

R.I. LOCAL ESSAY QUESTION #3

You have been asked to help defend Ken Lewis, a pawnbroker accused of money laundering. Nine months ago, DEA agents searched Lewis' shop. Among other things, they seized a small, removable, computer data storage device called a "memory stick." The stick was found to contain lists of initials and numbers organized by date. The initials are consistent with names of drug dealers known to be operating in the area. The prosecution alleges it is a record of Lewis' financial transactions with the criminals.

The prosecution also has an admission from Lewis that the stick was his property. However, that is not all. The *piece de resistance* is a tape-recorded statement given by Gladys Pilfer, his bookkeeper/cashier. In it, she said that Lewis plugged the stick into the shop's computer at the end of each day. She described him reading from scraps of paper and counting wads of twenty-dollar bills while he typed on the keyboard. Otherwise, she did not know where the stick was kept or what it contained.

The trial judge recently denied Lewis' motion to suppress admission of the stick. He found that the search warrant authorizing the search had been properly obtained and that the search and seizure were properly executed.

Now, your assignment is to focus on Lewis' admission and Pilfer's statement, and advise lead counsel regarding their admissibility under the Fifth or Sixth Amendments to the United State Constitution.

According to the case file, Pilfer was alone in the shop when the agents arrived. She asked what they wanted. The supervising agent told her they were there to wrap up an investigation into serious crimes involving money. He advised her to think about helping herself while there was still time left.

Pilfer almost fainted. She had worked for Lewis for fifteen years. For the last ten years or so, she had been paying her cable bills from the shop's checking account. About a month earlier, she started to increase her take by drawing "refund" checks to nonexistent payees. She shuffled the fakes into stacks of legitimate checks she gave Lewis to sign. She then deposited them in an account opened in her cat's name. So far, the money had gone for a down payment on an all-inclusive Aruba vacation.

Pilfer was sure the gig was up. She blurted out that she would tell them what happened with the money; that she just wanted protection from Lewis. The agent immediately got on his cell phone with the prosecuting attorney and made arrangements to take her in for an interview.

Pilfer was no longer there when Lewis arrived at his shop. He asked where she was. The supervising agent did not respond. Instead, he pointed to Pilfer's chair and told Lewis to sit and not move. The agent instructed another officer to "watch this guy – keep him there and out of the way." The officer escorted Lewis to the chair and stood next to him as the search continued.

During the next hour, agents moved in and out of the area where Lewis was seated. When they came across a locked file cabinet they called into him and asked where the key was kept. He told them. He also furnished the combination to his safe.

At the end of the search, the supervising agent walked toward Lewis with an inventory of items they had seized. As he approached, he noticed the memory stick, up against the base of the counter, not far from Lewis' feet. He picked it up, held it in front of Lewis and said, "This is yours, isn't it?" Lewis did not respond. The agent added,

“I saw you drop it.” The agent later acknowledged the last part was not was not true, but “worth a try.” Still, Lewis said nothing. Finally, the agent said. “Look, the warrant allows us to take business records kept here. If you just brought this in, if it’s not a business record, I’ll just have to return it later. So tell me, is this your personal stuff?” Lewis took the bait and answered, “it is mine – it’s just pictures of my grandkids.” The agent wrote down what Lewis had said and added the stick to the seizure inventory. He then walked out the shop, leaving Lewis alone still sitting in Pilfer’s chair.

Back at the station, the agent joined Pilfer and the prosecutor for a tape-recorded interview. To his surprise, he found out that, while Pilfer was anxious to confess her own crime, she knew nothing about money laundering. When shown the memory stick, she said it was just like the one she saw Lewis plug into the computer each night. She told them about seeing Lewis working at the computer while reading notes and counting twenties. She guessed the money was from gambling or maybe from selling merchandise for cash to avoid taxes.

Within a few weeks, Lewis was indicted. As it turned out, the police also learned that Pilfer was embezzling from her brother-in-law Vinnie’s restaurant where she was the night cashier. Accordingly, she was charged with stealing from both Lewis and Vinnie. She disappeared after her arraignment and is nowhere to be found.

Lead counsel expects the prosecution to try to introduce Pilfer’s statement. She has told you to assume that the judge will find that the statement to be against Pilfer’s penal interest with such “circumstantial guarantees of trustworthiness” that it should be admitted in the “interest of justice.” Rule 804 (b) (3) & (5). She wants your thoughts on whatever constitutional grounds there are to challenge Pilfer’s statement and what Lewis

is alleged to have said about the memory stick. She has also told you that Lewis wants to testify and, at this point, she intends to put him on the stand.

As you respond, please focus on:

1. Lewis' admission during the search, and
2. Pilfer's statement back at the station and discuss the strengths and weaknesses of potential challenges based on the Fifth or Sixth Amendments to the United States Constitution. Keep in mind that it is more important to show you understand the relevant legal principles and how they apply to the circumstances, than it is to give the "right answer."