## ANSWER TO QUESTION 1

(1) The trial court should deny the motion to suppress based on the Fourth Amendment. At issue is whether Student was unreasonably seized.

As a general rule, evidence obtained in violation of a person's Fourth Amendment rights must be suppressed. The Fourth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibits unreasonable searches and seizures. A person is seized if a reasonable person under the circumstances would not feel free to leave. Whether a seizure is reasonable under the Fourth Amendment depends on the scope of the seizure (e.g., an arrest vs. an investigatory detention) and the strength of the suspicion prompting the seizure (e.g., an arrest requires probable cause while an investigatory detention can be based on reasonable suspicion).

Here, a court probably would find that Student was seized. On the one hand, the officers ***asked*** Student to go into his manager's office to talk with them and he complied, which makes this seem more like a voluntary questioning situation. On the other hand, an officer stood near the door, in uniform, wearing a gun—a position that would probably send a message to the average person that leaving was out of the question, the questioning went on for 25 minutes, and the officers did not indicate that Student was free to leave. On balance, a court would probably find a seizure here.

Assuming that Student was seized, a court would probably find that the seizure was reasonable. It is unlikely that the court would find that the police had probable cause to make an arrest before Student confessed. Without a warrant, police may arrest a person for a felony, such as the robbery here, only if they have information sufficient to make a reasonable person believe that a felony was committed and the person before them committed it (that is, probable cause). Here, while the police had sufficient information to reasonably believe that a robbery was committed, the photo identifications of Student all were too uncertain to make a reasonable person believe that Student committed the robbery. However, the police had reasonable suspicion for an investigatory detention.

Under *Terry v. Ohio*, if the police have reasonable suspicion of criminal activity based on articulable facts, they may stop a person without a warrant to conduct a brief investigation. Here, three people said that the person seen committing the robbery on videotape could be Student. These identifications were sufficient to give rise to reasonable suspicion to investigate. Moreover, given that two of the witnesses were familiar with Student and their assertions that Student "could be" and "might be" the robber on the videotape, questioning Student for 25 minutes would probably be considered a reasonable investigation. Thus, the seizure was valid under the Fourth Amendment and Student's statements should not be suppressed on this ground.

(2) The motion to suppress based on *Miranda* presents a very close question, with no certain result. At issue is whether Student was in custody when he was being interrogated.

To offset the coercive effects of police interrogation, the Supreme Court requires police to give detainees *Miranda* warnings (e.g., that they have a right to remain silent and to an attorney) before conducting any custodial interrogation. Here, the police did not give Student *Miranda* warnings before they began questioning him. That the questioning constituted an interrogation is not in doubt. Interrogation is any police conduct designed to elicit an incriminating response. Here, the officers asked Student questions about the robbery—clearly an interrogation.

The real question here is whether Student was in custody. Whether a person is in custody depends on whether a reasonable person under the circumstances would feel free to terminate the interrogation and leave. The more the situation resembles a formal arrest, the more likely a court will find the person to have been in custody. Here, the facts go both ways: On the one hand, the officers brought Student into a small office, and a uniformed officer with a gun was stationed between Student and the door. Moreover, the officers did not tell Student that he was free to go at any time. On the other hand, the officers did not place Student under arrest; they merely told him that they wanted to talk to him. They did not restrain Student with handcuffs or take him to the police station. Thus, the result here remains very much an open question with there being no clear result.

(3) The motion to suppress Student's confession based on voluntariness should be denied. An involuntary confession will be suppressed as a violation of the Due Process Clause of the Fourteenth Amendment. Whether a confession is involuntary is determined under the totality of the circumstances. Here, two police officers questioned Student in a small room, and an armed officer was between Student and the door. Moreover, the officers lied to Student about the strength of their evidence (telling him that three people had positively identified him when in fact no one was sure if it was Student). They also told him that prison would not be good for him.

On the other hand, Student seems to have possessed at least average intelligence (he was a C student), he had experience with the criminal justice system (he was found delinquent for auto theft), he is an adult (18 years old), and the interview was relatively brief (about 25 minutes). Given the latter facts, a court would probably find the confession voluntary. Thus, the motion should be denied.

## ANSWER TO QUESTION 2

(1) Ryan's "I'm sorry" statement probably will be held admissible, but not his other two initial statements. At issue is whether Ryan was in custody when he made the statements.

Under *Miranda v. Arizona*, law enforcement officers must give specific warnings regarding a person's right to an attorney and right to remain silent prior to any ***custodial interrogation***. Failure to give the required warnings may result in suppression of statements obtained during the interrogation. Because no *Miranda* warnings were given prior to Ryan's statements at issue, if the court concludes that Ryan was in custody and interrogated, the statements will be suppressed. If not, the statements may be used against him.

In this case, therefore, we must determine whether Ryan was (i) interrogated, and (ii) in custody when he made the statement, "Please don't do that, I'm sorry," and talked about Marissa leaving him. Although Ryan was not questioned in a traditional sense, an interrogation occurs when officers use words or actions that are likely to produce an incriminating response. Here, Van Buren's 10 minutes of silence followed by the comment that he was going to meet an eyewitness who saw Ryan dispose of the body likely meets the standard, and, therefore, constitutes an interrogation.

With regard to whether Ryan was in custody, the test is whether a reasonable person in Ryan's circumstances would have concluded that he was not free to terminate the interrogation and leave. Although Van Buren initially told Ryan that he was free to leave, the circumstances

were remarkably similar to a custodial interrogation. Ryan traveled to the station, was taken to a small room, and was kept there for a period of time. It is, however, a close call with regard to the "I'm sorry" statement in light of Van Buren's remark that Ryan was not under arrest and could leave anytime. However, when Van Buren blocked Ryan's exit and said, "stay put," during Ryan's panic attack, a finding of "custody" becomes more likely. As a result, Ryan's subsequent statements about Marissa leaving him and that "no other man was good enough for her" are more likely to be suppressed.

(2) Ryan's question about needing a lawyer and request for a cell phone probably will have no effect on the admissibility of his subsequent confession. At issue is whether Ryan properly invoked his right to counsel under *Miranda*.

After the initial statements discussed above, Van Buren advised Ryan of his *Miranda* rights and Ryan signed an acknowledgment and waiver form. A waiver, however, must be voluntary and knowing. Ryan had just suffered a panic attack and had been promised medical attention, but before receiving it was read his *Miranda* rights and given a rights waiver form. Ryan could argue, therefore, that his waiver was not voluntary and knowing. However, courts applying a totality of the circumstances test rarely find a waiver to be involuntary. In this case, therefore, the argument is likely to fail.

Ryan could also argue that the statement, "Do I need a lawyer just so I can see a doctor?" followed by a subsequent request for a cell phone constituted an assertion of his right to counsel. If Ryan did assert his right to counsel, all questioning had to cease and any statements taken in violation of the right would likely be suppressed. However, courts have consistently held that an assertion of a right to counsel must be unambiguous. It is very likely, therefore, that a court will hold that Ryan's ambiguous statement was not an effective assertion of his right to counsel and, therefore, the confession will not be suppressed on that basis.

(3) Ryan's pronouncement, "I'm through talking to that jerk," probably also will not have any effect on the admissibility of his confession. At issue is whether it constitutes a valid invocation of the right to remain silent.

Under *Miranda*, if a defendant invokes the right to remain silent, questioning must stop and the request must be scrupulously honored. Such an assertion, however, must be clear and unambiguous. Arguably, it is not clear here. Ryan could argue, however, that at least Van Buren understood that Ryan had asserted his right against self-incrimination as demonstrated by Van Buren's question "what can I do to get you to change your mind?" If a court finds that Ryan had validly asserted his right, Van Buren violated that right by continuing the interrogation and trying to get Ryan to change his mind. In that case, the confession may be suppressed as taken in violation of Ryan's right against self-incrimination under the Fifth Amendment. However, it seems more likely that the court would find Ryan's statement ambiguous. In that event, there would be no *Miranda* violation and his subsequent confession would be admissible.

## ANSWER TO QUESTION 3

(1) The warrantless search of the Sotwin garage violated the Fourth Amendment to the United States Constitution. At issue is whether any exception to the warrant requirement is applicable.

Under the Fourth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, searches must be reasonable. Generally, to be reasonable, a search must be pursuant to a warrant. However, the Supreme Court has carved out a number of exceptions to the warrant requirement, including an exception based on consent. A warrant is not needed to conduct a search if the police have valid consent to conduct the search. Consent generally can be granted by anyone with apparent access to the place searched. However, the United States Supreme Court has held that where two occupants are reasonably believed to share authority over the premises, one occupant's consent to search can be vetoed by the other occupant's express refusal. Here, Andy had apparent authority to consent to a search of the home, because when the police knocked at the door, Andy, an adult, answered it, and he gave them permission to search. However, when Nancy walked out of the bathroom and shouted at the police to leave, she effectively revoked Andy's consent. Therefore, the search of the garage was unconstitutional and any evidence derived from the search must be suppressed under the exclusionary rule (all evidence obtained in an unconstitutional manner or that is the fruit of an unconstitutional search or seizure must be suppressed from evidence).

It should be noted that the above does not necessarily mean that the blood from the Saturn will be suppressed. If the state can show that the police would have discovered the evidence anyway or that it was obtained from an independent source, the evidence may be admitted. The state might be able to make such a showing here. The facts indicate that after seeing the blood on the Saturn, the police applied for a search warrant and then tested the vehicle. The facts do not indicate what was included in the warrant. A search warrant will be issued if it shows probable cause to believe that seizable evidence will be found at the place to be searched. Whether probable cause is present is based on the totality of the circumstances. Here, the police probably could have met the probable cause standard even without seeing the blood on the Saturn, because an eyewitness told them that he saw Nancy driving erratically, strike the child, and pull into her garage. Thus, the inevitable discovery or independent source exceptions to the exclusionary rule may apply here.

(2) The federal Confrontation Clause would not bar admission of the 911 tape recording. At issue is whether the call would be considered testimonial under the Confrontation Clause.

The Confrontation Clause prohibits introduction of prior testimonial evidence unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant at the time the statement was admitted. Here, clearly Nancy did not have an opportunity to cross-examine the 911 caller, and we do not know if the caller was unavailable for trial. Nevertheless the 911 tape is admissible. The Supreme Court has held that generally, responses to police questioning are testimonial in nature. However, the Court has found that 911 tapes are nontestimonial—even if they include statements made in response to police questions—if the statements are made to enable the police to respond to an ongoing emergency. That was the case here. The call appears to have been made shortly after Nancy hit the young child. Thus, the Confrontation Clause would not bar admission of the tape recording of the call.

(3) The Confrontation Clause bars admission of Doug's statement to the police officers. The rules set out in (2), above, apply here. Doug is now unavailable, given that he has been deployed to Iraq. However, unlike the 911 call, Doug's statements were testimonial. They were made in response to police questioning and were not made to enable police to respond to an on-

going emergency. The police interviewed Doug the day after the hit and run took place. Thus, admission of Doug's testimony would violate the Confrontation Clause, because Nancy did not have an opportunity to cross-examine Doug when his statements were made.

## ANSWER TO QUESTION 4

(1) ***Right to Court-Appointed Counsel:*** Kirk should be successful in having his conviction overturned for the court's failure to appoint counsel. At issue is whether Kirk's Sixth Amendment right to counsel has been violated.

The Sixth Amendment guarantees the right to be represented by counsel in all criminal cases. This right turns on whether the sentence that is ***actually*** imposed includes any imprisonment, however short. Thus, it does not matter that the judge said he would not impose a sentence of more than six months. Because Kirk received a sentence that included imprisonment, Kirk was entitled to a court-appointed attorney (the facts state that he was otherwise qualified; the courts have never clarified how inability to afford counsel is to be determined under the Sixth Amendment). Thus, the court should overturn Kirk's conviction on this ground.

(2) ***Right to Jury Trial:*** Kirk would also be successful in arguing that his conviction should be overturned for the judge's denial of Kirk's request for a jury. At issue is whether Kirk's Sixth Amendment right to a jury trial was violated. The Supreme Court has held the Sixth Amendment jury trial right applicable to the states via the Fourteenth Amendment, but the right applies only to serious, not petty, offenses. A serious offense is one for which more than six months' imprisonment is ***authorized***. Here, although only six months was given, and although this was stated in advance, the crime is serious enough to carry a 10-month possible sentence, so the right to a jury trial attaches. Also, the court may consider the total combination of penalties—the fine and the loss of hunting rights for five years—in deciding whether the offense is serious. However, the additional penalties imposed here would not make much difference.

(3) ***The Same Judge in the Second Case:*** Kirk would not be successful in having his conviction overturned merely because the second prosecution is before the same judge who presided over the first prosecution. At issue is whether Kirk's right to Due Process was violated.

The Due Process Clause of the Fourteenth Amendment includes a guarantee of the fairness of criminal prosecutions. This includes a right to an unbiased decisionmaker. However, the fact that the judge already knows some of the facts in his case because of a prior case is not considered "prejudice" within the meaning of the due process requirement. Moreover, the facts do not show that Kirk preserved the issue for appeal at trial. Thus, Kirk would not be successful in arguing this ground for reversal.

(4) ***Double Jeopardy:*** Kirk would not be successful in arguing that his conviction should be overturned because of double jeopardy. At issue is whether the second prosecution would be considered the same offense as was prosecuted at the first trial.

The Double Jeopardy Clause of the Fifth Amendment provides that people shall not twice be prosecuted for the same offense. The clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Whether two offenses constitute the same offense for purposes of the Double Jeopardy Clause depends on whether each crime requires proof of an additional element that the other does not require, even though some of the same facts may be necessary to prove both crimes.

Here, the negligent homicide charge of the first proceeding requires proof of a killing, which is not required in the second prosecution for hunting within 400 feet of a dwelling. And the second prosecution requires proof of hunting within 400 feet of a dwelling, which is not an element of a negligent homicide case. Thus, Kirk would not be successful in arguing that his conviction should be overturned on double jeopardy grounds.