

**QUESTION 6 THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK II
OR IN SOFTEST ANSWER SCREEN 6**

Defendant Barkey is awaiting trial in state court on charges of felony possession of a controlled substance with intent to distribute. Drug Task Force Officer Witherspoon arrested Barkey as Barkey waited in a parking garage for a pre-arranged drug buy. Barkey resisted arrest while a bystander, who identified himself as Montana and claimed not to know Barkey, waited patiently to be interviewed by Witherspoon. As Barkey's disruptive conduct continued and the night wore on, Montana was allowed to leave, giving his name and address and a promise to report to task force headquarters at noon the next day. The next day, Montana appeared as promised and provided a sworn statement. He continued to insist he was in the parking garage by pure happenstance, and described in detail what he had witnessed.

In pretrial proceedings, the prosecution announced plans to introduce Officer Witherspoon's police report of Barkey's arrest so that the jury could consider the sworn and highly incriminating statement of eyewitness Montana. Montana - as it turns out - provided Officer Witherspoon with a false name and address, and now cannot be found anywhere. The prosecution also announced its intent to use Barkey's felony identity theft conviction from three years earlier in the event Barkey takes the stand.

Barkey's counsel objects to the police report as hearsay. He also argues that the conviction is more prejudicial than probative and thus cannot be used. The prosecution argues that the police report is admissible under MRE 803(8), the public records exception, or under MRE 803(6), record of regularly conducted activity, or, alternatively, under MRE 804(b), because Montana is unavailable. The prosecution also contends that the conviction will be used only for impeachment purposes.

(1) How should the court rule on both of Barkey's objections? Explain your answers.

(2) Discuss why each hearsay exception offered by the prosecution will or will not succeed.

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