



**July 2019**

**California  
Bar  
Examination**

**Performance Test  
INSTRUCTIONS AND FILE**

**STATE v. MARTIN**

Instructions.....

**FILE**

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## **STATE v. MARTIN**

### **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 involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases 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 citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. 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 parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. 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. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

## OFFICE OF THE DISTRICT ATTORNEY

Concord Judicial Circuit  
Sonnerville, Columbia

### MEMORANDUM

TO: Applicant  
FROM: Andrew Solmark, Assistant District Attorney  
DATE: July 30, 2019  
RE: State v. Martin

I had a hearing yesterday on the Bernice Martin case. We have charged her with identity theft. Martin acquired the name and Social Security number (SSN) of another person from her former job at FastCom, a cell phone company. Using this information, she tried to open charge accounts at several stores, in one case successfully. The person whose name and SSN Ms. Martin used discovered that use and put a fraud alert on her cards. The police eventually arrested Ms. Martin. I include a Memorandum to File that summarizes the expected testimony on these points.

At yesterday's hearing, I gave notice that we intended to introduce evidence of three specific incidents involving Ms. Martin.

We want to use all three of these incidents as similar acts evidence to rebut the defense that we expect Ms. Martin to offer. I would like to admit them as substantive evidence under *Columbia Rule of Evidence* 404. I would also like to use them to impeach Ms. Martin if she takes the stand under *Columbia Rule of Evidence* 608.

Before I start briefing, I need an objective appraisal of the arguments for and against admission of this testimony. Please write a memorandum analyzing first, whether we can admit any of these incidents as substantive evidence, and second, whether we can use them in impeaching Ms. Martin if she takes the stand.

## MEMORANDUM

TO: File

FROM: Janelle Phinney, Deputy District Attorney

DATE: May 16, 2019

RE: State v. Martin – Summary of Expected Testimony

We have charged Bernice Martin with two counts of identity theft, for the use of a name and Social Security number acquired while employed by FastCom, a cell phone company. The following witnesses have been subpoenaed for trial:

**CONSTANCE GAINER:** Gainer is a customer service representative at Blake's Department Stores. She will testify that she reviewed an application for store credit from a "Bernecia Martinez" whose Social Security number was 989-22-0094. A credit check verified "Bernecia Martinez" met the credit requirements for a charge card. Pursuant to store policy, Gainer called the number listed on the application to confirm a mailing address. The caller answered, "This is Bernice." A later check of that phone number indicated that it belonged to the defendant, Bernice Martin.

Gainer will also testify that Ms. Martin charged nearly \$5,000 worth of goods from the store, including appliances, electronics, and some clothing.

**HENRY FRANKS:** Franks is an accounts manager at Chiclet's Clothing, a women's clothing store. Franks will testify that he received an online application for store credit from "Bernecia Martinez" whose Social Security number was 989-22-0094. Franks noted that the store already had an account in that name with that Social Security number. He called Martinez and reported the effort to open another card in her name. Martinez asked him to put a fraud alert on her account. Franks testified that he notified the police of the incident.

**JOAN TIMMONS:** Timmons was Martin's immediate supervisor at FastCom. She will testify that Martin had a position in the accounts department. Martin's job responsibilities included reviewing applications for new accounts and ensuring the new customers had provided complete information in their applications, including name and Social Security numbers.

Timmons will testify to the procedures through which FastCom receives, reviews, and stores records of application. She will testify that Martin had access to FastCom records that included the name of Bernecia Martinez, who had the same Social Security number listed above.

Finally, Timmons can testify that she personally reviewed Martin's employment record with FastCom and that Martin listed her Social Security number as 989-21-0994, which contained only two digits that were different from Ms. Martinez's number.

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**COURT:** All right, that is all for the witness lists. Mr. Solmark, what's next on the case?

**SOLMARK:** Your honor, the State provides pretrial notice of its intention to offer similar acts evidence.

**COURT:** Any objection from the defense, Ms. Dacosta?

**DACOSTA:** There will be, yes, your honor.

**COURT:** All right. I'll hear from Mr. Solmark first.

**SOLMARK:** Your honor, I am referring to three separate incidents. First, we have a good faith belief that, three months ago, a police officer stopped Ms. Martin for a broken tail light. Ms. Martin gave the officer a different name and driver's license than her own, which the officer discovered when he ran the car's registration. It turned out that Ms. Martin's own license had expired. He later learned that the name and license belonged to Ms. Martin's sister, Beverly Martin.

**COURT:** Has she been charged or convicted of any crimes arising out of the traffic stop?

**SOLMARK:** No, your honor.

Second, we have a good faith belief that another officer stopped Ms. Martin on the sidewalk outside the Blue Moon Bar about two months ago. Ms. Martin was visibly intoxicated, barely able to stand, with a strong smell

of alcohol on her breath. She started to shout at the officer, but after a warning, she walked away and hailed a cab.

Third, your honor, we have information involving Bernecia Martinez, the individual in whose name Ms. Martin tried to open several store accounts. Two weeks ago, Ms. Martinez received a call on her cell phone from a woman who identified herself as Bernice. The caller threatened Ms. Martinez by saying that, if she testified at the trial in this case, she would regret it. She will also testify that the caller said that it would be better if Ms. Martinez would testify that she gave "Bernice" permission to open those accounts. After the call ended, Ms. Martinez wrote down the phone number. We later identified it as belonging to Ms. Martin's FastCom phone account.

**COURT:** Ms. Dacosta, your objection?

**DACOSTA:** Your honor, we contend that this entire case is the result of a computer error at the two stores. The stores mixed up the names and social security numbers of Ms. Martinez and Ms. Martin. My client was trying to open accounts in her own name and had entirely innocent intentions.

We object to this evidence. None of those incidents qualify under Rule 404(b). The State just wants to show Ms. Martin up as a bad actor who should be punished for other reasons. It's propensity evidence, pure and simple.

**COURT:** Mr. Solmark?

**SOLMARK:** Your honor, all three incidents raise inferences under Rule 404(b)(2). In addition, the defendant will likely take the stand. If she does, we will use these incidents to impeach her.

**DACOSTA:** Your honor, not one of these incidents goes to truthfulness. First, the traffic stop was just a mistake. Second, being drunk doesn't make you a



liar. And finally, that conversation with Ms. Martinez isn't about truthfulness. It's about the prosecution's effort to paint my client as a violent person. Rule 608(b) requires that the specific conduct go to truthfulness. These do not.

**SOLMARK:** Your honor, may I respond?

**COURT:** No. I'm not ruling today. We will set a briefing schedule later. Anything else on this case?

**SOLMARK:** No. Thank you, your honor.

**DACOSTA:** Nor from me, your honor.