STATE OF NEW JERSEY

In the Matter of Gordon Harvey, *et al.*, County Police Sergeant and Police Sergeant, various jurisdictions	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2019-2540, *et al.*	:	Examination Appeal

ISSUED: September 11, 2019 (JH)

Gordon Harvey (PC2513W), Camden County; Jonathan Donker and Caesar Mazzeo (PM2514W), Bloomfield; George Johnson (PM2515W), Boonton; Tyler Bender (PM2519W), Ewing; Kevin Werner (PM2520W), Freehold; John McKee, Anthony Sarno and Michael Verwey (PM2527W), Lacey; Brian Willett (PM2535W), Marlboro; Marquis Brock, Anthony Buono, Stephen Dellavalle, Santos Duran, Valeria Sanchez and Eric Santos (PM2540W), Newark; Joseph Kuchmek (PM2545W), Pennsauken; Lawrence Mayberry (PM2553W), Seaside Heights; Peter Burns (PM2555W), Somers Point; Michael Clark and Bryan Cohen (PM2559W), Winslow; appeal the examination for County Police Sergeant and Police Sergeant (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

This was a two-part examination, which was administered on February 23, 2019, consisting of a video-based portion, items 1 through 21, and a multiple-choice portion, items 22 through 85. The test was worth 80 percent of the final average and seniority was worth the remaining 20 percent. As noted in the 2018-2019 Police Sergeant Orientation Guide (Orientation Guide), which was available on the Civil Service Commission's (Commission) website, the examination content was based on the most recent job analysis verification which includes descriptions of the duties performed by incumbents and identifies the knowledge, skill and abilities (KSAs) that are necessary to perform the duties of a Police Sergeant. As part of this verification process, information about the job was gathered through interviews and surveys of on-the-job activities of incumbent Police Sergeants throughout the State.

As a result of this process, critical KSAs were identified and considered for inclusion on the exam.

In the video-based portion of the examination, candidates were presented with two separate scenarios: Scenario #1: Overdose Event and Scenario #2: Noise Complaint. The candidates were to assume the role of a Police Sergeant as they viewed scenarios associated with the duties of a Police Sergeant. Each scenario was divided into segments, which presented information and circumstances that candidates were to consider before responding to questions in their test booklet.

Clark contends that at review, his ability to take notes on exam items was severely curtailed. As such, he requests that any appealed item in which he selected the correct response be disregarded and that if he misidentified an item number in his appeal, his arguments be addressed.

With respect to misidentified items, to the extent that it is possible to identify the items in question, they are reviewed. It is noted that it is the responsibility of the appellant to accurately describe appealed items.

An independent review of the issues presented under appeal has resulted in the following findings:

For Scenario #1: Overdose Event, you are the responding supervisor and Officer Brady informs you that he and Officer Singh were dispatched to a possible overdose incident. He also informs you that there were three females, Amanda Jones, Kayla Pearson and Shanelle Carter, in the residence who were invited by the owner, Kevin Gamble. Jones had indicated that all four of them spent most of the night drinking, smoking marijuana and shooting heroin. All were present in the room when the overdose victim, Pearson, lost consciousness while sitting in a chair. Jones also indicated that Gamble told them that Pearson just needed to "sleep it off" and to let her be and then Gamble went into his bedroom. Jones indicated that she and Carter attempted to revive Pearson but she was not responsive. They noticed that Pearson had difficulty breathing and her lips were blue and called 911 for assistance. Upon learning of the call for assistance, Gamble left the residence. Officer Brady further informs you that when he and Officer Singh arrived, they observed Pearson unresponsive sitting in a chair with Jones and Carter sitting by her side. They confirmed that Gamble was not in the residence. They also observed empty bottles of vodka, drug paraphernalia and a smart phone. Officer Brady administered Narcan to Pearson who then regained consciousness and is currently with the EMTs.

For questions 1 through 6, candidates were presented with six potential actions and were instructed, based on the information presented in the scenario, and considering the New Jersey Attorney General Directive No. 2014-2 Concerning

Heroin and Opiate Investigations/Prosecutions, to decide if the action is required or not required, at this point, to be taken by Officers Brady and Singh who are responding to the overdose incident.

Question 1 refers to the action, "Investigate the circumstances of the incident." The keyed response is option a, "At this point, this action is required in response to the overdose event." Burns maintains that option b, "At this point, this action is not required in response to the overdose event," is correct. Burns contends that this action "was already taking place" since the responding officer has "determined that the victim overdosed, has learned what she took, and who was there." It is noted that the Division of Test of Development and Analytics contacted Subject Matter Experts (SMEs) regarding this matter who indicated that while Officer Brady has provided you with information, there are many unanswered questions that still need to be addressed, *e.g.*, who supplied the drugs, Gamble's location, the role Gamble and the others played in obtaining the drugs, etc. As such, the SMEs noted that you would instruct Officers Singh and Brady to keep investigating. Accordingly, the SMEs determined that "investigating the circumstances" is a required action as the investigation has not been completed and is ongoing. Thus, the question is correct as keyed.

For question 3, since Donker selected the correct response, his appeal of this item is moot.

Question 4 refers to the action, "Identify witnesses." The keyed response is option a, "At this point, this action is required in response to the overdose event." Since Donker and Kuchmek selected the correct response, their appeals of this item are moot. Brock, Burns, Dellavalle, Harvey and Sanchez contend that option b, "At this point, this action is not required in response to the overdose event," is the best response. In this regard, they maintain that the responding officers have already identified the witnesses by name and age. They add that it is not the responsibility of the Sergeant to identify witnesses. As noted above, the instructions for this item provide, in pertinent part, that candidates are to "decide if the action is required or not required, at this point, *to be taken by Officers Brady and Singh* who are responding to the overdose incident" (emphasis added). Nevertheless, the SMEs indicated that as the supervisor, you are responsible for ensuring that the responding officers have identified everyone who could be a witness. In this regard, the SMEs noted that since the scene is still unfolding, there may be more witnesses for Officers Brady and Singh to identify. The SMEs emphasized that witnesses would include any individual who has information to provide. As such, identifying witnesses would not be limited to those individuals directly involved in the incident but would also include, *e.g.*, any individuals near the residence who may have seen or heard what was occurring or may have seen or know where Gamble may have gone. Accordingly, the question is correct is keyed.

Question 5 refers to the action, "Take statements from witnesses." The keyed response is option a, "At this point, this action is required in response to the overdose event." Since Kuchmek selected the correct response, his appeal of this item is moot. Sanchez contends that option b, "At this point, this action is not required in response to the overdose event," is the best response. Specifically, Sanchez argues that "statements had already been provided to responding officers in detail." Although the scenario indicates that Jones has spoken with at least one of the officers, it does not indicate that Carter, Pearson or any other witness has spoken with or provided a statement to the officers. Thus, the question is correct as keyed.

Question 6 refers to the action, "Conduct a complete search of the residence for contraband." The keyed response is option b, "At this point, this action is not required in response to the overdose event." Burns maintains that option a, "At this point, this action is required in response to the overdose event," is the best response. In this regard, he presents that "the responding officer indicates there was paraphernalia in plain view and admitted drug use by the victim and witnesses. The officers should be taking action to ensure there are no more drugs in the apartment which might lead to another overdose." The SMEs indicated that a complete search of the residence would not be appropriate at this time. Rather, they noted that securing the scene is all that is required *at this point*. As such, the question is correct as keyed.

For question 10, candidates were instructed, based on the information presented in the scenario, and considering New Jersey Attorney General Directive No. 2013-1 to Ensure Uniform Statewide Enforcement of the "Overdose Prevention Act," to evaluate "Kevin Gamble's" eligibility for immunity from arrest, prosecution, or conviction under the Overdose Prevention Act. The keyed response is option b, "This individual is not eligible for immunity under the Overdose Prevention Act." Sarno asserts that option a, "This individual is eligible for immunity under the Overdose Prevention Act," is correct. In this regard, Sarno presents that the scenario does not state that Gamble "left to avoid prosecution. The reason is not specified. This opens the possibility that he could, for example, have been going out to attain further medical assistance. The directive mentions non-immunity for those who happen to be there at, for example, a 'crack house.' [Gamble] didn't 'happen' to be at the said residence because he was noted as the homeowner and would ultimately be returning to his home. [Gamble] was present in the residence at the time of the call and was aware of the same as noted in the narrative. He was also aware of the female friend's prior health condition prior to the call for assistance. [Gamble] never discouraged or attempted to stop the call for medical assistance." Sarno also argues that the scenario did not indicate why Gamble told the women to let the victim "sleep it off" and "it could include that [Gamble] was 'chilled' from acknowledging the real issue at hand." Sarno further asserts that Gamble "was aware [that] something was wrong with the [victim] and was also

aware (upon leaving) that help was contacted. This course of conduct would necessarily appear that [Gamble] was associated and aware of the actions of each person of his residence prior to leaving for an unknown reason." Directive No. 2013-1 notes:

> This policy is not intended, however, to insulate from arrest and prosecution all persons who happen, for example, to be in a 'crack house' or at a party at which a person experiences an overdose. Rather, it is intended to apply only to those individuals who were aware of and collaborated in the request for medical assistance. For example, police should refrain from arresting a person who was aware that someone else had placed a 9-1-1 call for medical assistance and stayed with the person who was experiencing an overdose until help arrived. This enforcement policy would also apply where a person can demonstrate that he or she left the presence of the overdose victim for the purpose of seeking medical assistance, such as by going to a neighbor's house to make a 9-1-1 call. It would not apply, however, to those who flee the scene to avoid apprehension without collaborating in a good-faith effort to seek medical assistance, or to any person who had in any way or by any means discouraged others from making a call for assistance.

The scenario indicates that once Pearson lost consciousness, Gamble told Jones and Carter to "let [Pearson] be" and then went into his bedroom. As such, there is no indication that Gamble was concerned about Pearson's condition or that he was aware that the call for assistance was being made. Furthermore, as indicated in the scenario, "upon learning of the call for assistance, Mr. Gamble decided to leave the residence." As noted above, the policy "is intended to apply only to those individuals who were aware of ***and*** collaborated in the request for medical assistance" (emphasis added). Despite Sarno's claim, it is not clear what type of medical assistance Gamble would be seeking once the call to 9-1-1 had been made, especially given his previous lack of concern and inaction. As such, Sarno's arguments are specious at best. Therefore, the question is correct as keyed.

For questions 12 through 15, candidates were presented with four agencies and were instructed, based on the information presented in the scenario, and considering the New Jersey Attorney General Directive No. 2014-2 Concerning Heroin and Opiate Investigations/Prosecutions, to decide if notification to the agency is required or not required to properly report this overdose incident.

Question 12 refers to the agency, "The Municipal or County Prosecutor." The keyed response is option a, "This notification is required as a result of this overdose event." It is noted that Directive 2014-2, section 1d, "Notice to prosecutor of arrests made at scene of an overdose event," provides, "Whenever an arrest is made **at the**

scene of an overdose event for an offense enumerated in the Overdose Prevention Act that is potentially eligible for immunity protection, the officer shall alert the municipal prosecutor or county prosecutor handling the complaint" (emphasis added). The SMEs indicated that making a call to the municipal or county prosecutor would not be inappropriate under these circumstances. In this regard, the SMEs noted that even if there was no arrest made at the scene, they would contact the prosecutor to ensure that the immunity feature was being applied appropriately. However, the SMEs noted that unless an arrest is made at the scene, a call to the prosecutor is not required pursuant to Directive 2014-2. Given that the SMEs indicated that this action would be appropriate under the circumstances indicated, although not technically required by Directive 2014-2, the Division of Test of Development and Analytics has determined to double key this item to option a and option b, "This notification is not required as a result of this overdose event," prior to the lists being issued.

Question 14 refers to the agency, "New Jersey State Police's Regional Operations Intelligence Center." The keyed response is option a, "This notification is required as a result of this overdose event." Mayberry and Willett argue that option b, "This notification is not required as a result of this overdose event," is the best response. Specifically, Mayberry maintains that according to Directive No. 2014-2, "it is directed that in the case of Municipal Law Enforcement, the County Narcan Coordinator is to be notified, and then the County Narcan Coordinator notifies the ROIC, not the Municipal Law Enforcement Agency." Willett presents that "it is the responsibility of the County Narcan Coordinator to compile the data and forward that information to the ROIC. This notification exceeds the scope for the job title of municipal Police Sergeant." As indicated above, the directions indicated that candidates were required to determine whether the agency was required to be notified and not whether you, as a Police Sergeant, were required to make the notification. Accordingly, the question is correct as keyed.

For Scenario #2: Noise Complaint, in the first video segment, plainclothes officers arrived at the scene of a noise complaint, a large house party with over 100 people in the house. You are the first arriving supervisor on the scene where Officer Mitchell informs you that he has been to this residence before as there was a similar noise complaint a few months ago. Officer Mitchell tells you that when he arrived, he knocked on the front door and an unidentified male opened the door but walked away before he could speak with him. The officers entered the common area of the house and observed a large number of people drinking beer and talking loudly. The officers attempted to abate the noise by dispersing the crowd. The officers called out to request that the residents come forward. For those occupants who wanted to leave, the officers obtained IDs to confirm that they did not live at the residence. Officer Mitchell further tells you that when no one responded to the request, the officers spread out to canvass the rest of the house.

For question 17 candidates were instructed, based on what has been reported to you, as the Police Sergeant responding to the scene, to determine if "obtaining identification (ID) from occupants in the common area" was appropriate or not appropriate for the officers to have taken, at this point, to deal with the situation. The keyed response is option a, "This action was proper." It is noted that this scenario is based on *State v. Kaltner*, 210 *N.J.* 114 (2012). McKee argues that the officers in *Kaltner*, *supra*, did not "obtain IDs" and that "requiring individuals to provide IDs would have turned a mere inquiry into an investigative detention." Given that the officers in *Kaltner*, *supra*, did not "obtain IDs," the court did not make a determination regarding this action. Furthermore, while the scenario states that "the officers obtained IDs to confirm that [the occupants] did not live at the residence," it does not provide any further information describing this action. Accordingly, the Division of Test Development and Analytics has determined to omit this item from scoring prior to the lists being issued.

In the second video segment for Scenario #2, Officer Mitchell tells you that he went upstairs to the second and third floors and looked in the bedrooms while the other officers checked out the first floor. Officer Mitchell notes that when he reached the third floor, he discovered an open bedroom door where, from the hallway, he saw in plain view a prescription pill bottle, two dozen empty plastic bags, a digital scale covered in a white powdery residue and two star shaped pills that he recognized as ecstasy. Officer Mitchell entered the room and saw the name Jay White on the prescription bottle and on ID cards on a nearby table. He seized all of the items and went downstairs. Officer Mitchell further tells you that during this time, the other officers had already identified three of the residents. One of the residents phoned Jay White and he arrived at the house a short time later.

Question 21 asks for the exception to the warrant requirement, if any, that permitted Officer Mitchell to lawfully seize the CDS from Jay White's bedroom. The keyed response is option d, "No exception permitted the seizure of the CDS." Cohen argues that option c, "Community Caretaking," is the best response. In this regard, he contends that "despite the officers being in a portion of the house that they were not lawfully permitted to be, finding the dangerous drugs and failing to seize them as 'community caretaking' contradicts the public safety exception to the warrant requirement, and puts the people in that house in danger of possible overdose and death." In *Kaltner*, 420 *N.J. Super.* 524 (App. Div. 2011),[1] the court noted:

> Rather, the question in this case is whether, once legitimately inside, the police acted lawfully in fanning out in search of those in control of

[1] It is noted that in *Kaltner*, *supra*, the court "affirmed, substantially for the reasons expressed in Judge Parrillo's opinion of the Appellate Division[, *i.e.*, *State v. Kaltner*, 420 *N.J. Super.* 524 (App. Div. 2011)] . . ." *See id.* at 114.

> the premises in an attempt to abate the noise nuisance. In this regard, the State relies exclusively on the community caretaker exception to the warrant requirement . . . [*Id.* at 537] [W]e conclude that the police action in this instance was not constitutionally permitted. Although police entry into the dwelling was initially justified, their subsequent action in fanning out and conducting, in essence, a full-blown search of the home was neither reasonably related in scope to the circumstances that justified the entry in the first place nor carried out in a manner consistent with the factors supporting the entry's initial legitimacy . . . Balancing all of the constituent competing interests, we conclude that the State has failed to demonstrate the objective reasonableness of its agents' claimed exercise of their community caretaking function . . . Absent justification to search the entire house, Officer Camacho was not lawfully in the hallway outside defendant's bedroom when he viewed the ecstasy. Therefore, the entry into defendant's bedroom and seizure of the drugs therein cannot be sustained under the plain-view doctrine. *Id.* at 544-45.

As such, option c is incorrect.

Question 24 indicates:

> Shortly after 10:00 p.m., Officers Jackson and Wilson received a message from the police dispatcher to the effect that a caller had reported a vehicle with a specific license plate driving around on Fairway Street. The dispatcher told Officer Jackson that the caller had said that the vehicle was continually driving around the neighborhood, and the male driver kept exiting the vehicle. When Officer Jackson and his partner arrived at Fairway Street, he observed a 1999 four-door Toyota with the same license plate number given to him by the dispatcher. The vehicle was stopped by the side of the road with its headlights on and engine running. The male occupant was speaking loudly on a cell phone.
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> Officer Jackson activated the emergency flashers on his patrol car and pulled up behind the vehicle. As he approached the driver, he detected a strong odor of alcohol. When he got to the driver's side front window, he observed that the driver's eyes were bloodshot and his speech slurred. Officer Jackson asked the driver where he was coming from, and the driver told him that he had been drinking at a bar in Clearfield. Officer Jackson instructed the driver to get out of his car, after which he administered field-sobriety tests. Based upon the results of those tests, the driver was arrested and charged with DWI, along with other offenses.

The question asks for the true statement. The keyed response is option b, "Once Officer Jackson ascertained that the driver had the odor of alcohol on his breath, bloodshot and watery eyes, slurred speech, and that he had been drinking, Officer Jackson had a sufficient basis for a *Terry* stop." Johnson, who selected option c, "The information provided in the anonymous call provided Officer Jackson a sufficient basis for a *Terry* stop," refers to *State v. Martinez* and *State v. Golotta*[2] and argues that "the officer was authorized to conduct a *Terry* stop when he located the vehicle with the exact registration that was described by the dispatcher on the side of the road." It is noted that this item is based on *State v. Adubato*, 420 *N.J. Super.* 167 (App. Div. 2011), in which the court indicated:

> The question then becomes whether the fact that [the officer] had his flashers on when he pulled up behind Adubato's car transformed a *Pineiro*[3] or *Martinez*[4] field inquiry into a *Terry* stop. The answer to this question is important because it is clear that, at the time he observed Adubato stopped by the side of the road speaking on his cell phone, [the officer] did not have a factual basis for 'a particularized suspicion' sufficient to warrant a *Terry* stop. The anonymous call did not supply a sufficient basis for a *Terry* stop under the principles enunciated by the Supreme Court in *State v. Golotta*, [*supra*]. *Id.* at 180.

The court concluded:

> In summary, when he arrived on the scene, [the officer] and his partner had a sufficient basis to make further inquiry under the concepts of both *Pineiro* (field inquiry) and *Martinez* (community caretaking). [The officer's] decision to turn his flashers on when he pulled behind Adubato's parked car did not, under the particular facts of this case, elevate that inquiry into a *Terry* stop. Once [the officer] ascertained that Adubato had the odor of alcohol on his breath, bloodshot and watery eyes, slurred speech, and that he had been drinking, he had a sufficient basis for a *Terry* stop. *Id.* at 181-82.

As such, the question is correct as keyed.

Question 25 indicates:

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[2] Johnson does not provide citations for these matters but it appears that he is referring to *State v. Martinez*, 260 *N.J. Super.* 75 (App. Div. 1992) and *State v. Golotta*, 178 *N.J.* 205 (2003).

[3] *State v. Pineiro*, 181 *N.J.* 13 (2004).

[4] S*upra.*

> At approximately 3:30 a.m., Sun Valley Police Officer Lauren Hague observed Phillip Brady operating a motor vehicle with tinted windows and loud exhaust. After following him for about one block, Officer Hague pulled Brady's vehicle over for the observed equipment violations. Officer Hague approached Brady and requested his driver's credentials, which Brady then produced. Appearing a bit scared and nervous, Brady asked why he was stopped. Officer Hague explained the muffler was excessively noisy and the windows were completely tinted black, preventing the officer from seeing the inside of the vehicle. Detecting a strong odor of alcohol coming from Brady's breath, Officer Hague inquired whether Brady had been drinking. Brady admitted to consuming a beer that night at a local bar. Officer Hague sensed the alcohol smelled more like hard liquor and not beer. Based on her observations and Brady's admissions, Officer Hague requested Brady exit the vehicle to perform field sobriety testing, to make sure that he was okay to drive. Thereafter, Brady was arrested and charged with driving while intoxicated.

The question asks, according to relevant New Jersey case law, for the true statement. The keyed response is option d, "The facts in the scenario amounted to a reasonable articulable suspicion that Brady was driving while intoxicated, therefore justifying the added detention required to administer the field sobriety test."[5] Since Brock selected the correct response, his appeal of this item is moot. Buono argues:[6]

> [Y]ou need reasonable suspicion in order to perform a field sobriety test and would then lead to an arrest for driving under the influence of alcohol . . . Th[e] circumstances [presented in the scenario] would lead any other officer with the same training and experience [to] reasonably believe that the driver would be under the influence of alcohol. Thus performing a field sobriety test would be one of the least intrusive means to determine if the driver would be able to properly perform the exam and be able than be sent [*sic*] to perform an alcohol breathalyzer

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[5] It is noted that this item is based on *State v. Bernokeits*, 423 *N.J. Super.* 365 (App. Div. 2011), in which the court determined that "while we agree that the facts of record do not support a finding of probable cause, they do amount to a reasonable articulable suspicion that defendant was driving while intoxicated and, therefore, justify the added detention required to administer the field sobriety tests." *Id.* at 370.

[6] It is noted that Buono selected option c, "The motor vehicle violations observed by Officer Hague, as justification for the initial motor vehicle stop, did not establish the required reasonable suspicion that Brady had committed a crime or other unlawful act."

> [test] and subsequent arrest based on the reasonable articulable suspicion.

Given that Buono appears to be arguing for the keyed response, his appeal of this item is misplaced.

Question 26 indicates that Officer Kendall, after arriving at the scene of a call for service, is informed by the victim that she was in the rear seat of her car, removing a bag, when an unknown male suddenly entered her car and began driving the car away. She immediately began to scream and hit the back of the head of the suspect. The unknown male drove about one-half block down the road before pulling the victim out of the car. The unknown male proceeded to leave with her vehicle. The question asks for the most appropriate *N.J.S.A.* 2C charge for the unknown male. The keyed response is option c, "Carjacking, because the suspect used force against the victim while she was an occupant of the motor vehicle at the time of its taking."[7] Johnson and Mazzeo assert that option d, "Kidnapping, because the victim was forcibly removed from her current location by the suspect," is the best response.[8] Specifically, Johnson refers to *State v. LaChance*,[9] *State v.*

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[7] *N.J.S.A.* 2C:15-2 (Carjacking defined) provides:

> a. Carjacking defined. A person is guilty of carjacking if in the course of committing an unlawful taking of a motor vehicle, as defined in R.S. 39:1-1, or in an attempt to commit an unlawful taking of a motor vehicle he:
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> (1) inflicts bodily injury or uses force upon an occupant or person in possession or control of a motor vehicle;
> (2) threatens an occupant or person in control with, or purposely or knowingly puts an occupant or person in control of the motor vehicle in fear of, immediate bodily injury;
> (3) commits or threatens immediately to commit any crime of the first or second degree; or
> (4) operates or causes said vehicle to be operated with the person who was in possession or control or was an occupant of the motor vehicle at the time of the taking remaining in the vehicle.
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> An act shall be deemed to be "in the course of committing an unlawful taking of a motor vehicle" if it occurs during an attempt to commit the unlawful taking of a motor vehicle or during an immediate flight after the attempt or commission.

[8] *N.J.S.A.* 2C:13-1 (Kidnapping) provides:

> a. Holding for ransom, reward, or as a hostage. A person is guilty of kidnapping if he unlawfully removes another from the place where he is found or if he unlawfully confines another with the purpose of holding that person for ransom or reward or as a shield or hostage.
> b. Holding for other purposes. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the

Masino[10] and *State v. Jackson*[11] and maintains that "based on the exam question, the removal of the victim a substantial distance from the scene, along with the confinement and isolation, exposed the victim to an increased risk of harm. The actor also unlawfully confined the victim for a substantial period, with the purpose to facilitate commission of a crime. In addition, the flight along with terrorizing the victim while fleeing the area with the victim inside the vehicle, satisfied the elements of the kidnapping statute and would be the most appropriate 2C charge."

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vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:
(1) To facilitate commission of any crime or flight thereafter;
(2) To inflict bodily injury on or to terrorize the victim or another;
(3) To interfere with the performance of any governmental or political function; or
(4) To permanently deprive a parent, guardian or other lawful custodian of custody of the victim.

[9] Johnson does not provide a citation for this matter. In addition, it is noted that an internet search did not find a New Jersey matter captioned, "*State v. LaChance*." Moreover, this matter could not be identified based on the information provided by Johnson, *i.e.*, "In *State v. LaChance*, the court said that, 'a person will be deemed to have been confined for a substantial period of that confinement is criminally significant in the sense of being more than incidental to the underlying crime and that determination is made with reference not only to the duration of the confinement, but also to the enhanced risk of harm resulting from the confinement and isolation of the victim or others.'" However, Johnson continues, "In this case, the court was satisfied that the 'defendant had unlawfully confined the husband for a substantial period in a place of isolation with the intention, at a minimum, to inflict bodily injury on or to terrorize.'" It is noted that the quoted portion appears to be taken from *State v. La France*, 117 *N.J.* 583 (1990), in which La France, in part, entered a residence, tied up the husband and sexually assaulted the wife. The court in that matter indicated, "We are satisfied, under the principles stated, that the jury could have concluded that defendant had unlawfully confined the husband for a substantial period in a place of isolation with the intention, at a minimum, to inflict bodily injury on or to terrorize his wife." *Id*. at 592. Thus, it is unclear whether Johnson is referring to *State v. La France*, *supra*, or another matter which cites *State v. La France*, *supra*. As such, the Commission is unable to address this reference further.

[10] Johnson does not provide a citation for this matter. However, it appears that he is referring to *State v. Masino*, 94 *N.J.* 436 (1983). In *Masino*, *supra*, Masino met the victim at a disco club where the victim invited Masino to accompany her and a friend to get coffee. Masino, in his car, followed the victim's car. However, on the way to get coffee, the friend asked to be taken home and after leaving the friend's home, the victim pulled up to Masino's parked car, rolled down her window and told Masino that she decided to go home. Masino then entered the victim's car and punched her several times. The victim attempted to flee but Masino caught her, dragged her across the street and down to a pond where he, in part, sexually assaulted her, beat her and stripped her of her clothes. *Id*. at 438.

[11] Johnson does not provide a citation for this matter. However, it appears that he is referring to *State v. Jackson*, 211 *N.J.* 394 (2012). In *Jackson*, *supra*, a taxi driver was on his way to pick up a customer and while stopped at a light, Jackson entered the taxi, ordered to be taken to a location less than a mile away (approximately 15 city blocks), pointed a gun at the driver and demanded money. Upon arriving at his destination, Jackson exited the taxi without injuring the driver and was arrested shortly thereafter. *Id.* at 401-402.

Mazzeo argues that "the victim was removed from the location in which she was found and moved a substantial distance during the flight of the crime [*sic*]." Mazzeo adds that "with the information given, the female was not in control of the vehicle and the scenario was not specific enough to lead one believe that the female victim was an actual occupant of the vehicle at the time of the taking." It is noted that the circumstances presented in *State v. Masino*, *supra*, and *State v. Jackson*, *supra*, are not remotely similar to those presented in the question. Thus, the relevance of these matters is unclear. In addition, neither Johnson nor Mazzeo have demonstrated how driving the victim one-half block constitutes a "substantial distance" or a "substantial period" pursuant to *N.J.S.A.* 2C:13-1b under the circumstances presented in the question. Furthermore, Johnson has not demonstrated how the unknown male terrorized the victim pursuant to *N.J.S.A.* 2C:13-1b(2) under the circumstances presented in the question. Moreover, despite Mazzeo's claim, the question clearly indicates that the victim "*was in the rear seat of her car*, removing a bag, when an unknown male entered her car . . ." (emphasis added). Accordingly, Johnson and Mazzeo have failed to support their burden of proof for this item.

Question 31 indicates that James recently attended Tax Court and was found to be delinquent on back taxes. As a result, he was ordered to pay a substantial amount in fines. James was upset and a few days later, he saw the presiding judge of his case walking out of a store. James followed the judge for approximately two hours. James finally exited his car and approached the judge. James assaulted the judge by punching him in the face and yelling, "You ruined my life," before walking away. The judge did not suffer any bodily injury. The judge notified police, and two of your officers were able to apprehend James down the street without incident. The question asks, according to the information presented in this scenario, for the most appropriate *N.J.S.A.* 2C charge for James. The keyed response is option d, "Aggravated Assault."[12] Kuchmek maintains that option a, "Stalking," is equally correct.[13] Kuchmek argues that "the facts leading up to the assault are extremely

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[12] *N.J.S.A.* 2C:12-1b(5)(f) provides that a person is guilty of aggravated assault if he commits a simple assault upon any justice of the Supreme Court, judge of the Superior Court, judge of the Tax Court or municipal judge while clearly identifiable as being engaged in the performance of judicial duties or because of his status as a member of the judiciary.

[13] *N.J.S.A.* 2C:12-10 (Definitions; stalking designated a crime; degrees) provides:

> 1. a. As used in this act:
> (1) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person; directly, indirectly, or through third parties, by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about, a person, or interfering with a person's property; repeatedly committing harassment against a person; or repeatedly conveying, or causing to be conveyed, verbal or written threats or threats conveyed by any

vague but important. The first issue is the verdict. Nowhere in the fact pattern does it give details of the conviction ([*e.g.*]: imprisonment beginning at a later date, probation, monetary restitution, etc[.]).[14] Next, after observing the judge, James engaged in a course of conduct and begin [*sic*] to follow the judge over a two hour period. Nowhere does it specify the number of locations James follows him to or distance followed.[15] It also does not specify the number of separate occasions that took place within that time frame. These omitted details are crucial for proper charging and prosecution of James." He asserts that since James followed the judge for two hours, this "most definitely shows that the events took place at multiple locations[16] . . . These facts that are missing are crucial for clearly showing James[']s course of conduct . . . [, which is] the biggest unknown. Course of conduct, as per the statute, constitutes a repeated act. Repeatedly, by definition, means two or more occasions. Occasion as defined by Merriam-Webster, means a particular instance of time of an event. Nowhere does it state that the two events have to be separated by an extended period of time (*i*[.]*e*[.]: next calendar day, month, year, etc[.]). The same goes for this incident." Kuchmek describes an attempted abduction of a child in Lake Elsinore, California as "an example of a course of conduct with more than one occurrence within close time and proximity to each other" and argues that "the course of conduct of James is no different than the Lake

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other means of communication or threats implied by conduct or a combination thereof directed at or toward a person.

(2) "Repeatedly" means on two or more occasions.
(3) "Emotional distress" means significant mental suffering or distress.
(4) "Cause a reasonable person to fear" means to cause fear which a reasonable victim, similarly situated, would have under the circumstances.

b. A person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress.
c. A person is guilty of a crime of the third degree if he commits the crime of stalking in violation of an existing court order prohibiting the behavior.
d. A person who commits a second or subsequent offense of stalking against the same victim is guilty of a crime of the third degree.
e. A person is guilty of a crime of the third degree if he commits the crime of stalking while serving a term of imprisonment or while on parole or probation as the result of a conviction for any indictable offense under the laws of this State, any other state or the United States.
f. This act shall not apply to conduct which occurs during organized group picketing.

[14] Kuchmek does not explain the relevance of this information.

[15] Kuchmek does not explain the relevance of this information.

[16] Kuchmek does not explain how he arrived at this conclusion and as previously noted, he does not explain the relevance of this information.

Elisnor[e] incident."[17] Kuchmek contends that "this is not a case of James and the judge coming into contact spontaneously and unexpectedly. This encounter took place due to the calculated, thought out, and deliberate actions of James."[18] Candidates are instructed to "choose the single BEST answer among the options." In this regard, Kuchmek does not explain why he chose option a if he believed that crucial details were missing in the question stem to support that answer choice. Option d is the best response given the information provided in the question.

Question 37 indicates that Mary and Fred worked together at a company in your jurisdiction for many years. They were both recently fired due to their poor performance on a project they worked on together. Since the firing, Fred has made numerous phone calls to Mary demonstrating his anger towards her. All the phone calls were made in the middle of the night and contained offensively coarse language. At times, Fred repeatedly called Mary just to annoy her. Fred is a resident of your jurisdiction, while Mary maintains a residence several towns over, outside your jurisdiction. Mary has come to your police station and is requesting to have a complaint signed against Fred for his actions. Your officer is concerned about the proper charges and the appropriate jurisdiction. You should advise the officer that the most appropriate *N.J.S.A.* 2C charge is Harassment. The question requires candidates to complete the following sentence, "Mary may . . ." The keyed response is option a, "either file the complaint at your police department or the department of the jurisdiction where she received the messages and communications." Johnson argues that harassment is a petty disorderly persons offense and thus, to make an arrest, "an officer needs probable cause the offense occurred and the offense needs to take place in the officer's presence . . . Before a summons may be issued on a complaint made by a private citizen, there must be an independent determination of probable cause made by a judicial officer. Complaints for these types of offenses are made in the municipal court in the municipality

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[17] The relevance of an attempted *kidnapping* matter in *California* (which is not governed by New Jersey Title 2C) is not clear. Furthermore, it appears that Kuchmek misremembered the incident he references as he indicates that on March 12, 2019, a male sex offender made two attempts to abduct a three year-old boy from a playground and was charged with two counts of kidnapping (one for each attempt). However, the Riverside Sheriff's Office (Riverside County, California) provides, "On Monday, March 11, 2019, at 11:30 AM, an adult male attempted to abduct two small children from a play area . . . The suspect, 29 year-old Lake Elsinore resident Marcus DeWitt, initially tried to grab a three year-old male child by the arm. The child was partially inside of a play apparatus and DeWitt was unsuccessful. DeWitt then picked up a four year-old male victim and attempted to flee the area with him." *See* http://www.riversidesheriff.org/press/lak19-0311.asp. *See also* https://patch.com/california/lakeelsinore-wildomar/sex-offender-charged-trying-snatch-boys-elsinore-park.

[18] Kuchmek does not explain the significance of this distinction or how James seeing the judge walking out of a store a few days after James' court date "is not a case of James and the judge coming into contact spontaneously and unexpectedly" but rather, due to "calculated, thought out, and deliberate actions" by James.

where the offense occurred. Court rule 7:2-2(a)(1) provides that a complaint-summons charging any offense made by a private citizen may be issued only by a judge, or if authorized by the judge, by a municipal court administrator or deputy court administrator of a court with jurisdiction in the municipality where the offense is alleged to have been committed within the statutory time limitation . . . Since it is unknown where the harassing phone calls originated from, the complaint summons should be signed where the victim resides, in the jurisdiction where the unwanted communications were received." The question indicates that "Mary has come to your police station and is requesting to have a complaint signed against Fred for his actions." Thus, the question does not ask candidates to determine whether a summons should be issued and an arrest made based on that complaint. Rather, candidates were required to determine where Mary may file a complaint. In this regard, all of the answer choices present possible locations where Mary may file the complaint. Moreover, the SMEs indicated that a complaint may be signed in a police department and is not limited to a municipal court. In addition, the SMEs noted that it would not be reasonable for your police station to turn Mary away because it may be unknown whether Fred made the harassing calls from his residence in your jurisdiction. In this respect, the SMEs indicated that seeking a communications data warrant in order for Mary to sign a complaint for a disorderly persons offense is impractical. Accordingly, the question is correct as keyed.

Question 38 indicates:

> Responding to a request from another agency, Officer Huertas was looking for a tan 2013 Ford with an out-of-state license plate. Officer Huertas located the vehicle and observed its driver commit two motor vehicle violations. The officer conducted a traffic stop and asked the driver to produce her license, registration, and proof of insurance. The driver, Stefanie Doxie, explained that the car was rented by her boyfriend, Tim Stevens. Ms. Doxie was unable to produce her driver's credentials and instead provided Officer Huertas with an expired state-issued identification card. She was also unable to locate the required vehicle-related documents.
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> Officer Huertas granted Ms. Doxie permission to call her boyfriend in an attempt to locate the necessary documents. Although her cell phone was plainly visible on the passenger seat, she quickly opened and shut the car's center console. By this time, two other officers had arrived on the scene, and they ordered her not to make any other sudden movements. Ms. Doxie then used her cell phone to make a phone call and informed the officers that Stevens was on his way, but did not estimate how long it would take him to arrive.

> Following the phone call, Officer Huertas inquired as to the whereabouts of the vehicle's rental agreement. Ms. Doxie replied she was unaware of its location, or whether it included her name as an authorized driver. Because the driver was unable to produce a valid driver's license, Officer Huertas ordered her out of the car, and patted her down for weapons. Ms. Doxie was then advised to sit on the curb.
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> In an effort to avoid unnecessarily prolonging the stop, Officer Huertas searched for the vehicle's credentials in the side visor, glove compartment, and in an open compartment located near the gear shifter. When he opened the center console, he observed a large quantity of heroin and cash. Ms. Doxie was arrested, and a search of her person revealed a bag containing heroin.

The question asks whether Officer Huertas' search of the vehicle was proper. The keyed response is option b, "Yes; the failure to produce the vehicle's documents triggered a recognized exception to the search warrant requirement."[19] Bender argues that none of the answer choices are correct. In this regard, he maintains:

> Due to the verbiage 'recognized exception' it is understood that this specifically refers to several carefully tailored exceptions to the warrant requirement. The courts have addressed this and stated that 'warrantless searches are permissible only if 'justified by one of the few specifically established and well-delineated exceptions to the warrant requirement.' *Witt*, 233 *N.J.* at 422 (quoting *Frankel*, 179 *N.J.* at 598).[20] A credential search does not fall under one of the 'recognized exceptions', instead it falls under a very limited set of criteria when the 'operator is unable to produce proof of registration' and 'the officer may search the car for evidence for ownership[.] *State v. Boykins*, 50 *N.J.* 73, 77 (1967). Specifically, it does not fall under the recognized automobile exception . . . [since] there was no probable cause to believe that the vehicle contained contraband or evidence of an offense. In *State v. Pena-Flores*, 198 *N.J.* 6, 31 (2009), for example, the Court held stated [*sic*], police were 'entitled, separate and apart from the automobile exception, to look into the areas in the vehicle in which evidence of ownership might be expected to be found.'

In *Hamlett*, *supra*, the court noted:

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[19] It is noted that the item is based on *State v. Hamlett*, 449 *N.J. Super.* 159 (App. Div. 2017).

[20] Although he miscites the reporter volume number as 233, Bender appears be referring to *State v. Witt*, 223 *N.J.* 409 (2015).

> Our cases have recognized, however, that even absent probable cause, police may conduct a limited warrantless search of a car for documentation if a defendant is unwilling or unable to produce it. *See*, *e.g.*, *State v. Gammons*, 113 *N.J. Super.* 434, 437 (App. Div.), aff'd 59 *N.J.* 541 (1971) . . . We recognized the vitality of the credentials exception to the warrant requirement '[W]here there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may search the car for evidence of ownership.' *Ibid*. (citing *Boykins*, *supra*, 50 *N.J.* at 77). *Id*. at 173.

The court further noted, "Defendant's failure to produce the documents required under *N.J.S.A.* 39:3-29 triggered the 'documents' exception to the warrant requirement as articulated in *Keaton*, *supra*, 222 *N.J.* at 442-3 . . ." *Id*. at 174. Thus, it is not clear what distinction Bender is trying to articulate as this exception has clearly been recognized.[21] Kuchmek and Willett contend that option c, "No; the driver's inability to locate the vehicle's documents did not justify the search because her actions did not amount to a refusal," is the best response. In this regard, Kuchmek presents that there are differences between *Hamlett*, *supra*, and the scenario. Specifically, Kuchmek maintains:

> In *Hamlett*, Ptl. Heintz stated that Hamlett's attempt to locate the documentation appeared to be halfhearted. In this incident, the driver (Stefanie Doxie) made every effort to provide Ptl. Huertas with the documents he requested with negative results. Like Hamlett, Doxie contacted her boyfriend (Tim Stevens) to arrive with the rental agreement. The difference between the two cases is that Ptl. Huertas acknowledged that Doxie had spoken with Stevens. In *Hamlett*, officers on scene testified they did not overhear Hamlett's conversation, and it appeared as if Hamlett wasn't talking to anyone at all. Julian Hamlett advised that his girlfriend was en route with the rental agreement, but gave no time frame. In this incident, a time frame was given by Doxie for Stevens arrival. Unlike Hamlett, it is clear that Doxie was acting in good faith and that Hamlett was not.

Kuchmek continues:

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[21] Furthermore, the court in *State v. Terry*, 232 *N.J.* 218 (2018), noted that "the limited registration search exception to the warrant requirement has been an accepted doctrine in this State for more than fifty years." *Id.* at 242.

> The totality of the circumstances in *Hamlett* are similar to *State v. Terry*.[22] Even though Hamlett appeared to be cooperating with ACPD officers, his actions were nothing more than a ruse. It was clear that Hamlett was acting in ill faith under the guise of cooperation. Ptl. Heintz had a justifiable reason to believe that the likelihood of Hamlett's girlfriend responding on scene was slim to none. Ptl. Heintz's warrantless search for documents was justifiable. This is not the case for this incident. As the facts unraveled, it was clear that Doxie was acting in good faith. A definitive time frame was given and Ptl. Huertas acknowledged that Doxie did in fact speak with Stevens and that he was responding. At no time was it mentioned or implied by Stevens that Doxie was not allowed to be possession of the vehicle. In *Terry*, the New Jersey Supreme Court held[,] 'when a police officer can determine that the driver or passenger is the lawful possessor of the vehicle despite an inability to produce a registration a warrantless search for proof of ownership will not be justified.'

Willett contends that "there was nothing in the fact pattern that led you to believe the driver of the rental vehicle was in possession of the vehicle illegally . . . Even the fact pattern in [*Hamlett*, *supra*,] makes no reference to the fact whether or not the rental vehicle was legally or illegally possessed. Reference is made to the case of *State v. Terry*; if the officer has no basis to believe the driver possesses the vehicle illegally, regardless of the inability to produce documents, a warrantless search for proof of ownership will not be justified." It is noted that the scenario presented in the question is taken almost verbatim from *Hamlett*, *supra*.[23] It is not clear how

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[22] Although Kuchmek does not provide a citation, it appears that he is referring to *Terry*, *supra*. In *Terry*, *supra*, the court noted that Officer Devlin observed Terry's truck run a stop sign and almost hit his patrol car. Officer Devlin activated the overhead lights and siren but Terry did not pull to the side of the road. Rather, he continued on, zigzagging back and forth between lanes. The court noted that "during the chase, Officer Devlin relayed the truck's license plate number to a dispatcher, who notified him that the vehicle was a Newark Airport Hertz rental, which at that point had not been reported as stolen." *Id*. at 224-5. After a half a mile, Terry stopped at a gas station and Officer Devlin repeatedly ordered Terry to show his hands. Terry did not respond and after 20-30 seconds, Officer Devlin opened the driver's side door and ordered Terry out of the vehicle. When Officer Devlin asked for identification, Terry provided his license. Officer Devlin then asked for the vehicle's registration and insurance card but Terry was non-responsive. Officer Devlin then opened the passenger's side door and looked in the glove box using a flashlight. *Id*. at 225. While there was no documentation in the glove box, Officer Devlin saw a handgun on the floorboard. Terry was arrested and during the search incident to arrest, the officers found a valid rental agreement for the truck in his front jacket pocket. *Id*. at 226. It is noted that the court determined that "all in all, the officers acted reasonably, in accordance with our precedents permitting a limited registration search without a warrant and the dictates of the Fourth Amendment and Article I, Paragraph 7 of our State Constitution." *Id*. at 247.

[23] In *Hamlett*, *supra*, the court indicated:

Kuchmek arrived at his description of the information presented in *Hamlett*, *supra*, or the information presented in the question. With regard to *Terry*, *supra*, it is not clear how Kuchmek determined that "the totality of the circumstances in *Hamlett* are similar to *State v. Terry*." Nevertheless, it is noted that, although not germane to its determination in the matter, the court provided, "We further note that if a driver or passenger explains to an officer that he has lost or forgotten his registration, and the officer can readily determine that either is the lawful possessor, then a warrantless search for proof of ownership is not justified." *Id.* at 243. The SMEs emphasized that Doxie is not a "driver or passenger [who] explains to an officer that [s]he has lost or forgotten h[er] registration" but rather, she states that her boyfriend, a non-present third party, rented the vehicle. In addition, Doxie is unable to produce her driver's credentials or the rental agreement. Thus, the SMEs indicated that these circumstances would lead the officer to reasonably believe that Doxie is not lawfully operating or in possession of the vehicle. Accordingly, Kuchmek and Willett have failed to support their burden of proof for this item.

Detective Jeremy Narenberg of the Atlantic City Police Department (ACPD) directed Officer Charles Heintz to stop a tan 2011 Chevy Malibu with Pennsylvania license plates. Narenberg did not provide a reason for this request. Heintz located the vehicle and observed its driver commit two motor vehicle violations. Heintz stopped the car and asked defendant to produce his license, registration, and proof of insurance. Defendant explained that the car was rented by his girlfriend, Ms. Boyd. He was unable to produce his driver's credentials and instead provided Heintz with an expired state-issued identification card. Defendant looked in the car's glove compartment for additional documentation, but found only an owner's manual. Heintz did not believe defendant was under the influence, but he testified he saw a half-empty bottle of vodka on the car's back seat, and smelled an odor of burnt marijuana emanating from the car's interior. Defendant requested permission to call Boyd in an attempt to locate the necessary documents. Heintz allowed defendant to do so. Although defendant's cell phone was plainly visible on the passenger seat, Heintz observed defendant quickly open and shut the car's center console. By this time, two other officers had arrived on the scene. The officers ordered defendant not to make any other sudden movements. Defendant then used his cell phone, ostensibly to call Boyd. The officers did not listen to defendant's conversation, and did not know who, if anyone, defendant actually spoke to. Defendant informed the officers that Boyd was on her way, but he did not estimate how long it would take her to arrive. Following the phone call, Heintz inquired as to the whereabouts of the vehicle's rental agreement. Defendant replied he was unaware of its location, or whether it included his name. Because defendant was unable to produce a valid driver's license, Heintz ordered him out of the car. He then patted defendant down for weapons, found none, and placed defendant on the curb. In an effort to avoid unnecessarily prolonging the stop, Heintz searched for the vehicle's credentials in the side visor and glove compartment, and in an open compartment located near the gear shifter. Heintz then opened the center console, where he observed 7.25 grams of cocaine, two bricks of heroin, 98.6 grams of marijuana, and $2,595 in cash. Defendant was arrested, and a search of his person revealed a bag containing additional marijuana, cocaine, and heroin. *Id.* at 163-64.

Question 41 provides:

On a summer evening, Sergeant Cortez of the Narcotics Bureau of the Talleville Police Department set up a surveillance along Route 2 based on information received from a confidential, reliable informer that a Blue Honda, bearing the registration CB-854D, would be traveling south on Route 2 from New York City after leaving a party where the driver had just purchased marijuana.

Less than two hours after the surveillance began, Sergeant Cortez saw a car matching the informant's description traveling south on Route 2, in the center lane. Upon seeing the vehicle, Sergeant Cortez pulled behind it in the unmarked van he was driving. Sergeant Cortez was traveling two or three car lengths behind the Honda when the driver shot off without signaling from the center lane to the right lane and got off at a gas station. There was a car in the right lane approximately one to two car lengths behind Sergeant Cortez's van.

The driver, later identified as Desean Poole, pulled up front-first to the side of the building at the gas station, and Sergeant Cortez pulled up behind him. Poole had just returned to the car when Sergeant Cortez confronted him. Sergeant Cortez identified the reason for the stop as Poole's unsafe lane change. Upon request, Poole showed Sergeant Cortez his credentials, and Sergeant Cortez started asking him questions based upon the tip he had received. Poole appeared very nervous and jittery. Poole told Sergeant Cortez that he was coming from a nearby town and that he had filled up his tank that morning, but Sergeant Cortez believed that the gas gauge was too low for Poole to have traveled such a short distance. Sergeant Cortez felt that Poole's incorrect answers substantiated the tip he had received. Sergeant Cortez read Poole his Miranda rights and asked him if he had any drugs in the car. Poole denied having drugs in the car, but he still became very nervous. Sergeant Cortez ordered him to stand by the front portion of the driver's side. While Sergeant Cortez began looking through the car, he found a cigarette box containing marijuana roaches in it.

While searching the car, Sergeant Cortez observed Poole motion toward the front portion of his sweat pants. Knowing people often carry drugs in their pants, Sergeant Cortez, with the help of two uniformed backup officers, searched Poole's pants and recovered a bag containing what looked like marijuana. Lab tests later positively identified the substance as marijuana.

The question asks for the true statement. The keyed response is option d, "The totality of the circumstances failed to establish probable cause to search Poole." It is noted that this item is based on *State v. Zutic*, 155 *N.J.* 103 (1998). The issue before the court in *State v. Zutic*, *supra*, was "whether the police, acting on a confidential informant's tip that was partially corroborated, had probable cause to justify the personal search of defendant." *Id.* at 106. In this regard, the court noted that "in evaluating an informant's tip, the probable cause determination is governed by the totality of the circumstances test from *Illinois v. Gates* [citation omitted]," *id.* at 110, which includes a determination of informant veracity and informant basis of knowledge. The court noted that "[the officer] simply asserted that the informant was 'reliable' without indicating what made him think so.[24] In the absence of information about the informant's veracity, the court cannot make an independent evaluation of the informant's veracity. The officer's conclusory assertion that the informant was reliable was not sufficient to establish the informant's veracity." *Id.* at 111. The court further determined:

> Under the totality of the circumstances test, the several circumstances, though insufficient if considered in isolation, may in combination reinforce or augment one another and become sufficient to demonstrate probable cause. *Gates*, *supra*. Here, the circumstances both singly and in combination are insufficient to establish probable cause. These are the absence of informant veracity; the absence of a reliable basis of knowledge, either directly disclosed in the tip itself or indirectly disclosed by the presentation of extensive details or unusual predictive events; the absence of corroboration that could serve to bolster or reinforce the likely existence of criminal activity; and the absence of any independent investigation of facts indicating probable criminal activity. Consequently, the totality of the circumstances surrounding the search of defendant failed to establish probable cause. *Id.* at 113.

As such, the court found, "The police corroboration under the surrounding circumstances generated only reasonable articulable suspicion to justify an investigative stop . . . The police certainly did not have the probable cause required to subject defendant to a personal search for contraband." *Id.* at 113. Given that the question states that that the information was "received from a confidential, reliable informer" and does not indicate that this statement may require further inquiry, it was not possible for candidates to arrive at the keyed response. As such, the

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[24] As noted by the court, the officer testified that he "set up a surveillance along Route 23 North 'based on information we received from a confidential reliable informer that a vehicle bearing registration . . .'" *Id.* at 106. The court further noted that the officer, however, "never indicated why he believed the informant was reliable." *Id.* at 106. It is noted that while the question indicates that "Sergeant Cortez . . . set up a surveillance along Route 2 based on information received from a confidential, reliable informer . . .", the question does not indicate that this information is Officer Cortez's testimony.

Division of Test Development and Analytics has determined to omit this item from scoring prior to the lists being issued.

Question 43 provides:

Officers from the Canton Police Department were investigating a string of armed robberies committed by three individuals during the early morning hours of Tuesday, June 14th. In each incident, two of the individuals, brandishing handguns, approached the victims and robbed them of various items. Among the items taken were two cell phones. The next day, a Superior Court Judge signed a Communications Data Warrant permitting the use of a mobile electronic tracking device.

With assistance from the county prosecutor's office and U.S. Marshals, members of the Canton Police Department tracked one of the stolen cell phones using a mobile unit equipped with a tracking/homing device, which can track and locate cell phones by the use of cell phone towers. It took them approximately thirty minutes to find the street location using the tracking device. At approximately 2:00 p.m. on June 15th (approximately 30 hours since the last robbery), the cell phone was tracked to a three-family house at 13 Maple Street, located in a high-crime area. Three officers entered the building, led by Lieutenant Farr of the major crimes unit, while two other officers remained outside where many people had gathered.

Operating a handheld tracking device, officers were led to the second-floor apartment. Standing in a small hallway on the second floor, Lieutenant Farr knocked on the door and announced he was a police officer. From within the apartment, Lieutenant Farr heard a voice he believed to be a young female yelling and then a man's voice saying, 'shut-up, shut-up, it's the police.' He then heard scurrying in the apartment. Knowing they were in a high-crime area, that the robberies involved males who were armed with handguns, and believing a teenage female was in the apartment, the officers 'shouldered' the door and entered the apartment with their weapons drawn. After entering the apartment, the officers found items on the living room table that were identified as having been taken during the robberies. The three individuals involved in the robberies were in the apartment. As the officers entered, one individual ran into the bedroom, where the officers found a silver handgun on the bed. The stolen cell phone was found on one of the two teenage girls who were in the apartment, after Lieutenant Farr dialed the number from his cell phone.

The question asks, based on relevant New Jersey case law, for the true statement. The keyed response is option d, "The proper determination of probable cause, along with the seriousness of the offense, the close proximity in time, and the possibility that the suspects were armed, combined to establish the necessary exigent circumstances."[25] Burns maintains that option b, "Exigent circumstances were created by the officers' unreasonable investigative conduct of entering the building and knocking on the door, thus nullifying the validity of the search," is the best response. In this regard, he refers to *Brown v. State*[26] and *State in the Interest of J.A.*[27] Specifically, he notes that in *Brown*, *supra*, the court indicated that "New Jersey recognizes the exigency exception to the warrant requirement. In a case of true exigency and probable cause, the police can enter a dwelling. However, police-created exigency 'designed to subvert the warrant requirement' has long been rejected as a basis to justify a warrantless entry into a home, in comparison to exigency that arises 'as a result of reasonable police investigative conduct intended to generate evidence of criminal activity,' which can justify entry [citation omitted]."

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[25] It is noted that this item is taken almost verbatim from *State v. Laboo*, 396 *N.J. Super.* 97 (App. Div. 2007).

[26] It is noted that Burns does not provide a citation for this matter but it appears that he is referring to *Brown v. State*, 230 *N.J.* 84 (2017). In *Brown*, *supra*, the issue before the court was "the applicability of qualified immunity to a claim brought under the New Jersey Civil Rights Act (NJCRA), *N.J.S.A.* 10:6-1 to -2, against a State Police detective named in his individual and official capacity." *Id*. at 89. By way of background, the court indicated, in part, that police received a tip that Brown's boyfriend, who was suspected of being involved in a home invasion, had given her a stolen locket. While driving Brown's BMW, Brown's boyfriend was involved in a traffic stop and arrested for driving with a suspended license and the BMW was impounded. During a search of Brown's impounded BMW, for which a warrant had been obtained, the police found items, but not the locket, linking the car to the home invasion. The police, instead of first seeking a search warrant, went to Brown's apartment, told her about the stolen locket and asked if she would consent to a search of her home. Brown refused and the officer told Brown that she could either stay outside of the apartment which would be secured by officers from the outside or she could go inside with a police escort. Brown decided to enter her apartment and an officer followed her inside while another officer left to obtain a search warrant. More officers arrived and stayed in the kitchen. Later, a female officer was brought in to accompany Brown to the bathroom. Hours later, when Brown had to leave for work, the officers exited the apartment with her. Subsequently, the officer returned with the warrant and during the search, officers found a bag used in the home invasion. *Id.* at 90-93.

[27] It is noted that Burns does not provide a citation for this matter but it appears that he is referring to *In the Interest of J.A.*, 233 *N.J.* 432 (2018). In *In the Interest of J.A.*, *supra*, the victim's iPhone was stolen by a young man at a bus stop. The police officer and the victim used an app to track the location of the stolen phone to a house three blocks away from the bus stop. Officers went to the home, which appeared to be abandoned, and while securing the perimeter of the house, an officer noticed the stolen phone while peering through a first-floor window. Officers entered the home through an unlocked window and the front door and found the suspect in a bedroom but not the stolen phone. Subsequently, family members arrived at the home and the suspect's brother, without encouragement from the police, located the stolen phone in another bedroom. *Id.* at 439-41.

Id. at 110-11. In *In the Interest of J.A.*, *supra*, the court determined that "in the absence of any danger that defendant would commit violent acts or that he would destroy the desired evidence, we find that the officers' pursuit of defendant was not an exigency overriding the warrant requirement. We therefore find that neither exigency nor the hot pursuit doctrine justified the officers' warrantless entry here." *Id.* at 451. The court in *Laboo*, *supra*, determined that "although the exigent circumstances that justified entry into the apartment may have been 'police-created,' they arose as a result of reasonable police investigative conduct." *Id*. at 106. The court in *Laboo*, *supra*, concluded that "the particular circumstances here were sufficiently exigent to justify the warrantless entry into the apartment. The officers had probable cause to believe that the delay involved in procuring a warrant might gravely endanger themselves or other persons. The seriousness of the offenses, along with the close proximity in time (approximately thirty hours), and the real possibility that the suspects were armed, combined to establish the necessary exigent circumstances." *Id.* at 108. As such, Burns' reliance on *Brown*, *supra*, and *In the Interest of J.A.*, *supra*, is misplaced. Accordingly, the question is correct as keyed.

Question 47 provides:

> Officers under your command are conducting an undercover surveillance of a drug trafficking area of the city when they see and hear Fred Banks ask a male, who had exited a blue Ford truck, 'how much do you need?' The male driver states he needs 'four.' Fred Banks then yells to Allen Jefferson, who is standing in front of a house at 159 Valley Avenue, 'he wants four.' The officers watch as Jefferson walks into a yard and towards the side of the house. One of the officers further observes Jefferson walk next to the side of the house, kneel down and reach into a hole that is located near the bottom portion of the house. The officer watches as Jefferson reaches his hand up into the opening and pulls out a clear plastic bag. Jefferson takes an item from the bag and then reinserts the bag up into the opening. The officers then observe Jefferson hand several objects to Banks, who then passes them along to the driver of the Ford truck. The driver of the vehicle hands money to Banks, who in turn hands the money to Jefferson. Immediately thereafter, your officers move in, stop and arrest the driver of the truck, and recover the drugs that he had purchased. Banks and Jefferson are then placed under arrest.

The question indicates that one of the officers on scene asks you if they are allowed to retrieve the drugs from the hole where they observed Jefferson remove the drugs. The question asks, based on relevant New Jersey case law, what you should advise the officer. The keyed response is option d, "Yes. The officers may retrieve the drugs because once the drugs were lawfully exposed to the view of the officers, the

clear bag and its contents remained subject to plain view." In recounting the background of this matter, the Appellate Division noted that at the trial level, "the defendants never asserted that either of them was authorized to occupy or utilize the house. Although it seems unlikely that they were, the trial judge afforded them the rights of a person enjoying such status, reasoning that the State should have proved defendants were not lawful users of the property." Unlike the trial judge, the Appellate Division did not afford the defendants the rights of a lawful user of the property. Rather, in remanding this matter, the Appellate Division recommended that the trial judge establish "whether each defendant was a lawful occupant or owner of [the house], and also whether the house was abandoned, as others in the area appear to have been." *Id.* at 354 n2. Accordingly, the Appellate Division's analysis focused solely on the plain view doctrine[28] and did not examine any Fourth Amendment protections that would apply to an owner or lawful occupant of a home, *e.g.*, the concept of curtilage.[29] Given that the question stem does not establish whether or not Banks and Jefferson are the legal owners or occupants of the house, it is not possible for candidates to arrive at the keyed response. As such, the Division of Test Development and Analytics has determined to omit this item from scoring prior to the lists being issued.

Question 50 provides:

> On a Tuesday afternoon, Sandra Harrison asked Officers Delk and Pierce to accompany her to the trailer where she lived with her husband, Nathan, so that they could keep the peace while she removed her belongings. The two officers arrived with Sandra at the trailer at about 1:15 p.m. Sandra went inside, where Nathan was present. The officers remained outside. When Sandra emerged after collecting her possessions, she spoke to Officer Delk, who was then on the porch. She suggested he check the trailer because, as she stated, 'Nathan had dope in there.' She added that she had seen Nathan slide some dope underneath the couch.
>
> Officer Delk knocked on the trailer door, told Nathan what Sandra had said, and asked for permission to search the trailer, which Nathan

[28] Specifically, the court indicated that its "attention on review has . . . been focused upon the State's assertion that 'One [sic] cannot commit a crime on a public street in clear view of anyone passing by, and then claim their privacy rights have been violated because officers watched where they hid the instrumentalities of their crimes.'" *Id.* at 355.

[29] As noted in the dissenting opinion, "I would not relegate the factual issue of defendants' authorization to use or occupy the house to a footnote. If they are mere strangers, trespassers or intruders in their use of the house they have no right to assert Fourth Amendment protections. But that would be the only basis upon which the warrantless seizure here could be justified." *Id.* at 363.

> denied. Officer Delk then sent Officer Pierce with Sandra to get a search warrant. Officer Delk told Nathan, who by this time was also on the porch, that he could not reenter the trailer unless a police officer accompanied him. Nathan subsequently reentered the trailer two or three times to get cigarettes and to make phone calls. Each time Officer Delk stood just inside the door to observe what Nathan did.
>
> Officer Pierce obtained the warrant by about 3 p.m. He returned to the trailer and, along with other officers, searched it. The officers found under the sofa a marijuana pipe, a box for marijuana, and a small amount of marijuana. Nathan was arrested.

The question asks for the true statement. The keyed response is option b, "The officers executed a proper search of the trailer by establishing probable cause to believe the trailer contained contraband, and exercising a limited restraint of Nathan Harrison for a reasonable period of time while the warrant was secured." It is noted that this item is based on *Illinois v. McArthur*, 531 *U.S.* 326 (2001). Bender, Burns, Clark, Donker and Werner refer to *Brown v. State*, *supra*, and argue that the determination in *Illinois v. McArthur*, *supra*, is not applicable in New Jersey. Specifically, they emphasize that the court in *Brown*, *supra*, indicated, in part, "Also, in the future, law enforcement officials may not rely on *McArthur* to enter an apartment to secure it while awaiting a search warrant. Although *McArthur* does not explicitly permit or forbid entry into a home under *those circumstances*,[30] our ruling today makes clear that officers may not do so. They must get a warrant and, if reasonably necessary, may secure the apartment for a reasonable period of time from the outside" (emphasis added). *Id.* at 111-112. Although the circumstances in *Brown*, *supra*, are substantially different from those presented in the question, the SMEs indicated that given the court's finding, as indicated above, the outcome of the scenario presented in the question would be unclear. As such, the Division of Test Development and Analytics has determined to omit this item from scoring prior to the lists being issued.

For question 62, candidates were provided with the following passage:

> As I neared the stairwell the individual staggered down the last steps, landing no more than 3 feet away from me. As he stood, he was

[30] In this regard, the court indicated that while the Court in *McArthur*, *supra*, "noted that the officer on the scene prevented McArthur from entering his home 'unless a police officer accompanied him,' the Court did not explicitly and separately address whether the officer could have 'accompanied' McArthur into the residence [citation omitted]" as the officers did with Brown. *Id*. at 107. The court further noted, "In fact while awaiting a warrant, the officer twice monitored McArthur from inside the door, which the Court labeled as an 'observation.' [citation omitted]" *Id*. at 107. However, the Court in *McArthur*, *supra*, did not "address the intrusion effected by a warrantless entry to allow for extended observation, as in this case . . ." *Id*. at 108.

> unsteady on his feet. From my training and experiance I determined he was clearly intoxicated.

The question requires candidates to determine how many spelling errors the passage contains. The keyed response is b, 1. Verwey and Werner maintain that the best response is option c, 2. Specifically, Verwey presents that the passage requires a comma and thus, there are two errors. As noted previously, the question asks for the number of *spelling* errors. Thus, Verwey misremembered the question. Werner argues that "different writing styles, which include that of the Associated Press (A.P.), Chicago Manual [of Style], Modern Language Association (MLA), and others, have conflicting rules, which include when a numeric value is to be represented as a written number or as a numeral." The choice of using words or figures to express a number is a matter of style or format rather than spelling. Accordingly, the question is correct as keyed.

Question 81 refers to the Attorney General Guidelines regarding the "Substantially Identical" provision in the State's Assault Firearms laws and asks, "Which of these is **NOT** considered an assault weapon?" The keyed response is option c, "a pump-action shotgun with a folding stock and has a threaded barrel." Clark and Duran maintain that option, b, "A semi-automatic pistol that has the ability to accept a detachable magazine and has a manufactured weight of 60 ounces when the pistol is loaded and has a threaded barrel capable of accepting a barrel extender," is equally correct. In this regard, the Guidelines indicate, in pertinent part, "A semi-automatic pistol that has an ability to accept a detachable magazine and has at least 2 of the following . . . a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; . . . manufactured weight of 50 ounces or more when the pistol is **unloaded** . . ." (emphasis added). Since it is not possible for the candidates to determine the weight of the unloaded pistol and/or ammunition, the Division of Test Development and Analytics has determined to double key this item to option b and option c prior to the lists being issued.

CONCLUSION

A thorough review of appellants' submissions and the test materials reveals that, other than the scoring changes noted above, the appellants' examination scores are amply supported by the record, and the appellants have failed to meet their burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 10TH DAY OF SEPTEMBER, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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