

QUESTION 1
(One hour)

Ace is accused of common law burglary. He was arrested by Policeman Peter the day after Peter had talked to witness Walt, who had seen a figure near a house with an open front door late at night. Peter showed Walt a photo line up a short time later and Walt identified the photo of Ace as the figure. At the line up, Walt had also told Peter that the figure was dressed in a red jacket with "Go Nortenos" lettering on the back. The Nortenos are a notorious criminal street gang. When Walt had seen Ace near the house, he asked Ace what he was doing and said that he thought Ace had robbed the house. Ace smiled and said nothing, since his father had taught him at an early age to never trust anyone after dark.

At the trial the prosecution called Walt to testify about his encounter with the apparent burglar and statements to Peter during the photo lineup.

The prosecution also called Department of Justice chemist Cal to testify about DNA evidence. Cal testified that he'd received a report stating that Peter had recovered a handkerchief left by the burglar from the house and delivered it to the DOJ, which properly tested it and compared the result to an earlier sample tested by Cellmark. DOJ had determined that the odds of Ace's DNA being on the handkerchief were over ten trillion to one.

Finally, at the time that Peter contacted Ace, before the arrest, Ace asked him, "What's going on? You must have caught me at the wrong place at the wrong time." At trial, the prosecution called Officer Lou to testify that he had arrested Ace six times in the six months before the arrest in this case, always for minor offenses for which Ace had pleaded guilty. Each time, when Lou asked Ace about what had happened, Ace had said that he didn't know because Lou had caught him at the wrong place at the wrong time.

Ace called Officer Ollie to testify that Ollie had arrested Ace's identical twin Mace for burglary four times in the previous four years. At the time of the last arrest Mace told Ollie that the police always got Mace and Ace mixed up and that Mace had always been the one who had committed the serious crimes. Mace had been prosecuted for them but had always gained acquittals by showing the jury photos of him and his brother. By stipulation of the parties, Mace was unavailable to testify.

As advocates for each party, advance all appropriate theories to introduce the evidence and make all appropriate objections. As the trial judge, discuss the rulings you will make including limiting jury instructions, and the reasons for them. Answer according to the general principles we've covered in class, and point out any significant differences between California and federal law.

QUESTION 2
(One hour)

Pat, driving his red car to the store to buy a quart of milk, stopped at a four way stop sign. When Pat started through the intersection Dan, driving on the cross street and having failed to stop at the sign, crashed into the side of Pat's car. Dan then got out of his Pizza Delivers truck and breathlessly said, "I'm so sorry, I have a migraine headache and I can't think straight. I called my boss a few minutes ago, but he said to do one more delivery before I go to the doctor. Will you take \$500 for the damage to your car?" Pat said that he would, though his car had been totally destroyed.

Dan went directly to his doctor and told her that he'd had a bad migraines off and on since he was a child. At times they were so bad that he couldn't think and had to lie down in a dark room immediately. He went on to say that it was bothering him so much that he'd lost concentration, missed a stop sign and run into a car.

Pizza Delivers' record keeping department kept tapes of its drivers' calls as well as notes made by the operator regarding the content of the order and other incidental information. Their records indicated a call from Dan twenty minutes before the accident; the tape confirmed that he had complained of a migraine headache and the other information Dan stated to Pat. The operator's notes made reference to the order, and stated, "driver sounds disoriented and generally out of it."

Before trial, Dan was fired after a hearing in front of company management.

Pat sued Pizza Delivers but not Dan using theories of liability discussed in evidence class. At trial, Pat's case included the above evidence including Dan's conversation with his doctor, which was stipulated not to be privileged. Pizza Delivers offered Pat's agreement to \$500 damages.

Pat objected to Pizza Delivers' motion that damages be limited to \$500.

As an advocate for each party, advance **all** appropriate theories to introduce the evidence and make all appropriate objections. As the trial judge, explain the rulings you will make including limiting admissibility, and a brief statement of the reasons for them. Answer according to the general principles we've covered in class, and point out any significant differences between California and federal law.