



California Bar Examination

**Performance Test
and
Selected Answers**

February 2023



PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2023 California Bar Examination and two selected answers.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

CONTENTS

- I. Performance Test: State v. Hughes
- II. Selected Answers for Performance Test



February 2023

**California
Bar
Examination**

**Performance Test
INSTRUCTIONS AND FILE**

STATE v. HUGHES

Instructions.....

FILE

Memorandum to Applicant from Jan Dauss

Transcript of Pretrial Hearing

Transcript of Interview of Sebastian Hughes.....

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.
2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.
5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that 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. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.
6. In answering this performance test, you should concentrate on the materials in the File and Library. 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.
7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session

of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.
9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

**OFFICE OF THE STATE ATTORNEY
County of Gaston
Littleton, Columbia**

MEMORANDUM

TO: Applicant
FROM: Jan Dauss, State's Attorney
DATE: February 21, 2023
RE: State v. Hughes

Defendant, Sebastian Hughes, is charged with murder after he fatally stabbed his uncle, Peter Gault, during a dispute over a Corvette car engine. Defendant asserts he acted in self-defense. A centerpiece of our case against Defendant is a recorded statement Defendant made to detectives while he was in the hospital recovering from a stab wound inflicted by his uncle.

Defendant originally moved to suppress the statement based on a failure to be given *Miranda* warnings. The judge ruled in the State's favor on that motion. Defendant now argues that the statement was not voluntary and therefore should be excluded from his trial. The court decided that this new motion does not need to be briefed, but the court does want oral argument.

Please draft the oral argument I will give in opposition to suppression of the statement. Our success depends on our ability to marshal the facts. Do not start with a statement of facts as you would if you were writing a brief. Rather, weave the specific facts into your argument as they relate to each of the elements of the controlling law.

Attached are the transcript of the recorded statement and a portion of the transcript where the court refused to suppress the statement on *Miranda* grounds. While

you are not to address the *Miranda* issue, the court's characterization of the interview may be helpful to your argument.

State v. Hughes

Transcript of Pretrial Hearing

February 17, 2023

COURT: Let's first deal with defense counsel's motion to exclude Defendant's statement for failure to be given *Miranda* warnings. I have read counsels' briefs and listened to the recorded statement. I have decided that the circumstances in this case overwhelmingly demonstrate that Defendant was not in custody for *Miranda* purposes. The motion is denied.

Does Defendant plan any other motions?

DEFENSE COUNSEL: Your Honor, Defendant moves to exclude the statement made while confined in the hospital as involuntary. At the time of his questioning, Defendant was not sufficiently lucid and the coercive surrounding circumstances of the questioning were such that, under the United States Supreme Court's *Mincey v. Arizona*, his statement was not the result of a rational intellect and free will. Defendant was at the complete mercy of the detectives because he was in physical shock from being stabbed in the lung and in mental shock from being involved in the death of his uncle. I think everyone will agree that Defendant sustained a stab injury. He had to go through surgery in order to recover from that injury. He was administered pain medication. Further, he was still under the constant care of a medical professional while the interview began and as it progressed. I don't know exactly what the medication was at that point, but it was pain medication consistent with surgery.

COURT: Does the State stipulate to these facts?

DISTRICT ATTORNEY: We certainly do not stipulate to the allegations characterizing the lucidity of Defendant or the coercive nature of the questioning. It is also unclear what medication Defendant was on at that point. The rest of the facts we would

concede.

COURT: All right. As I said, I have listened to the recording of the statement. I don't think I need briefs on this motion. The law is pretty straightforward. I would, however, like to hear counsels' arguments on the point. Let's schedule those arguments five days from today at 9:00 a.m. See you then counsel.

**Transcript of Interview of Sebastian Hughes
with Detectives Ray and Martindale
August 22, 2022**

DETECTIVE RAY: Good evening Mr. Hughes, I'm Detective Ray and this is

HUGHES: He's dead?

RAY: If you mean Peter Gault, yes, he's dead. Mr. Hughes, this is my partner, Detective Martindale. We need to ask you some questions about what happened. You understand you're not under arrest, right? You do? You're nodding yes. Are you able to speak?

HUGHES: I've got tubes in both my lungs and I'm a little drugged up, but yeah, I can speak. It's just, I can't believe it.

RAY: We need to interview you. Our job is to come in when someone passes away. We weren't there. We don't know what happened. If it's okay, we are going to tape record our interview.

HUGHES: It's okay.

RAY: We are starting the interview with Mr. Sebastian Hughes in the surgical observation unit of the hospital at 7:50 p.m., after calling the hospital about three or four times throughout the day to see if you were well enough to speak with us. We understand that you were injured around 11:30 this morning. You've been in the hospital about 8 hours. You got out of surgery two hours ago.

Just for our record, Mr. Hughes, I want to describe what I see. Mr. Hughes is shirtless and lying down kind of in a quasi-seated position with his back kind of at maybe a 45-degree angle in his bed in his room. Mr. Hughes has redness or an abrasion on his forehead, and a stab wound on his right side near the right chest area under the armpit.

Can you tell us what happened?

HUGHES: I've got to call my mom.

RAY: Mm-hm. What happened?

HUGHES: I received a phone call from my mom's brother, Peter Gault, this morning around 11:00 o'clock. He wanted to know the whereabouts of a Corvette engine he had been storing in the garage of my mom's house. I had sold the engine for \$800 several months ago, and told him about the sale at that time. I reminded Peter that he had sold the engine to me and I figured it was mine to sell. He became angry.

RAY: Mm-hm.

HUGHES: I heard my mom crying in the background. I feared for her safety because Peter had a short temper and he was hot-headed when it came to her. I decided to leave work and drive to the house to make sure she was okay.

RAY: Did you go directly there?

HUGHES: I've really got to call my mom.

RAY: Yeah, yeah, will get to that. So, you were at work and decided to leave. What happened next?

HUGHES: I stopped at my work locker on my way out and placed an eight-inch wrench in my shirt pocket as protection, just in case it came to that.

UNIDENTIFIED VOICE: Excuse me officers, I'm from Cardiology and need to draw some blood from Mr. Hughes.

RAY: We'll get out of your way here.

HUGHES: You guys aren't leaving, are you?

RAY: No, we're not going anywhere. We will turn the tape off while medical staff draws blood and Detective Martindale and I stretch our legs.

BREAK IN RECORDING

RAY: Okay, we're back, Mr. Hughes. We left off just as you were going to the house. What happened when you got to the house?

HUGHES: Peter and my mom were standing in the driveway in front of his van. Peter was furious. My mom stood between Peter and me, crying her eyes out trying to keep us separate. She grabbed the wrench from my pocket. I guess to make sure I didn't use it on Peter.

We argued at first. Then things got wild. Eventually, Peter knocks me to the ground. He pushed my mom a couple of times and grabbed the wrench from my mom and tried to hit me with it. At some point, Peter either dropped the wrench or threw it at me. Somehow, it ended up on the ground.

RAY: So what happened then?

HUGHES: I bent down and tried to pick up the wrench. Peter said, "You're not gonna do anything with that," and kicked me real hard on the right side of my forehead. I wound up on the ground between the van and the truck. He had the wrench in his hand.

RAY: Mm-hm.

HUGHES: Peter ran to the back doors of his van. I thought he was going to grab a knife or tool from the van. So I pulled my knife from my boot. Peter saw me getting up with the knife and ran toward the front of the van and got his own knife. I chased him. He tripped and fell near the porch, but got up right away. He lunged at me, saying, "I'm

gonna kill you,” and that’s when I stabbed him with my knife.

RAY: I’m sorry. I guess I missed where your knife comes into the story. Were you wearing the knife while at work?

HUGHES: Yeah, I guess I forgot to mention that I got it from my work locker when I got the wrench. I placed a big knife in my boot, underneath my pant leg. Because, you know, I know how he is.

I realized I had been stabbed only when I saw blood all over myself and could not breathe. I thought I was going to die and walked over to a neighboring house to lie in the shade.

RAY: Do you think that, if you didn’t bring the knife, your uncle would be alive right now?

HUGHES: Probably, but I would still be in the hospital.

RAY: How do you know that?

HUGHES: I know. This was all self-defense, man. If I had not stabbed Peter, Peter would’ve killed me. You guys don’t know what that man was capable of. Look, I see you’re skeptical. You can give me a lie detector test, or check my phone records, or talk to my family to confirm the truth I’m telling you.

RAY: We may do that Mr. Hughes, but for now I think we have enough. You’ve been generous with your time and we need to let you rest.

HUGHES: I may stay awake. I’m going to try to watch the University of Columbia game on TV. I went there for a couple of years.

RAY: Enjoy. We'll be in touch.

Interview concluded at 8:20 p.m., August 22, 2022.



February 2023

**California
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**Performance Test
LIBRARY**

STATE v. HUGHES

LIBRARY

State v. Perdomo

Columbia Supreme Court (2007)

State v. Perdomo
Columbia Supreme Court (2007)

Defendant Gerson Perdomo was involved in a single-car accident in which he and another occupant of the car, Marco Quinonez, were seriously injured. A third occupant, Ismael Rodriguez, was killed. Defendant was convicted by a jury of felony vehicular manslaughter while driving intoxicated. The only seriously contested issue at trial was whether Defendant was the driver.

After a night of heavy drinking, at around 2:45 a.m. on August 23, 2003, Defendant was allegedly driving on the freeway at approximately 80 miles an hour when he crashed into, and nearly went over, the concrete center median. Rodriguez, found in the back seat, was pronounced dead when taken to a nearby hospital. Quinonez and Defendant were found in the front seat. Each had serious injuries.

Defendant based his defense on the contention that the other surviving occupant, Marco Quinonez, was driving at the time of the accident. Defendant moved pretrial to exclude the evidence of inculpatory statements he made to the police officers. Near the end of the interview, Defendant admitted he sometimes smoked marijuana and then said, "Maybe that day I was smoking. I'm not going to mess with you guys. I was driving Marco's car."

Defendant argued that admission of his statements violated his Fifth and Fourteenth Amendment rights to a fair trial. He claims it was error of constitutional dimension to admit statements he made to officers who interrogated him in the intensive care unit of the hospital while he was recovering from surgery and heavily sedated with narcotic pain medications.

Defendant suffered severe traumatic injuries to his chest area. Several of his ribs were fractured. He underwent emergency surgery to remove his spleen. He also had some bleeding in his brain.

Four days after the accident and Defendant's surgery, medical personnel in the intensive care unit of the hospital finally granted Officer Laubscher and his partner Officer Jensen permission to speak to Defendant. Medical personnel directed the officers to keep their discussion brief. Around 6:30 a.m., the officers interviewed Defendant in the intensive care unit of the hospital. The interview was tape recorded.

Defendant was lying flat on his bed, recovering from the splenectomy, broken ribs and head injury. He was in obvious pain. Defendant had received his last pain medication five and a half hours earlier. He was still connected to intravenous solutions and monitors. He had been on a ventilator since the surgery, but this device had been removed the day before and he was breathing on his own. Defendant's speech was slow and deliberate but not slurred or overly raspy from the intubation. The officers' questions were also slow, subdued and deliberate. The interview, with numerous pauses, lasted approximately 20 minutes.

The officers questioned Defendant about the events occurring before and after the accident. Defendant's answers were responsive to the officers' questions. Most significantly, according to Officer Jensen, who was present and later transcribed the tape, Defendant admitted he had been driving the car when the accident occurred.

A statement is involuntary if it is not the product of "a rational intellect and free will." *Mincey v. Arizona* (U.S. 1978). The question posed by the Due Process Clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.

In determining whether or not an accused's will is overborne, an examination must be made of all the surrounding circumstances, including: 1) the characteristics of the accused, including such factors as the defendant's maturity, education, physical condition, and mental health (including mental acuity), and 2) the details of the

interrogation that indicate coercion, which include the length of the interrogation, the location of the interrogation, and the interrogation's continuity. Additional factors that might indicate coercion include whether the officers dominated or controlled the course of the interrogation; whether they allowed defendant to tell his story, then asked follow-up questions to clarify the details; whether their questions were open-ended and neither aggressive nor particularly accusatory in nature; and whether there is evidence that the officers had or drew weapons or otherwise employed threatening or intimidating interrogation tactics. No single factor is dispositive.

Defendant asserts there are numerous parallels between his case and the factual circumstances of *Mincey v. Arizona*, sufficient to find his statements involuntary and require reversal of his convictions.

Surrounding Circumstances

1. Characteristics of the Accused

In *Mincey v. Arizona*, Mincey was shot in the hip by police officers in a raid on his apartment. Mincey was transported to the hospital where he received emergency treatment. When he arrived at the hospital, he was almost to the point of coma. The shot caused damage to the sciatic nerve and partial paralysis of his right leg. In the emergency room, tubes were inserted into his throat to help him breathe, and through his nose into his stomach to keep him from vomiting. A catheter was inserted into his bladder. He received various drugs, and medical personnel attached a device to his arm so he could be fed intravenously. Mincey was then moved from the emergency room into the intensive care unit.

Around 8:00 p.m., a police detective came to the intensive care unit to interrogate Mincey. The detective told Mincey he was under arrest for the murder of the police officer. He gave *Miranda* warnings to Mincey and then started questioning him about the activities and shooting at his apartment. Mincey could not talk because of the tube in his

mouth. He responded to the detective's questions by writing answers on pieces of paper. The detective continued to question Mincey until almost midnight. During the interrogation, Mincey repeatedly asked for the interrogation to cease. Several times, Mincey requested the assistance of counsel before responding. He complained to the detective that the pain in his leg was unbearable. Some of Mincey's written responses were incoherent and on their face showed he was confused and unable to think clearly about the events at his apartment or about the interrogation.

The Supreme Court concluded Mincey's statements were not the product of his free and rational choice: "To the contrary, the undisputed evidence makes clear that Mincey wanted *not* to answer Detective Hust. But Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."

Like the situation in *Mincey*, here Defendant was questioned while lying in a hospital bed in the intensive care unit. As in *Mincey*, no family members or friends were then with him. He was recovering from surgery for the injuries he received four days earlier. Intravenous tubes were still attached to his body. Defendant had been receiving narcotic pain medications since his admission to the hospital. According to the interrogating officers, Defendant appeared to be in pain and also appeared to still be under the influence of the narcotic pain medication.

However, this is where the similarities end. Unlike what occurred in *Mincey*, Defendant was not interrogated within hours of his injuries, and not interrogated only a few hours after receiving medical treatment. Also unlike in *Mincey*, Defendant was not interrogated while going in and out of consciousness. In this case, the officers were not permitted to interview Defendant until four days after Defendant's surgery. Hospital personnel did not permit the officers to talk to Defendant until they determined he was "alert," "oriented," and could "obey commands," as indicated by his medical chart. By this time, Defendant no longer needed the assistance of a respirator and medical

personnel had removed it the day before the interview.

On the day of the interview, hospital staff determined Defendant's condition had improved sufficiently so that he could safely be cared for in a regular hospital room. At 8:30 a.m., and two hours after the interview, Defendant was moved out of the intensive care unit, taken off intravenous pain medications and thereafter given oral doses of Vicodin for pain as needed.

The evidence showed Defendant was probably still under the influence of the pain medications, although the effect of the morphine he received five and a half hours earlier had likely diminished over the hours.

Nothing on the tape shows Defendant's thinking was impaired by the medications. Defendant's speech is slow and deliberate, but is not slurred or incoherent. Each of Defendant's answers is appropriate to the question asked. In some instances, his answers were detailed. For example, when asked the name of the security company for which they all worked, Defendant stated the name for the officers, spelled out the company name several times, and even recited the company's telephone number.

At the beginning of the tape it appears Defendant was even alert enough to attempt to deceive the officers. He initially told the officers the night of the accident that he had been driving his mother's Nissan, alone, and without passengers. He later acknowledged being with Rodriguez and Quinonez in Quinonez's mother's Honda.

2. Details of the Interrogation

In *Mincey*, the detective ceased the interrogation only during the intervals when Mincey lost consciousness or received medical treatment and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

Most importantly, the interrogation in the present case exhibits none of the coercive police activity found in *Mincey* and other cases finding statements to have been involuntary. The interview in the present case was relatively short. It lasted a maximum of 20 minutes, as compared to the three hours *Mincey* was forced to endure. The officers in the present case posed their questions in a calm, deliberate manner. The officers' voices on the tape are very quiet and subdued, perhaps in deference to the other patients in the unit, and/or because of the relative lack of privacy in the room. The 20-minute interview includes several pauses as well, as medical personnel enter and exit the room providing treatment for the other patients. Unlike *Mincey*, who had asked for the interrogation to cease and had refused to answer some questions without the assistance of counsel, Defendant made no such requests and did not express distress or otherwise indicate any unwillingness to speak to the officers.

As the trial court noted, the officers' tone was conversational and not threatening. One of the subjects discussed was how supportive and attentive Defendant's mother had been. Defendant expressed gratitude for his recovery. He asked the officers questions regarding his friends' conditions. At the end of the tape the officers wish Defendant good luck and a speedy recovery.

In short, the record is devoid of any suggestion the officers resorted to physical or psychological pressure to elicit statements from Defendant. Absent some indication of coercive police activity, an admission or confession cannot be deemed involuntary within the Due Process Clause of the Fourteenth Amendment.

The judgment is affirmed.

PT: SELECTED ANSWER 1

Good morning and may it please the court. Jan Dauss on behalf of the State, Your Honor.

After a 30-minute interview in which the defendant spoke in complex, complete sentences, painted a vivid, self-serving story that he had acted in self-defense, and even invited the detectives to stay when they left the room so he could receive medical care, the defendant now moves to suppress his confession on the basis that it was not the result of his rational intellect and free will under *Mincey v. Arizona*. The defense argument fails for multiple reasons and is squarely foreclosed by the Columbia Supreme Court's decision in *Perdomo*.

The *Perdomo* Court announced multiple factors that courts should consider when confronted with involuntary-confession suppression arguments. They're grouped into two main categories: the defendant's maturity, education, and health, and the details of the interrogation itself. I want to start first with a focus on the defendant, and then I'll move into the conduct of the detectives in the interrogation.

Let's look first at the defendant's characteristics. The defendant is employed. He spent two years in college. This is a man who has a place in society and is not vulnerable to coercion. The statements he made in his interrogation confirm that he's a smart guy.

When the detectives asked him what happened, he said, quote, "I received a phone call from my mom's brother, Peter Gault, this morning around 11 o'clock. He wanted to know the whereabouts of a Corvette engine he had been storing" These are cogent

sentences, Your Honor. They are not the product of a man unable to think. The defendant talking about how he "received a phone call from" his "mom's brother," and saying the victim "wanted to know the whereabouts of a Corvette engine"? How often do you come across the word "whereabouts" in normal conversation? The defendant is intelligent, and he was intelligent at the time of the interrogation.

The defendant was aware of specific key facts that he could recall from memory. He mentioned to the detectives he had sold a Corvette engine for \$800 several months ago. This is not the kind of fact that a person struggling with mental function is able to recall on the spot. And that example is a lot like *Perdomo*, where the defendant was able to name the company he worked for and recite its telephone number from memory. The *Perdomo* Court held that defendant gave a voluntary confession in part relying on that finding.

Here, when the defendant was questioned, he said he was "a little drugged up," but he could speak. And he spoke in full sentences. He told a story from beginning to end about what happened. Over the course of multiple questions, the defendant offered longer and longer explanations and excuses for his conduct. This was not a man who "wanted *not* to answer" the detectives, like in *Mincey*. This was a man who wanted to exculpate himself, right then and there.

The context confirms this, Your Honor. The defendant's story paints him in the best light over and over. The defendant makes a conscious choice to frame himself as acting in self-defense. Right off the bat, the defendant tells the detectives that the victim, Mr. Gault, "became angry." The defendant says he feared for his mother's safety and that the victim "had a short temper and . . . was hot-headed." The defendant's story portrays

himself as the hero. He's going to go save his mother from Mr. Gault. This is not the interrogation of a man who is "weakened by pain and shock" and "barely conscious," so that "his will" is "simply overborne" by the detectives, like in *Mincey*. This is the calculated attempt to get away with it from a guy who's able to think about the best way to try to do that.

The defendant's cold calculation is really drawn into focus by his deception. The defendant deceived the officers about the knife. Early on in the questioning, the defendant tells the officers that he took an eight-inch wrench from his work locker for "protection." Later on in his story, he tells the detectives that - after the victim said "I'm gonna kill you," according to the defendant, of course - he stabbed the victim with his knife. When the detectives asked where the knife came from, the defendant said, "I guess I forgot to mention that I got it from my work locker when I got the wrench." This kind of deception was a key factor in *Perdomo* in finding that defendant's confession was voluntary.

I expect you'll hear the defense argue that the defendant was not given the opportunity to tell detectives about the knife, because hospital staff caused the interview to break just after the defendant mentioned the wrench. That's no excuse. The defendant repeatedly volunteered facts about what happened rather than needing to be asked for them, and he said later in the interview that he "forgot to mention" the knife. It wasn't that his opportunity to mention it was cut off. It's that he didn't want to bring it up, because he thought it would be bad for his self-defense story.

Because this picture of the defendant as an intelligent, savvy, shrewd communicator

is so clear, the court need not focus too much time on the defendant's physical condition at the time of questioning. But even if you choose to do so, Your Honor, the defendant's physical condition confirms the finding that his confession was voluntary.

The defendant had been injured at 11:30 a.m. before the detectives interviewed him at 7:50 p.m. That's more than eight hours later. At that time, the defendant was sitting in a hospital bed at a 45-degree angle. He had a stab wound and a "redness" on his forehead. He said he was "a little drugged up."

A comparison on this point to *Mincey* and *Perdomo* is especially useful. In *Mincey*, the defendant had a tube in his mouth and could not speak at all. The defendant had to communicate in writing, and some of those writings were "incoherent" and "on their face showed he was confused and unable to think clearly." That defendant was going in and out of consciousness during questioning, Your Honor. The *Mincey* Court found his confession was "the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness" and thus involuntary.

In *Perdomo*, the defendant suffered from bleeding in his brain and was in "obvious pain" at the time of questioning. He had been in surgery to have his spleen removed, and was lying flat on his bed, broken ribs all over his chest, intravenous solutions hooked to his veins. And the *Perdomo* defendant was still under the influence of narcotic pain medication at the time he was questioned. In fact, he received morphine five and a half hours before the interrogation and he received multiple doses of Vicodin after questioning.

Still, the *Perdomo* Court held that the defendant's confession was not involuntary. It

found that it did not rise to the level of not being the product of a rational intellect and a free will, like in *Mincey*. Even the *Perdomo* facts were not enough. And the facts here are nowhere near as bad. *Perdomo* involved a brain bleed - this case has "redness" on the forehead. *Perdomo* involved a defendant flat on his back, no spleen, broken ribs, tubes hooked up to his veins - this case has a mostly upright defendant, who is speaking in clear, complete sentences through some breathing tubes. And *Perdomo* involved a defendant who had taken morphine within five and a half hours of questioning. This case has a defendant who said he was "a little drugged up" before he went on to construct his self-defense story. In fact, the defendant wanted to stay up after the interview to watch the UC game. He was in good enough spirits and health to stay up and watch the game, Your Honor.

The defense is going to tell you that the *Perdomo* interrogation was four days after his accident. But that was due to the extent of the *Perdomo* defendant's injuries. His injuries were far more extensive. The detectives in that case waited for the hospital to give permission for them to speak with him. And the detectives in this case did the same thing. They called the hospital to ask if the defendant was medically cleared to be interrogated, and they waited until they got that permission.

When we look at the defendant's maturity, education, and mental and physical health, we get a clear picture, Your Honor. The defendant is college educated. He is someone who knows that self-defense is his only way out. And he is someone who had the capacity to develop a story in his self interest and then tell that story to the detectives. His physical health is worlds apart from *Perdomo*, let alone *Mincey*. And even *Perdomo* was not enough for the defendant to establish his confession was

involuntary. This category of factors weighs heavily in the state's favor.

Turning next to the second category, there is vanishingly little in the interrogation that could suggest coercion by the detectives. It simply isn't there. The *Perdomo* Court has instructed to look at the duration, location, and continuity of the interrogation as three factors that could suggest coercion. Starting with those, none of them establish an involuntary confession.

The defendant was questioned for less than 30 minutes. The questioning began at 7:50 p.m., included a short break for medical care, and concluded at 8:20 p.m. A 30-minute interview – max – is not coercive. In *Mincey*, the interview was 3 hours. The *Perdomo* interview was 20 minutes. Again, comparing this case to those, this one is much, much more like *Perdomo*.

The location is also entirely reasonable. The defendant was partially upright in his hospital bed. The *Perdomo* interview was at the hospital too. This is where these conversations should be expected to be had. The defendant was injured in the course of murdering Mr. Gault, so of course the detectives are going to come to him there.

And the interview - even though it was just 30 minutes - was not continuous. This is a key fact in *Mincey*. The *Mincey* defendant repeatedly asked for the questioning to stop. He even invoked his right to counsel several times. The officer in *Mincey* just kept pushing for three hours. We don't have anything like that here. In fact, when hospital staff came into the room to provide medical care to the defendant, the officers stopped questioning immediately and took a break. So this 30-minute interrogation wasn't even a continuous 30 minutes, Your Honor. There was a break in there.

I want to point out something here that I think is a key fact in support of the voluntariness of the defendant's confession. When the officers took that break, the defendant said, "You guys aren't leaving, are you?" He asked for them to stay. The defendant wasn't done with them yet. Why was that? Because he hadn't finished his story. The defendant saw the detectives as his chance to spin a yarn about self-defense. The defendant needed those detectives in the room with him. That's the complete opposite of an involuntary statement, Your Honor. The defendant insisted on those detectives staying with him so that he could keep talking.

And that goes directly to the remaining factors that the *Perdomo* Court explained we should focus on here: whether the officers dominated the conversation and whether they allowed the defendant to tell his story and try to clarify with follow up questions. Looking through the transcript, it's clear that if anyone dominated the conversation, it was the defendant. Multiple times, he told multiple sentences of his story in response to "Mm-hm" from a detective. The detectives also asked questions like "So what happened then?" and "How do you know that?" Your Honor, this reads more like a direct examination of a friendly witness than it does an interrogation. And through it all, the defendant is speaking clearly, he's using complete sentences, he's using that college-educated grammar, and he's building a self-serving story of self-defense.

Finally, these officers' questions aren't aggressive or accusatory, and they weren't threatening to the defendant at all. They didn't have their weapons drawn or anything like that. They keep asking him what happened. In fact, throughout the entire interrogation, the officers brush off the defendant one time - and it was to keep him on track about what happened when he said that he wanted to call his mother. It wasn't

aggressive like the defense will tell you, Your Honor: it was an open-ended attempt to keep the conversation on track. The question was simply "What happened next?" And the defendant picked up there and kept telling the story he wanted to tell.

Throughout the whole time, the detectives are very gracious to the defendant. When the defendant slips up and mentions the knife for the first time, a detective says "I'm sorry. I guess I missed where your knife comes into the story." They don't get aggressive or accusatory with him. And they tell him that he's been generous with his time and should rest. They tell him to enjoy the UC game that he insists on staying up to watch. They are professional and polite throughout, just like they're trained to be. There's no evidence at all that they were coercive.

Your Honor, the *Perdomo* factors overwhelmingly establish that the defendant's confession was voluntary. The defendant's education and maturity levels are well above average. The defendant's health at the time of questioning was strong relative to *Perdomo*, where the Columbia Supreme Court held the confession to be voluntary. And the details of this interrogation show that it was brief, it had a break, and it involved no coercive questions or behavior whatsoever. I ask that the Court deny the defendant's motion to exclude the statement as involuntary. I welcome any questions the Court may have.

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PT: SELECTED ANSWER 2

To: Jan Dauss

From: Applicant

Re: State v Hughes - First Draft of Oral Arguments for Voluntariness Motion

Ms. Dauss,

You have asked me to prepare the first draft of your oral arguments in the Hughes matter concerning voluntariness of the Defendant's statement. You have asked me to weave the facts into your argument as they relate to each of the elements of the controlling law. I also understand that I am not to address the *Miranda* issue itself.

Please see the draft below. I am available to discuss.

Applicant

DRAFT BEGINS

Your Honor,

The defense seeks to have Mr. Hughes' statement excluded on the basis that it was involuntarily made in violation of Mr. Hughes' rights against making coerced confessions under the Due Process Clause.

The key issue before the court is whether Mr. Hughes' statement was not the result of a rational intellect and free will. As the parties and Your Honor discussed in the pretrial hearings, the controlling precedent in this case is *Mincey v Arizona* (U.S. 1978) ("*Mincey*"). In that case, the Court established that the question posed by the Due Process clause is whether the influences brought to bear upon the accused were such as to overbear the individual's will to resist and bring about confessions not freely self-determined." The *Mincey* court established that this is a contextual analysis that requires the court to 1) assess the maturity of the defendant and their education and physical condition, and 2) assess the facts of the interrogation itself, with regards to whether the facts of the interrogation itself indicate that a voluntary statement was not made.

If it pleases the court, the State of Columbia will present its argument on the *Mincey* factors by presenting that the characteristics of the accused and the interrogation show that the statement was made voluntarily and knowingly and was not the result of undue coercion by officers. Your Honor, we also note that the facts of this case bear a strong resemblance to a 2007 decision of the Columbia Supreme Court, *State v Perdomo*. In that case, the Court also applied the *Mincey* factors. Where helpful, the State will draw comparisons to that case to highlight the key issues.

The Characteristics of Mr. Hughes

Mr. Hughes is educated and mature

As noted by the court in *Mincey*, the education, maturity, and characteristics of the individual are relevant to the analysis. Where the speaker is educated and

knowledgeable and mature, they are more likely to have been able to understand the nature of the questioning and to govern themselves in a voluntary manner.

Here, Mr. Hughes is educated, having spent two years at the University of Columbia. His answers also evidence a feeling of responsibility and involvement for his mother, and also to engage in the purchase and sale of goods, indicating that he is mature and thinks that he is capable of acting to protect himself and his loved ones. In short, Mr. Hughes' education and the manner in which he describes his own decision-making indicate that he is mature and thinks of himself as someone that has agency, and is capable of acting to preserve his own rights.

Therefore, because Mr. Hughes is educated and appears to be mature for his age and interested in asserting his own rights, it is more likely that the statement was made voluntarily.

Mr. Hughes wanted to participate in the interview

In *Mincey*, the court stressed that the accused had clearly not wanted the interview to take place, requesting many times that the interview end. Where the individual clearly does not want to participate in the interview, the *Mincey* court found, there is a stronger likelihood that any statement they made implicating themselves was not voluntary and was not made in a communicative effort to be helpful or to discuss the issues.

Here, Mr. Hughes clearly wanted to participate in the interview. The transcript shows that Mr. Hughes repeatedly exclaimed his side of the story, adding details and rationalizations and explanations. Importantly, he also asked, "You guys aren't leaving,

are you?" when the detectives indicated that they would be pausing the interview while Mr. Hughes received care. Similarly, the court in *Perdomo* found that the accused had clearly wanted to talk to the officers, discussing his gratefulness at being OK and discussing his mother, and other matters. In that case, as here, the fact that the accused wanted to speak to officers and did not try to end the interview or otherwise evidence a lack of intent to talk, is evidence in support of the fact that Mr. Hughes made his statements in a voluntary manner.

Therefore, because Mr. Hughes wanted to help detectives, it is more likely that his statement was voluntary.

The interview took place a reasonable time after treatment

The *Mincey* precedent makes clear that a key question is whether the interview was conducted a reasonable time after the accused was receiving treatment so as to ensure that the accused was not still under active treatment and therefore not in a physical or mental condition to speak to anyone.

Here, Detectives spoke with Mr. Hughes in the evening, around 7:50 PM in the hospital unit, 2 hours after surgery. At this time, Mr. Hughes was sitting upright, was not still in treatment, and was not sedated. It is true that in the *Mincey* decision, the court found that the accused was being interviewed only mere hours after intensive surgery, and that this contributed heavily to the court's assessment that the statement was not voluntary.

However, the *Mincey* court's analysis can be distinguished here on the facts. In *Mincey*, the court found that the accused could not talk because of tubes in his mouth,

and he wrote on a piece of paper, and his responses were incoherent and often related to the issue of pain and asking the interrogation to cease. Here, Mr. Hughes' treatment was not as invasive or intense as in *Mincey* and, unlike the accused in *Mincey*, Mr. Hughes did not have any tubes in his mouth and was able to speak freely, if a little awkwardly. Mr. Hughes also was not actively being treated. While a medical professional did come in to take his blood, that kind of minimally invasive check-up is not akin to the active sedation and treatment of the accused in the ICU as in *Mincey*.

Therefore, while the interview did take place only a few hours after treatment like in *Mincey*, *Mincey* is distinguishable on the facts, and the interrogation here was not done while the accused was still clearly sedated and actively being treated.

Mr. Hughes was lucid and he spoke clearly and deliberately

In *Mincey*, the court held that the accused was clearly not lucid because many of his writings to the police were incoherent and he was still on intravenous pain medications. The defendant actually lost consciousness many times during the interrogation. The court found that because of these factors, it was likely that the accused was not in a position to voluntarily offer any information or to protect his own rights vis-a-vis the State as it tried to obtain information from him.

Here, by contrast, Mr. Hughes was not under intravenous medication like the accused in *Mincey*. Rather, he appears to have been given normal pain medication, which he said made him feel "drugged up." However, Mr. Hughes' drugged-up state looks far more like the drug state of the accused in *Perdomo*, where the accused was being given simple vicodin for pain as needed, and not like the heavily sedated and

intravenously sedated accused in *Mincey*. In that case, the court found that, while he was clearly feeling the effects of medication, the lucid nature of his responses indicated that they were not intense effects that overrode his ability to recall and discuss facts and make decisions.

Similarly here, Mr Hughes was clearly lucid and he spoke deliberately. He was able to provide extensive detail regarding the incident as he remembered it, showing that his short-term memory was functioning adequately. Further, he also had long-term memory to communicate, in discussing the issue of the Covette engine that had been bought and sold months ago. Mr. Hughes also communicated and clearly discussed his recollection of how his mother and uncle both acted and spoke, and so Mr. Hughes was clearly lucid despite the normal pain medication he was receiving. His speech did not appear to be slurred or confused like the writings in *Mincey*, nor did he lose consciousness during interrogation.

Therefore, because Mr. Hughes was not intravenously sedated, and because he was clearly lucid, his use of pain medication is distinguishable from the accused in *Mincey* and is more like the accused in *Perdomo*.

The Interrogation Itself

The interview was casual in tone, open-ended and not aggressive, and Mr. Hughes was allowed to tell his story without interruption.

A key finding in the *Perdomo* case was that the interview was casual, open-ended in the scope of discussion, and not at all aggressive. By contrast, the *Mincey* interrogation included a relentless series of questions posed at an accused coming in

and out of consciousness. In each of these cases, the nature of the conversation was crucial to a finding that the statements were and were not voluntary, respectively.

Here, as in *Perdomo*, the conversation was open-ended. Mr. Hughes was allowed to generally describe the events as they unfolded. He was able to provide follow-up details and further explain his meaning and his intent. The officers did not cut Mr. Hughes off and direct the conversation entirely. Rather, they allowed Mr. Hughes to direct the subject matter of the interrogation. They also spoke in a casual and frank manner, for example stating that they would "hang around" and "get out of Mr. Hughes" hair. This casual, open-ended conversation allowed Mr. Hughes to be comfortable and know that he was having a conversation of which he was a participating member, not that he was being subject to a one-way interrogation controlled and directed entirely by the officers.

Therefore, because the conversation here was open-ended and casual, and Mr. Hughes was largely allowed to control the discussion and the manner of speaking, it is far more akin to the permissible conversation in *Perdomo* as compared to the one-way relentless and intense interrogation in *Mincey*.

The interview lasted a reasonable duration, and included breaks and pauses

The *Mincey* court found that the interrogation in that case was intense and went for hours, ceasing only during intervals when the defendant lost consciousness. The statements at issue were thus found to be the result of relentless interrogation on a painfully and seriously wounded man, and deemed coercive and involuntary.

Here, the interrogation was paused casually to allow for a blood sample to be taken, and Mr. Hughes expressed hope that it would resume. The interview only lasted 30

minutes, and ended in time for Mr. Hughes to watch the football game. Accordingly, this case is heavily distinguishable from the events in *Mincey*, and more akin to the short, 20-minute duration interview in *Perdomo*, which the court found to be appropriate and supported the finding that the statement was voluntary and not the result of impermissible coercion.

Therefore, the short nature of the interview, which included a break for a blood treatment, supports the finding that the statement was not the result of a relentless interrogation of a wounded man, and rather a short reasonable interview with a person that was relaxing following a surgery.

Conclusion

For the reasons set out above, the interrogation in this case is clearly akin to the permissible interrogation in the *Perdomo* matter, and entirely distinguishable from the facts of the *Mincey* precedent. For this reason, we request that the court dismiss the motion to exclude the statement as being unduly coercive and a violation of the Due Process Clause as it applies to the State through the 14th Amendment.