234-7234

TO: Applicant
FROM: Lloyd Walters
RE: Mona St. John Petition for Executive Clemency
DATE: July 26, 2001

Based upon the legislature's addition of § 1425 to the Franklin Evidence Code after Mona St. John was convicted, we have undertaken *pro bono* to file a petition for executive clemency on her behalf. We believe if Battered Women's Syndrome (BWS) evidence had been allowed to come in at her trial, there's a good chance the jury would have accepted her claim of self-defense and acquitted her or, at least, convicted her of the lesser offense of manslaughter. In the latter case, she would have finished serving the minimum sentence by now.

I want you to draft the "Legal Argument" section of the clemency petition setting forth persuasively what effect BWS evidence would have had on Ms. St. John's case at trial and how the change in the Evidence Code supports Ms. St. John's request for pardon or for commutation of her sentence.

Please use the descriptive heading format suggested in *Walker's Treatise on Executive Powers*. I will put together the other parts of the petition, including the "Fairness Factors," and incorporate your draft into mine.

1 **State v. Mona St. John**

2 Excerpts from Trial Transcript (June 1994)

3
4 Direct Examination of Mona St. John by defense counsel, Sam Wilson:

5 **Q:** Tell me about your relationship with your husband, Rich St. John.

6 **By Matthew Ricco, Assistant District Attorney:** Objection. Irrelevant.

7 **Mr. Wilson:** Your honor, I want to present evidence of the history of brutality.

8 **Mr. Ricco:** May we approach the bench?

9 **The Court:** You may approach.

10 (At Side Bar):

11 **Mr. Wilson:** The defendant has been the victim of domestic violence throughout her marriage.
12 The history of this abuse is relevant to prove that she acted in self-defense when
13 she shot her husband.

14 **Mr. Ricco:** The only evidence that matters for purposes of self-defense is what happened on
15 the night in question. Self-defense turns on the events at the moment of the shoot-
16 ing. What went before has nothing to do with whether her actions were justifiable.

17 **Mr. Wilson:** The evidence will prove that her state of mind was such that she believed the threat
18 to her life was imminent.

19 **The Court:** I agree with the prosecutor. I will sustain the objection.

20 **Mr. Wilson:** I want to make a proffer of the testimony we would introduce if permitted.

21 **The Court:** You may do so after we excuse the jury.

22 (Side Bar Ends):

23 **The Court:** Ladies and Gentlemen of the jury. We will take a recess at this time and reconvene
24 this afternoon at 2 p.m. Please remember my instruction to not talk among your-
25 selves or with any other person about this case.

26 * * * *

27 **(Proffer of evidence outside the presence of the jury)**

28 **Mr. Wilson:** Now I will repeat my earlier question. Please describe your relationship with your
29 husband.

30 **A:** My husband and I met in high school in 1986. I should have known before I married him
31 that there would be trouble because, soon after we started dating, he got very jealous and

1 accused me of seeing other men. This wasn't true, but that didn't stop him from getting
2 worked up and sometimes hitting me. It turned out he also had a drinking problem and
3 when he got drunk the situation became worse. Little things would bother him—how I
4 dressed, telephone calls to my girlfriends, how long I spent shopping, even visits to my
5 family.

6 **Q:** When did you get married?

7 **A:** We got married in 1988 when I got pregnant with Daniella. The abuse got much worse
8 after I had my second child, Bobby.

9 **Q:** What happened?

10 **A:** Rich would beat me a lot, even in front of the children. They would cry but still he didn't
11 stop. He even did it in public. It got to the point that I thought he was going to hurt me
12 real bad or even kill me.

13 **Q:** What were your height and weight during the time you were married?

14 **A:** About what I am now—5'3", 110 lbs.

15 **Q:** And your husband's?

16 **A:** He was a big man—about 6' tall and over 250 lbs.

17 **Q:** Did you ever call the police when he got violent?

18 **A:** In the beginning I did, but, when they kept acting like our problems were private, I
19 stopped calling them because Rich would only get madder.

20 **Q:** Did you ever go to a doctor?

21 **A:** Rarely. I was afraid the hospital might call the police. Unless they could keep him away
22 from me for good, he would have gotten out and hurt me worse.

23 **Q:** Did Rich ever hurt the children?

24 **A:** Yes, he did. They were only youngsters. They couldn't be quiet like Rich wanted them to
25 be. It broke my heart.

26 **Q:** I have to ask you what I'm sure many people do—why didn't you just leave him?

27 **A:** When things got real bad, I did try. I went to my parents' house. But he would come there,
28 tell me he was sorry, and promise never to hit me again. I did love him and I wanted him
29 to change so badly that I fell for it. There were good times when he was a loving husband
30 and father, and, coming from a close family myself, I wanted my children to grow up in

1 one. Also, I couldn't have supported the kids on my pay alone.

2 **Q:** Did you ever think about divorcing him?

3 **A:** In the month before he died, I told him I wanted a divorce, but he told me if I left him he
4 would find me and kill me and the children.

5 **Q:** Your honor, that concludes the proffer.

6 **Mr. Ricco:** This is all very interesting but it will just confuse the jury on the issue they must
7 decide and is calculated just to generate sympathy. My objection stands.

8 **The Court:** I will sustain the objection. We will reconvene after lunch.

9 * * * *

10 (Trial Reconvenes)

11 **Mr. Wilson:** Ms. St. John, what was going on when you came home from work on the evening
12 of May 26?

13 **A:** Well, I came home a little late that night because of heavy traffic. My son, Bobby, started
14 bickering with Daniella over some toy. Rich became enraged and hit Bobby in the head
15 so hard the boy became very quiet. Then, in front of the kids, Rich accused me of being
16 with a man from work. I told him he was wrong, but he wouldn't believe me. He hit me
17 so hard I thought my jaw was broken. Finally, Rich stormed out of the house and yelled
18 back at me that he was going out to find a place to dump my body.

19 **Q:** What did you do?

20 **A:** I was very scared. I took the kids over to my parents' house and then came back home,
21 pacing around, trying to decide what to do. I just couldn't take it anymore. I found Rich's
22 pistol in the closet, put it under my pillow, and then sat on the bed. I was so exhausted I
23 might have fallen asleep. I don't remember.

24 **Q:** What time was this?

25 **A:** About 9:30 p.m.

26 **Q:** Then what happened?

27 **A:** At about midnight, I heard a crashing sound downstairs, then Rich yelling, "I'll show
28 you!" He came upstairs and came storming through the bedroom door. I shot him.

29 **Q:** Did you feel that your life was in danger?

30 **A:** Yes, I did.

1 **Q:** Why?

2 **A:** Rich was a big man. I was afraid he had a weapon or would get the gun away from me.
3 And he had made that comment about finding somewhere to put my body. I just felt that
4 this time things had really gotten out of hand.

5 **Mr. Ricco:** Objection and move to strike the reference to “this time.”

6 **The Court:** Sustained. Ladies and Gentlemen, please ignore the defendant’s statements about
7 prior events. I order the last sentence of the answer stricken from the record.

8 **Mr. Wilson:** Why didn’t you stay away from the house?

9 **A:** Somehow I didn’t feel like I could. I was afraid if he found our house empty he would
10 come after me at my parents’ home and hurt my children, too.

11 **Q:** What happened after you shot him?

12 **A:** I went next door to the neighbor, who called 911. I found out after I was arrested that Rich
13 had died.

14 * * * *

15 Cross-examination of Mona St. John by Assistant District Attorney Matthew Ricco:

16 **Q:** After Mr. St. John allegedly struck you that night, he left the house, correct?

17 **A:** Yes.

18 **Q:** You didn’t call the police then, did you?

19 **A:** No.

20 **Q:** You didn’t go to a hospital for treatment?

21 **A:** No.

22 **Q:** You did go to your parents’ house, right?

23 **A:** Yes.

24 **Q:** You did drop the kids off, is that right?

25 **A:** Yes.

26 **Q:** You were afraid for the kids?

27 **A:** Yes.

28 **Q:** You wanted to protect them?

29 **A:** Of course.

30 **Q:** You felt they were safer at your parents’ than at your house?

1 **A:** Yes.

2 **Q:** But you drove back to the house?

3 **A:** Yes.

4 **Q:** When you got home you searched for a gun?

5 **A:** Yes.

6 **Q:** You thought the gun would make you safer?

7 **A:** I don't remember.

8 **Q:** You actually found a pistol as a result of your search?

9 **A:** Yes.

10 **Q:** You placed the pistol under the pillow of your bed, sat down and waited for your husband,
11 is that right?

12 **A:** I think I fell asleep. I'm not sure.

13 **Q:** With the gun under your pillow?

14 **A:** Yes.

15 **Q:** Your testimony was that Mr. St. John came into the bedroom and as he opened the door
16 you shot him?

17 **A:** Yes.

18 **Q:** You'd heard him coming?

19 **A:** Yes. He was yelling.

20 **Q:** You have a phone in your bedroom, don't you?

21 **A:** Yes.

22 **Q:** As he was coming up the stairs, you didn't call the police?

23 **A:** No.

24 **Q:** You didn't call your parents?

25 **A:** No.

26 **Q:** You didn't call your neighbors?

27 **A:** I didn't call anyone.

28 **Q:** You didn't try to leave the bedroom?

29 **A:** There was nowhere to go. I was trapped.

30 **Q:** You waited?

1 Recognizing the nature of what had just occurred, Rich St. John withdrew completely
2 from the dispute with his wife. He left the house to cool down. As he retreated from the home, he
3 made an angry comment to his wife.
4

5 The defendant admits that she quickly gathered up her children and drove them straight to
6 her parents' home—worried, she claims, that in her husband's rage he might hurt the children
7 when he returned. The defendant concedes that she had a clear appreciation of the importance of
8 placing them in a safe and secure place. Although claiming that she was fearful for her own safe-
9 ty, the defendant immediately left the security of her parents' home and returned to her own
10 house. Alone. Without calling the police or getting any other kind of help. Thus, she intentional-
11 ly and with knowledge placed herself in what she recognized as harm's way.
12

13 And what does she do when she arrives home? She methodically searches for her hus-
14 band's pistol, finds it in the closet, and takes out the .38 caliber pistol that she later uses to mur-
15 der her husband. Leaving the light in the hallway on, the defendant goes to the bedroom that she
16 shared with her husband. She places the weapon under her pillow so she can remove it quickly.
17 Then, she sits in the darkened room and waits. For two and a half hours, she waits. Waits and
18 thinks, maybe dozes off. She doesn't call the police; she doesn't contact friends; she doesn't run
19 away to a safe place. She simply sits. And waits. And meditates.
20

21 At midnight, her husband returns. As he enters, Rich St. John calls out to her. As he pro-
22 ceeds up the stairs and moves toward the bedroom door, the defendant pulls the pistol from under
23 the pillow, grips it in both hands and points it at the door. Rich St. John comes to the threshold of
24 the room, clearly silhouetted against the lighted hallway, 15 feet away from the defendant. At that
25 moment, with calm precision, the defendant carefully squeezes off one, two, three shots, all of
26 which strike the decedent in the chest, fatally injuring him.
27

28 Only then does the defendant drop the weapon, walk past her husband's body, go to the
29 neighbor's house, and ask that the police be called because she had shot her husband.
30

* * * *

Franklin Correctional Facility at South Keansburg
1110 Locust Street
South Keansburg, Franklin 33345

July 20, 2001

The Honorable David Ashford
Office of the Governor
State Capitol Building
Franklin City, Franklin 33346

Dear Governor Ashford:

For the past twenty years, I have been employed as warden by the Franklin Department of Corrections at its South Keansburg Correctional Facility. For seven years, I have known Mona St. John, who is here serving a life sentence without parole for killing her husband. During her entire incarceration, Ms. St. John has been a model prisoner.

Ms. St. John is well liked by and gets along with other prisoners. During her time here, she obtained training as an executive secretary through our occupational training program. She has been a secretary in my office for the last six years. Ms. St. John also willingly accepts assignments to provide secretarial support at other facilities.

Ms. St. John participated in lengthy and successful psychological counseling at our facility. This caused her to understand the circumstances surrounding the commission of her crime and how to avoid such situations in the future.

During my tenure as warden, I have rarely recommended clemency for prisoners. Ms. St. John is an exception. I am confident that her crime was a one-time occurrence prompted by an abusive husband. Based on her behavior, demeanor and activities at our facility, I believe that Ms. St. John can become a contributing member of society and for this reason I do not hesitate to recommend that she be released.

Sincerely,

A handwritten signature in cursive script that reads "Jake Carmichael". The signature is written in dark ink and is positioned above the printed name and title.

Jake Carmichael
Warden

Declaration of Dr. Jessie Townsend

I, Dr. Jessie Townsend, declare as follows:

1. I am a licensed psychologist with a Diplomate in Clinical Psychology from the American Board of Professional Psychology. I am Director of the Domestic Violence Institute and have published a book, *The Battered Women's Syndrome in Domestic Homicide*.
2. There is a growing area of expertise regarding partner abuse. Although many myths regarding domestic violence have persisted, research has documented the dynamics of domestic violence. Studies have shown that there are common psychological and behavioral reactions exhibited by persons living in violent relationships that make it difficult for people to evaluate the danger they face at any particular moment and to identify effective ways to protect themselves and others.
3. Research has found that violence in a relationship may begin with minor incidents but often escalates in frequency and severity over time. Discrete violent incidents, sometimes seemingly minor, may escalate into an explosive battering incident. Because a woman who has experienced this kind of violence often cannot predict when the explosion will occur, any abuse or threat can create a reasonable fear of imminent harm.
4. I have reviewed the transcript from the trial of Mona St. John and conducted six hours of psychological testing and six hours of psychological interviewing of Ms. St. John. In addition, I conducted three hours of interviews with Ms. St. John's mother and children.
5. Ms. St. John's statements about her belief that her life and her children's lives were in imminent danger need to be evaluated in light of the history of abuse in her relationship with her husband and the effects of that abuse on her state of mind when she shot her husband.
6. Based upon the foregoing, I have concluded that Ms. St. John was physically abused by her husband throughout their relationship. She viewed her husband as holding all the power over her life, which he maintained through battering. In the month before Mr. St. John was shot, his violence was increasing rapidly and dangerously. When Mr. St. John entered the house on the night of the shooting, Ms. St. John believed he was going to kill her and that he was likely to seek out and harm her children. She states that she shot him in order to protect herself and her children. It is my belief that Ms. St. John acted reasonably under the circumstances.

I declare under penalty of perjury that the foregoing is true and correct.

Date:

7/24/01

Jessie Townsend, DCP

Signature:

Jessie Townsend

LIBRARY

Petition of Mona St. John

Franklin Penal Code

§ 197

Homicide is justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to inflict great bodily injury upon any person; or
2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or
3. When committed in the lawful defense of such person or another, when there is reasonable ground to apprehend a design to commit a felony or to inflict great bodily injury, and when there is imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must in good faith have endeavored to decline any further struggle before the homicide was committed.

A bare fear of the commission of any of the offenses mentioned in Subdivisions 2 and 3 is not sufficient to justify homicide. The circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

Franklin Evidence Code

§ 1425

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes (1) its relevancy, (2) the proper factual basis for the opinion from the testimony of the victim or other evidence, and (3) the proper qualifications of the expert witness. Expert opinion on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

(Enacted 1998)

Advisory Committee Notes. Subsection (b)(2) allows the domestic violence victim's testimony to provide a basis for the expert's opinion. There is, however, no intent to limit the testimony to providing this basis. General rules of relevancy may also make the victim's testimony admissible to prove the facts and the victim's state of mind.

Constitution of the State of Franklin

Article XV

Section 8. [Reprieves, Pardons, and Commutations]

(a) The Governor, on conditions the Governor deems proper, has the exclusive authority to grant a reprieve, pardon, or commutation, after sentence, except in cases involving impeachment. A reprieve withdraws the sentence for an interval of time. A pardon is a declaration on record that a person is relieved from the legal consequences of a crime. A commutation is the substitution of a lesser sentence for a greater one.

Walker's Treatise on Executive Powers

19.1 Nature and Purpose of Executive Clemency

Clemency is a general term for the power of a Governor to intervene in the sentence of a criminal defendant to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. Clemency provides a safety valve for the criminal justice system, allowing a governor to correct inequities and dispense mercy in appropriate cases after the justice system has run its course.

* * * *

19.3 Preparing the Petition for Executive Clemency

While the Franklin Constitution authorizes executive clemency “on conditions the Governor deems proper,” it does not specifically set out the format for a petition or the grounds upon which it may be sought. Petitions should cover the following points.

1. Changes in the Law Favorable to the Petitioner

Clemency petitions should not duplicate the legal appeal process. However, legal arguments can be asserted in situations where the law has changed in such a way that it is likely the defendant would not have been convicted or so severely sentenced had the change in the law occurred prior to the conviction.

2. Fairness Factors

These nonlegal arguments attempt to persuade the Governor that the grant of clemency to a defendant is fair and would not harm society. The most common arguments are rehabilitation of the defendant and a support network for successful re-entry into society, mitigating social causes that contributed to the defendant's criminal behavior, and adequacy of the sentence already served.

3. Legal Argument

This part of the petition is much like the argument section of an ordinary legal brief. It states any appropriate law, brings to bear the helpful facts, merges the two into a persuasive argument, and reaches a reasoned conclusion. Each major component of the argument should be preceded by a descriptive heading that summarizes the ensuing narrative.

State v. Seifer

Franklin Court of Appeal (2000)

On May 11, 1999, defendant and her husband, Brian Seifer, argued all day. Mr. Seifer hit defendant repeatedly. At some moment, he picked up a gun, told defendant “I’ll kill you,” shot at her, but missed. When Brian put the weapon down and went into the kitchen, defendant picked up the gun, pointed it at Brian and said, “You’re not going to hit me anymore.” Brian said, “What are you doing?” Believing that he was about to pick up something with which to hit her, defendant shot him. Brian later died of the gunshot wound.

At trial, defendant testified that Brian began beating her early in their relationship, but that she loved him and hoped they could work things out. However, Brian’s violence increased over time. He once tried to strangle her and in 1995 he tried to run her over with his car. Defendant never filed a formal complaint with the police because she believed officers would have sided with him. She also testified that she was afraid that the police would not protect her from Brian were he to be released after arrest.

At trial, defendant claimed she shot Brian in self-defense. To support the claim, the defense presented expert testimony on Battered Women’s Syndrome (BWS) by Dr. Hannah Aubry, who had examined defendant for a full day. The syndrome, Dr. Aubry testified, is a series of common characteristics that appear in people who are abused physically and psychologically over an extended

period of time by the dominant partner in their lives. Many battered women employ strategies to stop the abuse, including running away, committing counter-violence, seeking the help of friends and family, going to a shelter, and contacting police. However, according to Dr. Aubry, many battered women remain in the abusive relationships for the following reasons: love for the batterer; hope that the violence will end; economic dependence on the batterer; social isolation; lack of self-confidence; a belief that it is futile to leave; the inadequate response of law enforcement and other societal institutions; and a fear of reprisal by the batterer.

Dr. Aubry further described a characteristic of BWS: “Women abused over a period of time become sensitive to the abuser’s behavior and, when they see an acceleration in that behavior, it tells them that something onerous is going to happen. . . .” She described defendant as demonstrating “about as extreme a pattern of Battered Women’s Syndrome as you could find.” Dr. Aubry described the Seifers’ relationship as one involving a “traditional cycle of violence.” She testified that “tension would build, violence would occur and then Brian would promise not to batter defendant any more and she would believe him. He also convinced her that she could never escape him.”

The trial court permitted defendant to testify regarding the history of abuse in the relationship because it was relevant to establishing

the factual basis for the expert testimony on BWS. It also permitted Dr. Aubry, a qualified expert on BWS, to testify to the issue of the defendant's subjective belief that her husband's actions constituted imminent danger to her life. However, the court refused to allow Dr. Aubry to testify on the issue of the reasonableness of defendant's belief. Defendant was convicted of manslaughter.

The issue before us is whether defendant is correct in her assertion that the expert's testimony is relevant to the objective reasonableness of her belief that she was in imminent danger.

To constitute a defense of "perfect" self-defense, the defendant must actually and reasonably believe in the need to defend. She must fear imminent danger to life or great bodily injury. Fear of future harm—no matter how great the fear or likelihood of the harm—will not suffice. If the belief subjectively exists but is objectively unreasonable, there is "imperfect" self-defense, i.e., the defendant is deemed to have acted without malice and cannot be convicted of murder, but can be convicted of manslaughter. To constitute "perfect" self-defense, i.e., to exonerate the person completely, the belief must also be objectively reasonable.

In determining objective reasonableness, the jury must view the situation from the defendant's perspective. It must consider all the relevant circumstances to determine whether she acted in a manner in which a reasonable person would act in protecting her own life or bodily safety. Here, for example, Dr.

Aubry testified that, as the violence escalates, a battered woman can become increasingly sensitive to the abuser's behavior. This testimony is relevant to determining whether defendant reasonably believed the threat to her life was imminent. Indeed, the prosecutor argued that, "from an objective reasonableness standard, there was no reason for her to go get that gun because his threats were like so many he had made before, but not acted on."

Dr. Aubry's testimony supplied a response to the prosecutor's argument, but the jury was not allowed to consider Dr. Aubry's testimony in evaluating the objective reasonableness of defendant's fear for her life, i.e., as violence increases over time and threats gain credibility, a battered woman might become sensitized and thus able reasonably to discern when danger is real, as well as the likely extent of violence in any attack on her. Because evidence of BWS may help the jury understand the circumstances in which the defendant found herself at the time of the killing, it is relevant to evaluating the objective reasonableness of her fear.¹

BWS evidence is relevant to help jurors assess the reasonableness of a defendant's beliefs and actions. It would have assisted the jury in this case in analyzing defendant's claims of "perfect" and "imperfect" self-defense by explaining a set of beliefs and a

¹ We agree with the trial court's decision that BWS evidence is also relevant to the assessment of defendant's subjective belief.

behavior pattern that might otherwise appear unreasonable to the average juror. Thus, Dr. Aubry's testimony could have been helpful to the jury in assessing the reasonableness of defendant's claims regarding her state of mind at the time of the killing and should have been admitted for that purpose.

Judgment reversed.

POINT SHEET

State v. White

State v. White
DRAFTERS' POINT SHEET

In this performance test item, the applicant is employed by the Office of the Public Defender (PD). Last year, the PD had undertaken the defense of James White on a charge of aggravated assault with a knife against his brother. In the course of that representation, the PD referred White to a social worker employed by the Rehabilitation Services Division of the Office of the Public Defender. The object of the referral was to evaluate White for possible release on his own recognizance and admission to a hospital for psychiatric treatment.

The social worker interviewed White and filed a written report of the interview with the PD. During the interview, White made a number of admissions, denials, and related statements, which are contained in the report. The social worker has since left the PD's office and moved to Italy.

Before the assault case could be resolved, White was again arrested, this time for the knife-murder of his brother. As part of its case before the Grand Jury, the State has subpoenaed the social worker's report, hoping to use statements made by White about the assault in support of a murder indictment.

The PD intends to file a motion to quash the State's subpoena. The task for the applicant is to write a brief in support of the motion to be heard by the judge *in camera*.

The File contains the instructing memo from the Assistant PD, an office memorandum regarding persuasive briefs, the State's subpoena, the draft of the motion to quash, notes of the jailhouse interview with White following the first arrest (i.e., the arrest for the assault), and the social worker's report. The Library contains excerpts from the Franklin Evidence Code and two Franklin court cases bearing on different aspects of the problem.

The following discussion covers all the points the authors intended to raise in the item. Applicants can receive passing or even excellent grades without addressing all the points. That is left to the discretion of the graders in the user jurisdictions.

1. Overview: The office memorandum regarding persuasive briefs gives the applicants the template for writing their answers in the form of a brief. Thus, it is expected that the work product will resemble a brief such as a lawyer would file with a court. Graders will have to decide how to weight the subjective component of "persuasiveness."

- There should be a Statement of Facts that explains the nature and essential features of the case.
- The argument section should be broken down into carefully crafted headings that summarize the ensuing arguments. The arguments themselves should weave the law and the facts together into persuasive (as opposed to objective) statements of the case for the client.

The applicants are told that the brief will not be served on the other side, but rather that it will be filed along with the social worker's report for *in camera* inspection by the court.

2. Statement of Facts: This should include a recitation of the background of the case and the operative facts. Applicants may opt to include only the key facts and embellish them when they incorporate them into the legal argument part of the brief, but the Statement of Facts should at least inform the court of the essence of the dispute.

Some of the background facts will be taken from the Assistant PD's memo to the applicants, but the operative facts must be taken from the social worker's report. Applicants who attempt to use the facts from the notes of the jailhouse interview in support of the arguments (other than for background) have missed the point. What White told the Assistant PD is not in issue.

- Background: Applicants should explain the events leading up to the present:
 - About 10 months ago, White was arrested for allegedly assaulting his brother with a knife, and the Office of the Public Defender was appointed as his attorney at that time.
 - In the jailhouse interview, the Assistant PD learned that White was a disabled veteran of the Gulf War and in need of psychiatric treatment.
 - As a result, the Assistant PD decided to refer White to Grace Peterson, a licensed social worker at the PD's Rehabilitation Services Division.
 - The purpose of the referral was to get an evaluation in preparation for a motion to have White released on his own recognizance so he could be admitted to a hospital for psychiatric treatment.
 - White agreed to meet with the social worker and said he would accept treatment if it got him out of jail.
 - At the request of the Assistant PD, Peterson met with and interviewed White on the ensuing two days.

- Peterson then gave the Assistant PD the report, which is the object of the State’s subpoena.
- Peterson was successful in having White admitted to a hospital for psychiatric treatment.
- Peterson has since quit her job with the PD and now resides in Italy.
- Applicants should indicate somewhere in the introductory remarks that a copy of the report accompanies the brief, that it is submitted under seal for the court’s *in camera* inspection, and that neither the brief nor the report has been served on the State.
- The Gist of the Report and the Privileged Facts: The following sketch of the facts should suffice because the court will have the report before it.
 - The report shows on its face that it was prepared at the request of the PD’s office.
 - The social worker’s conclusion is that White may be suffering from Post Traumatic Stress Disorder and needs treatment.
 - The report shows that White’s responses range from total denial that he assaulted his brother to statements that might be construed as admissions, e.g.,
 - He had no memory of a fight with his brother.
 - “He is lucky I didn’t kill him.”
 - “I hope these things I’ve done to him have taught him his lesson.”
 - The report also refers to an earlier event of which Peterson doubts the credibility, i.e., that White once tried to poison his brother with rat poison.
 - Peterson’s conclusion is that White is possibly in the early stages of schizophrenia.
 - White expressed a willingness to voluntarily commit himself for treatment.

3. Argument: The argument implicates two distinct privileges: the privilege that attaches to communications with a social worker, and the lawyer-client privilege. The problem can be disposed of by arguing only the lawyer-client privilege, but the motion makes it clear that applicants should address the social worker privilege as well.

The following argument headings are suggestions only and should not be taken by the graders to be the only acceptable ones.

- The Motion to Quash Constitutes the Requisite Claim of the Privilege Under Franklin Evidence Code Section 954.

- Evidence Code § 954 makes it a prerequisite that the attorney assert the privilege whenever disclosure of a privileged communication is sought.
- Item 4 in the motion states, “All communications between Defendant and Grace Peterson were privileged and, therefore, cannot be divulged.”
 - This clearly constitutes the claim of privilege as required by § 954.
 - This requirement probably only goes to the claim of lawyer-client privilege, but it helps as a foundational matter to point out to the court that both privileges are being claimed.
- The Information Contained in the Social Worker’s Report to the Public Defender Was Acquired from White in Consultation with the Social Worker in Her Professional Capacity and None of the Exceptions in Evidence Code Section 835 Apply; Accordingly, the Information May Not Be Disclosed.
 - Peterson was a licensed social worker and it is clear on the face of the report that she was dealing with White in her professional capacity.
 - Thus, the prerequisites for the application of the social worker privilege are satisfied.
 - Section 835 speaks in terms of prohibiting the social worker from disclosing any privileged communications.
 - However, this privilege must necessarily extend to the report, especially because Peterson is unavailable as a witness.
 - The policy behind the privilege is to encourage individuals in need of help to seek it by ensuring the confidentiality of their communications. *Guthrie*.
 - Unless one or more of the exceptions articulated in § 835 apply, the communications contained in the report are inviolable.
 - The only two exceptions that are arguable in this case are those in subsections (b) and (c).
 - Subsection (b) allows disclosure of “a communication that reveals the contemplation or commission of a crime or a harmful act.”
 - The court in *Guthrie* specifically interpreted that exception narrowly to apply only to “communications that relate directly to the fact or immediate circumstances of a crime.”

- Although statements that show consciousness of guilt, such as denials or false statements, might be admissible evidence in a criminal trial, such statements do not fall within the exception.
- The bulk of the report, in which White’s military and psychiatric history are discussed, is clearly privileged because it has nothing whatsoever to do with the “contemplation or commission of a crime or a harmful act.”
- Applicants should argue that White’s statements of denial and others to the effect that, “He is lucky I didn’t kill him,” and “I hope these things I’ve done to him have taught him his lesson,” do not, in the words of *Guthrie*, “relate directly to the fact or immediate circumstances of a crime.”
 - Viewed objectively, those statements are not admissions that he assaulted his brother.
 - “He is lucky I didn’t kill him,” and “I hope these things . . . taught him his lesson,” could mean nothing more than, under the circumstances, “I was angry.”
- The statement about the rat poison is more problematic because, objectively, it does sound like “contemplation or commission of a crime or harmful act.”
 - However, according to Peterson, the story is of doubtful credibility —“said for the shock value.”
 - And, given its remoteness in time and White’s unstable psychiatric condition, the rat poison story should be discounted as not falling within the exception.
 - Moreover, the statement does not “relate directly to the fact or immediate circumstances of a crime.” *Guthrie*.
- Subsection (c) allows disclosure if the social worker finds “a substantial risk of imminent physical injury . . . and the person refuses explicitly to voluntarily accept further appropriate treatment.”
 - There is some basis in the report for concluding that Peterson feared that White was a very angry person and might not be able to “control his rage” if set free without further treatment.

- However, it is very clear that White was willing “to voluntarily accept further treatment.”
 - Accordingly, this exception is inapplicable.
- The Information in the Report Is a Confidential Communication Between Client and Lawyer and May Not Be Disclosed Without the Client’s Consent Because It Was Communicated in Confidence to the Social Worker, to Whom Disclosure Was Necessary for the Transmission of the Information.
 - Here, the applicants must bring to bear § 952 *et seq.* of the Evidence Code and the court’s decision in *Shea Cargo*.
 - The report is a “confidential communication between client and lawyer” within the meaning of § 952.
 - It is self-evident under the circumstances that White intended what he told the social worker to be held in confidence.
 - It is not plausible to conclude that he would have disclosed such details otherwise.
 - Moreover, the Assistant PD “explained lawyer-client confidentiality to client” before White agreed to meet with Peterson. It must be assumed that White understood and agreed to talk with her on the condition of confidentiality.
 - The communication to the social worker, whose task it was to evaluate White in anticipation of a motion to release him from jail and get him admitted to a hospital, was “reasonably necessary for the transmission of the information” to the lawyer within the meaning of § 952.
 - This conclusion is supported by the holding in *Shea Cargo*. As in that case, here Peterson was the “intermediate agent for communication between [White] and his lawyer.”
 - When that is the case and the client intended the communication to be confidential, the lawyer may invoke the privilege. *Shea Cargo*.
 - It is not limited by § 953 to communications overheard by the “lawyer’s secretary, stenographer, or clerk.”
 - Even if the court believes that certain statements in the report are not privileged under the § 835 social worker privilege and would, for that reason, require disclo-

sure of parts of the report (*cf. Guthrie*), the entire report is privileged under the lawyer-client privilege. Thus, none of it may be disclosed.

- *Shea Cargo* makes the point that a privilege is waived when the plaintiff puts in issue the condition that is the subject of the privilege. Applicants should note that the Public Defender was careful not to reveal the report or its contents to avoid having put the condition of White in issue. White was admitted to the hospital on grounds not related to the contents of the report. Thus, there was no waiver.

POINT SHEET

True Values Television Network, Inc.

True Values Television Network (TDTV)

DRAFTERS' POINT SHEET

In this performance test item, the firm represents True Values Television Network, Inc. (TDTV), which owns 80 television stations across the country. The chairman of TDTV's board has consulted the firm for advice on what options the board has in the face of a hostile takeover effort. The task for the applicant is to write a memorandum to the partner identifying the various constituencies that have interests in the matter and analyzing how the board can bring those interests to bear on its decision to make a deal with an entity other than the one that is attempting the hostile takeover.

TDTV was founded on the principle that it would broadcast family-oriented programs. At its inception, TDTV promoted the sale of its shares through places of worship in its market areas, and it is still the case that 200,000 of its individual investors owning about one million of its shares are viewers who bought and held their shares because of TDTV's broadcasting philosophy. Although its viewership, and thus its revenue-producing potential, has been declining in recent times, its value and attractiveness as a takeover target have increased because of a recently promulgated FCC rule permitting television broadcasters to own and operate two stations in major market areas. TDTV's stock has been trading in a range of \$25 to \$39 a share, currently at about \$34. Investment bankers consulted by TDTV have valued the company at \$50 per share.

Metro Communications Corporation (Metro) has made an offer to purchase TDTV's assets at a cash price that is the equivalent of \$47 per share. Because Metro has television stations in 49 market areas in common with TDTV, 42 of them in major market areas, TDTV is especially attractive to Metro. There is reason to believe that, if pushed, Metro will increase its offer to \$50 per share. However, Metro's programming is dominated by "sex, crime and rock 'n' roll," anathematic to TDTV's board and broadcasting philosophy. Metro's takeover plans contemplate that it will integrate TDTV's operations with its own and close down unprofitable stations.

At the same time, there have been ongoing merger discussions with a company called Family Friendly Publishing Company (Friendly), which publishes family-oriented books, greeting cards, and Internet communications. Friendly has no experience in television broadcasting. To thwart Metro's takeover efforts, TDTV's board has stepped up negotiations with Friendly. The latest offer from Friendly contemplates that TDTV shareholders will receive two shares of Friendly stock for every TDTV share held (equivalent to \$40 per TDTV share), and there is reason to

believe that Friendly might increase its offer to 2.25 of its shares to one of TVTV's (equivalent to \$45 per TVTV share). Also, Friendly promises that it will preserve and continue TVTV's "family friendly" broadcasting philosophy and continue to operate the less-profitable stations in the smaller heartland communities, relying heavily on TVTV's existing personnel.

TVTV's institutional investors, led by Corporate Resources Investment Fund (CRIF), are threatening to sue the TVTV board unless it abandons negotiations with Friendly and pursues a sale to Metro.

The factual materials and legal authorities the applicants need to perform the task are in the File and Library. The following discussion covers all the points the drafters of the item intended to raise. Applicants can receive passing or even excellent grades without addressing all the points. That is left to the discretion of the graders in the user jurisdictions.

1. Overview: It is expected that the applicant's work product will resemble an office memorandum such as an associate would send to a partner. The instructions from the partner tell the applicant to draft a two-part memo that

- First, discusses separately each of the different shareholder and other groups that have interests in the matter and identifies the interests of each; and
- Second, analyzes how the board, consistent with its fiduciary duty, can reconcile a decision to deal exclusively with Friendly with the conflicting interests of the various groups.

2. The various groups and their interests: The memo from the supervising partner tells the applicants how to identify the various groups, i.e., the corporation, shareholders with differing interests, and those identified in Franklin Corporations Code § 103(c). The task is for applicants to spell out separately what the interests of the various groups are and how these interests conflict.

- Franklin Corporations Code § 103(c), which states that directors may, "in considering the best interests of a corporation and its stockholders, consider the effects of any action on employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the directors consider pertinent."
- Inherent in this statutory language is the notion that the interests of the corporation and the shareholders are paramount and that the others are secondary. Better applicants will note this point.

- The corporation—TFTV:
 - Clearly, one of the constituencies to which the board owes a duty is the corporation itself. It has identifiable interests on both sides of the issue, especially in light of the fact that it has not met its goals and has lost money in each year since its creation.
 - TFTV, as an entity, has an interest in maximizing its value. The Metro offer, especially if it gets increased to \$50 per share, will allow TFTV to realize its full current value and eliminate the losses inherent in continued operation. Given that Friendly has no track record as a broadcaster, a merger with Friendly is no assurance that such risks will disappear.
 - On the other hand, TFTV has an interest in carrying out the purpose for which it was formed in the first place, i.e., to broadcast family-friendly programs in the major and minor markets where it has stations. Friendly's offer allows that to continue; Metro's does not.
- CRIF and the other institutional shareholders:
 - These shareholders own 1.5 million shares, 25% of the outstanding shares.
 - CRIF, in the letter from its lawyers, has already expressed the interests of the institutional shareholders—to obtain the largest possible immediate cash payout for their shares; they are opposed to a merger with Friendly.
 - However, perceptive applicants might point out that CRIF's long-term interests might be better served by a merger with Friendly. The File materials suggest that Friendly has been very successful and that its shares have quadrupled in value in the last three years. It is possible that shareholders would benefit from a merger with Friendly and that, in the long run, CRIF and its allies would be better off with a merger than with an immediate cash payment for their shares.
- The members of the board who do not represent the institutional shareholders:
 - These shareholders own 2.5 million shares, 42% of the outstanding shares.
 - The interests (or at least the desires) of these shareholders appear clearly to be in perpetuating the broadcasting mission of TFTV.
 - However, they also have an interest in acting in a way that does not breach their fiduciary duty to the corporation and the other shareholders. They are

particularly vulnerable to a claim that they are acting in their self-interest, although their self-interest here is as shareholders and is not as divided as it was in *Cole v. Nord*, where the directors were trying to avoid personal liability. Applicants should recognize this as a significant difference. See *Cole v. Nord*.

- Individual shareholders:
 - These shareholders own two million shares, 33% of the outstanding shares, and consist of two distinct groups, whose interests may differ.
 - One of these groups, according to the Goldman, Morgan report, consists of about 200,000 individual investors who own at least one million shares (17%) and who, according to a market survey, appear committed to TTVV's broadcasting philosophy. They still subscribe to the *Good Times* viewer's guide at the special stock ownership rate. The fact that TTVV's shares are lightly traded (about 1% of outstanding shares per day) is also an indication that people such as these hold their shares out of a desire to preserve the programming rather than to profit from the value of the shares. Presumably, the interests of these people lie in preserving the family-friendly programming that will continue under Friendly. Moreover, it appears that these people are concentrated largely in the heartland areas served by the smaller, less profitable stations that Friendly has promised to keep open. It is the only assurance they have that they will be able to watch the kind of TV programming they have come to expect.
 - The other of these groups is comprised of the holders of the remaining one million shares. It can be presumed that a number of them favor the Metro deal because it will give them an immediate cash bonus over what they could otherwise get for their shares. It can also be presumed that many of these shareholders would just as soon hold Friendly shares, betting that Friendly will increase in value after the merger, and that they would also prefer the stations continue to carry the family-friendly programming.
- Employees of TTVV:
 - The Goldman, Morgan report and the notes of the interview with Rudy Braccia show that of the 80 TTVV stations, 38 are in minor market areas

employing about 400 people. These are the stations that Metro is most likely to operate with its own personnel or to shut down. In either event, 400 TView people will lose their jobs. On the other hand, Friendly promises to keep the stations open and to use the expertise of TView personnel to operate them. Accordingly, it will be in the interests of these employees for TView to make the deal with Friendly.

- TView's viewing audience:
 - These are the customers of TView. Certainly, the 200,000 individual shareholders mentioned above (plus however much that number is increased by the number of members in the families of such shareholders) have an interest, as viewers, in having Friendly take over and continue the programming. Likewise, the unknown number of non-shareholding viewers have an interest in Friendly taking over.
 - However, according to the Goldman, Morgan report, the number of TView viewers is "modest" and "declining." Thus, it is problematic how much weight can be given to the viewers' interests.
- The communities where TView has stations:
 - This constituency consists of people and businesses that will be affected by the shutdowns of stations, principally in smaller heartland communities, if Metro takes over. The money that TView spends to maintain its facilities and that the employees spend to maintain their standards of living will cease to flow into the local economies of the towns where Metro shuts down the stations. These communities, for these reasons, have an interest in keeping the station alive and therefore in having TView make the deal with Friendly.
- Suppliers of programming:
 - The materials in the File suggest that reruns of programs such as "Touched by an Angel," and original programs, such as "Adventures of Louis the Saint," will no longer be aired on any of the former TView stations if Metro takes over. Suppliers of such programs will lose important outlets, and there will be adverse economic effects on other individuals and businesses.

3. Whether and how the TVTV board can take into consideration the interests of the various constituencies in justifying a decision to deal exclusively with Friendly:

- The task for the applicants is to discuss the competing interests in the context of the board’s fiduciary duty to act in the best interests of the corporation and the shareholders.
 - Franklin Corporations Code § 103(c) and the court’s dictum in *Cole v. Nord* make it clear that the board can take into consideration constituencies such as the foregoing in making a decision such as the one before them.
 - However, under § 103(c), the interests of the corporation and the shareholders are paramount, i.e., the statute allows the directors to consider the effects of the decision on the various constituencies recited in the statute, but only “in considering the best interests of [the] corporation and its stockholders.”
- The memo from the partner says the board is not at all sure that it is in the best interests of TVTV to accept either offer. However, now that both offers are out there, the circumstances suggest that the board may not have any choice but to recommend one or the other to the shareholders.
- The interests of the corporation fall on both sides of the line.
 - The Goldman, Morgan report makes it plain that TVTV is not doing well and is declining and that the new FCC duopoly rule offers a unique opportunity for TVTV to realize its value. If the directors do not sell to Metro and other competitors succeed in acquiring duopoly status in the major markets, TVTV will have lost its opportunity to maximize its value.
 - On the other hand, a corporation has an interest in preserving its existence. TVTV was formed and exists for the purpose of promoting family-oriented programming. A merger with Friendly may offer the only opportunity to perpetuate that purpose.
- Likewise, the interests of the shareholders are in conflict.

- In either case, i.e., merger with Friendly or sale of assets to Metro, the issue has to be voted on and approved by a majority of the shareholders. *See* Franklin Corporations Code § 251(a) and (b).
- It appears from the Goldman, Morgan report that those favoring the deal with Friendly may have the majority: 2.5 million shares held by board members plus at least one million shares owned by individual investors who presumably favor the deal with Friendly versus the 1.5 million shares held by the institutional investors and as many as one million held by individual investors who presumably favor a cash deal with Metro.
 - A problem for the directors, however, is that they are vulnerable to a charge that, in taking board action in favor of the Friendly deal, they would be acting in self-interest and not in the best interests of the corporation. *See Cole v. Nord*.
 - Also as pointed out in *Cole v. Nord*, the directors cannot always rely on the business judgment rule. It “does not absolve the directors of their fiduciary duty.” Once they decide to go forward with one deal or the other, they bear the burden of proving that they acted reasonably.
 - But, on this point, note that under Franklin Corp. Code § 103(b), the directors are protected if they reasonably rely on the expertise of Goldman, Morgan and the information in that report that would support a decision to deal exclusively with Friendly.
- With those considerations in mind, the applicants, utilizing what they have said earlier about the interests of the various constituencies, must rationalize a board decision to reject Metro’s overtures and deal exclusively with Friendly. For example:
 - Notwithstanding the desire of the institutional investors and their allies to cash out now, they may benefit more in the long run by taking Friendly shares, only slightly less in value than the \$50

Metro might eventually offer. If Mr. Braccia is right, the merger of TVTV and Friendly will accelerate the already remarkable growth in the value of Friendly's stock. The possible downside concerning Friendly's lack of experience in TV broadcasting is outweighed by the fact that Friendly intends to utilize TVTV's experienced personnel to run that end of the business. Thus, a decision to go with the Friendly deal is not necessarily contrary to the interests of these shareholders.

- There are at least 200,000 individual shareholders who are demonstrably committed to the continuation of family-oriented programming. Given that they were sold their stock with the promise that they would be provided with such programming, their preferences are entitled to great weight in deciding whether to sell to Metro or merge with Friendly.
- It is certain that if the assets are sold to Metro, a number of stations will be closed down, and some 400 employees of TVTV will lose their jobs. It is also certain that if Friendly takes over, most employees will keep their jobs. It is legitimate to weigh heavily the interests of those employees who have stuck it out with the company during bad times and give them an opportunity to keep their jobs.
- The entire viewing public in 80 market areas across the country, not just those shareholders who are known to favor family-oriented programming, will be deprived of such programming if Metro takes over. Friendly has promised to continue the format. Given that such programming was a founding principle of TVTV, the preferences of this viewership are also entitled to some weight.
- If Metro wins the deal, the communities where TVTV now has stations that Metro will shut down will suffer economically. Not so if Friendly takes over. Having created economic expectations by setting up stations in those communities, TVTV has an obligation not to leave them high and dry if it can be avoided.

- Finally, there are suppliers of reruns and original programs who rely on TVTV for outlets for their programs. Although this may not be the most weighty factor in the mix, TVTV should consider the economic impact on the suppliers and avoid adverse effects if possible. Merging with Friendly will avoid such effects.
- On balance, it would be entirely reasonable and not a breach of the directors' fiduciary duty to TVTV and its shareholders to reject Metro's overtures and cut the best possible deal with Friendly.

POINT SHEET

Petition of Mona St. John

Petition of Mona St. John
DRAFTERS' POINT SHEET

In this performance test item, the applicants are asked to draft the “Legal Argument” section of a petition for clemency. The Franklin Constitution authorizes the Governor to grant clemency (reprieve, pardon, or commutation) after sentence.

The firm has undertaken *pro bono* to represent Mona St. John who has served seven years of a life-without-parole sentence for the murder of her husband. At her trial, the court refused to admit evidence regarding battered women’s syndrome (BWS) to establish that she had acted in self-defense. Some time after Ms. St. John was convicted of first-degree murder, the Franklin Legislature enacted Evidence Code § 1425, which makes expert testimony regarding BWS admissible in a criminal proceeding.

An expert retained by the firm has opined that Ms. St. John was suffering from the effects of BWS when she killed her husband. This establishes the predicate for the petition. The task for the applicants is to draft the legal argument section of the petition setting forth how BWS evidence would have affected Ms. St. John’s case at trial and how the change in the Evidence Code supports her request for a pardon or commutation of her sentence. The object is to present a persuasive argument that had the court admitted the BWS evidence, the jury would have found her claim of self-defense credible and acquitted her or at least convicted her of the lesser crime of manslaughter. The applicants are told that Ms. St. John has already served time in prison equal to the minimum sentence for manslaughter.

The File contains excerpts of Ms. St. John’s testimony and the prosecutor’s closing argument from the trial transcript and the expert’s declaration. The Library contains sections of the Franklin Penal Code, the new § 1425 of the Evidence Code, the applicable section of the Franklin Constitution, an excerpt from a treatise explaining petitions for clemency, and a case discussing the relevance of BWS evidence.

The following discussion covers all the points the authors intended to raise. An applicant can get a passing and even an excellent grade without covering all the points. That is within the discretion of the graders in the user jurisdictions.

1. Overview: The instructions from the partner tell the applicants to follow the format laid out in *Walker’s Treatise on Executive Powers*. Thus, the work product should include

headings for each part of the argument followed by narrative that flows logically from the heading.

- The applicants must, somewhere in their answers, demonstrate an understanding that the BWS evidence goes to the issue of self-defense and not just make a generalized argument about BWS.
- The argument should incorporate both the facts and the law and make the following major points:
 - The addition of § 1425 to the Evidence Code affirmatively makes BWS evidence admissible to explain the reasons for a battered woman's conduct.
 - BWS evidence in this case would have given the jury a basis to evaluate the defendant's conduct in light of the statutory definition of self-defense and to determine whether the conduct was objectively or subjectively reasonable.
 - Without the BWS evidence, the jury was allowed to hear only of the events on the night of the killing; that evidence, standing alone, was insufficient to raise an issue of self-defense.
 - With the BWS evidence, the jury probably would have found Ms. St. John's conduct objectively reasonable and would have acquitted her on the basis of "perfect" self-defense.
 - Or, at worst, the jury would have found that her conduct was only subjectively reasonable and would have convicted her of the lesser crime of manslaughter, i.e., "imperfect" self-defense.
 - In the former situation, a pardon would be in order because she would not have been convicted in the first place.
 - In the latter situation, commutation would be in order because she has already served the minimum prison sentence for manslaughter.

2. The Legal Argument:

The Addition of § 1425 to the Evidence Code Affirmatively Makes BWS Evidence Admissible to Establish the Defense of Self-Defense.

- Section 1425 allows expert testimony to be introduced to show the "physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence."

- The defendant herself may testify regarding her experiences with the batterer.
 - Section 1425 explicitly allows the domestic violence victim’s testimony to come in for the purpose of establishing the factual foundation for the expert testimony.
 - But it is not limited to that purpose. The Advisory Committee Notes to § 1425 make it clear that the domestic violence victim’s testimony is also admissible to prove the facts and the victim’s state of mind and is thus direct evidence of the nature and extent of the battering.
- Another important piece of § 1425 is that, “Expert opinion on battered women’s syndrome shall not be considered a new scientific technique whose reliability is unproven.”
 - Thus, it would not have been necessary to show general acceptance in the psychological and medical fields as a foundation for admission of the expert testimony. The jury would have been instructed that BWS evidence was relevant in assessing Ms. St. John’s self-defense claim.

If BWS Evidence Had Been Allowed to Come in During Trial, the Jury Would Have Had a Basis for Evaluating Ms. St. John’s Conduct in Light of Her Husband’s Escalating Violence and for Applying That Evaluation to the Statutory Definitions of Justifiable Homicide.

- Penal Code § 197 makes homicide justifiable when it is committed in defense of one’s person against another who intends to commit a felony by violence or “when there is reasonable ground to apprehend a design to . . . inflict great bodily injury, and when there is imminent danger of such design being accomplished. . . .”
 - It goes on to say that, “The circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.”
- It is in light of these standards that Ms. St. John’s conduct should have been evaluated.
 - The applicants should then contrast the evidence that was allowed to come in with that which would have come in if BWS evidence had been admitted.

- The evidence the court admitted was limited to the events of the night of the killing and did not support her self-defense claim.
 - There was an argument between Ms. St. John and her husband;
 - He hit her on the jaw;
 - Her husband left the house threatening to find a place to dump her body;
 - Ms. St. John took the kids to her parents' house and returned to the house;
 - Ms. St. John found a pistol, put it under her pillow, and waited for her husband to come home;
 - Her husband came storming into the house, and she shot him.
- Standing alone, that evidence makes it appear that the explosive situation had cooled and that Ms. St. John premeditated the shooting rather than having acted in self-defense.
- On the other hand, admission of the expert testimony would have explained why Ms. St. John reasonably apprehended that “great bodily injury [was] imminent” and why she was justified in killing her husband. It would also have explained to the jury why obvious choices such as simply leaving her husband, calling the police, and retreating to a place of safety were not available to her given her situation and past experience.
 - The expert’s testimony would have provided evidence that:
 - There is a distinguished body of knowledge that there are common psychological and behavioral reactions among victims living in violent relationships. This finding is reinforced by the statutory language to the effect that BWS is a proven science.
 - Incremental escalations of violence pose a situation in which a domestic violence victim eventually considers that any abuse creates a reasonable fear of harm.
 - Ms. St. John was in a classic battered wife situation. Her husband’s violence had been escalating, she believed he was going to kill her on the night of the shooting, and she shot him to protect herself and her children.
 - Ms. St. John acted reasonably under the circumstances.

- Ms. St. John’s testimony would have demonstrated that she fit perfectly within the common characteristics of the syndrome:
 - The battering had been going on for some eight years and was escalating;
 - Her husband was a large man who could easily inflict great harm;
 - On the occasions when she called the police, they did not help her;
 - After that, she was afraid to get the police involved for fear that her husband would get angrier and do greater harm;
 - Her husband also beat the children in his fits of anger;
 - She didn’t leave her husband because she loved him and kept hoping he’d change, because she couldn’t support the kids on her own, and because she was afraid he’d come after her and kill her and the children.
- Ms. St. John’s behavior, including her resorting to counter-violence (i.e., shooting her husband), was characteristic of the behavior to be reasonably expected of a severely battered woman; this conclusion is further supported by the court’s recitations and findings in the *Seifer* case.
- The BWS evidence also would have undercut the prosecutor’s cross-examination and closing argument; i.e., it would have explained why it was reasonable that Ms. St. John
 - Did not call the police;
 - Did not go to the hospital;
 - Armed herself;
 - Shot her husband while he was cursing her and lunging through the door.
- Admission of the BWS evidence also would have bolstered Ms. St. John’s credibility by making it more plausible to the jury that she was telling the truth when she said she feared imminent harm.

The Ultimate Outcome Probably Would Have Been That the Jury Either Would Have Acquitted Her or Found Her Guilty of Only Manslaughter. In Either Case, Clemency Is Appropriate.

- Under *Seifer*, the jury would have been required to view the evidence from Ms. St. John’s perspective.

- If Evidence Code § 1425 had been in effect at the time of Ms. St. John’s trial, it is highly unlikely that the jury would have convicted her of murder. Accordingly, clemency in some form is in order.
- In weighing the foregoing BWS evidence against the legal standard for self-defense, the jury would have been able to assess whether Ms. St. John’s belief that she was in imminent danger was both objectively and subjectively reasonable. *See Seifer.*
 - It is highly likely that the jury would have found that her belief was objectively reasonable; i.e., that she acted as any prudent person would have acted to protect her own life and bodily safety. *Seifer.*
 - Such a conclusion would have resulted in a finding of “perfect” self-defense and in acquittal.
 - In that event, a pardon would be the appropriate form of clemency.
- It is even more certain that the jury would have found Ms. St. John’s actions to have been, if not objectively reasonable, then at least subjectively reasonable, i.e., she honestly believed harm was imminent, even though a prudent person might not have.
 - In that case, the malice element of murder would have been absent, and Ms. St. John would have been convicted of no more than manslaughter, i.e., “imperfect” self-defense.
 - Given that she has already served the minimum time for a manslaughter conviction, commutation would be appropriate.
 - Although it goes more to the “fairness factors,” the letter in the File from the warden might be referred to for the point that Ms. St. John is fully rehabilitated and that, therefore, letting her out of prison would not pose a risk to society.