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IN RESPECT OF CRIMINAL PROCEEDINGS

THE WRITTEN EXAMINATION

Question paper

Time allowed: 2 hours 30 minutes

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Permitted materials

- Archbold Hong Kong – Criminal Law, Pleading, Evidence and Practice
- The Hong Kong Solicitors' Guide to Professional Conduct (Vol. 1) published by the Law Society
- The Law Society's Code of Advocacy for Solicitor Advocates

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The Case

You are a solicitor advocate briefed by the Director of Legal Aid to represent a 39-year-old woman, Carol Chan, who has been charged with one count of trafficking in a dangerous drug contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134.

The case against your client is contained in the document below that is headed 'Summary of the prosecution evidence'.

Her evidence is contained in the notes of a meeting that you conducted with her, those notes being headed 'Defence notes'.

Summary of the prosecution evidence

On 24 May 2016, a squad of six police officers (PC 111, PC 222, PC 333, PC 444, WPC 555 and SGT 666) attached to Tsuen Wan Police Station were on duty in plainclothes. At around 4:20 p.m., the squad were briefed on an anti-drug operation to be mounted at Unit 101, 1/F, Venture Building, Kwai Chung (“the Premises”). They had a search warrant Writ No.1234 of 2016 issued by Tsuen Wan Magistrates’ Court.

At 5:25 p.m., the squad arrived in the vicinity of the Premises and were instructed to lie in ambush in the corridor on 1/F, Venture Building.

At 5:50 p.m., PC 111 noticed a man (later known as Male, Thomas Tsoi, aged 43) standing outside the Premises. Thomas Tsoi, facing the wooden door, looked around and knocked on the door once with his right hand. The door was opened and Thomas Tsoi entered the Premises. PC 111 and two police officers went up to stop Thomas Tsoi. They also found a woman (later known as Female, Carol Chan, aged 39) inside the Premises. The police officers revealed their identities by showing the police warrant cards and asked for identification documents. Immediately afterwards, PC 222 and two other police officers arrived at the Premises.

At 5:52 p.m., SGT 666 showed Carol Chan and Thomas Tsoi the search warrant (i.e. Writ No. 1234/2016) and explained the contents of the search warrant to them.

From 5:55 p.m. to 5:57 p.m., PC 333 searched Thomas Tsoi. No suspicious items were found.

From 5:58 p.m. to 6:00 p.m., in the toilet of the Premises, WPC 555 searched Carol Chan. No suspicious items were found.

At 6:01 p.m., witnessed by Carol Chan and Thomas Tsoi, PC 222 searched the Premises. During the house search, Carol Chan was guarded by PC 111 while Thomas Tsoi was guarded by PC 333.

At 6:10 p.m., PC 222 found a pink box on the round table near the sofa in the Premises. The box contained the following items:

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- (1) a transparent resealable plastic bag containing smaller transparent resealable plastic bags, each containing a powder in crystalline form suspected to be the dangerous drug ice;
 - (2) a transparent resealable plastic bag containing a crystalline substance in pellet form suspected to be the dangerous drug cocaine;
 - (3) a transparent resealable plastic bag containing a powder in crystalline form suspected to be the dangerous drug K Chai or ketamine,
 - (4) a pair of metal pliers,
 - (5) several transparent resealable plastic bags, and
 - (6) an electronic scale (with batteries).

At 6:12 p.m., PC 111 declared arrest on Carol Chan for the offence of trafficking in a dangerous drug and cautioned her. After being cautioned, Carol Chan said to PC 111, 'Ah Sir, I bought the dangerous drug ice, K Chai and Hoh Lok for treating others, and I would consume a little. Give me a chance.'

Meanwhile, PC 333 declared arrest on Thomas Tsoi for the same offence and cautioned him.

At 6:13 p.m., in the presence of Carol Chan and Thomas Tsoi, PC 222 placed the pink box and the suspected dangerous drugs inside back to the original position, and continued to search the Premises.

At 6:21 p.m., SGT 666 informed IP Au, the Officer-in-Charge ("OC"), about the situation.

At 6:29 p.m., IP Au arrived at the scene.

At 6:32 p.m., PC 222 showed the suspected dangerous drug exhibits to IP Au.

At 7:00 p.m., PC 222 finished the house search. No more suspicious items were found.

At 7:02 p.m., PC 333 handed over the yellow mobile phone seized from Thomas Tsoi to PC 222 for safekeeping.

At 7:05 p.m., PC 111 handed over a blue plastic wallet with HKD2,250 inside on the round table to PC 222 for safekeeping. PC 222 also seized a Samsung mobile phone on the table, a bunch of keys and two pages of rent receipt in the drawer of the table.

From 7:10 p.m. to 7:20 p.m., in the Premises, PC 111 issued and explained a Pol.153 to Carol Chan. Carol Chan signed to acknowledge receipt of its copy.

At 7:20 p.m., WPC 555 contacted the officers of Identification Bureau.

From 7:25 p.m. to 7:30 p.m., PC 222 drew a sketch of the scene. In summary, the Premises can be described as follows:

- (1) The flat was a 200-square-foot unit with open kitchen;
- (2) Standing by the door at one corner, there were along the wall a mirror cabinet, a vanity table, a glass cabinet, a wall-mounted television and a refrigerator;
- (3) On the opposite side, there were a toilet, a single-size bed and an L-shaped sofa;
- (4) In the empty space in the middle, there were a round table and a sofa chair.

From 7:23 p.m. to 8:15 p.m., in the Premises, PC 111 post-recorded a cautioned statement from Carol Chan in his note book.

At 8:20 p.m., two officers of Identification Bureau arrived at the scene.

From 8:25 p.m. to 8:55 p.m., witnessed by Carol Chan and Thomas Tsoi, the officers of Identification Bureau dusted for fingerprints (5 fingerprints and 1 palmprint) and took photographs (10 photographs).

At 9:00 p.m., the squad escorted Carol Chan and Thomas Tsoi to Kwai Chung Police Station in police vehicle AM 1234.

At 9:10 p.m., the squad and Carol Chan and Thomas Tsoi arrived at the Report Room, Kwai Chung Police Station and waited for the Duty Officer ("DO") at the Report Room.

At 9:30 p.m., with Carol Chan and Thomas Tsoi under escort, the squad reported the facts of the case and showed the suspected dangerous drugs to the DO, SSGT Luck.

From 9:31 p.m. to 9:34 p.m., in the presence of Carol Chan and Thomas Tsoi, the DO weighed the suspected dangerous drugs, and the results were as follows:

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- (1) The resealable plastic bag containing smaller transparent resealable plastic bag, each containing a powder in crystalline form suspected to be the dangerous drug ice weighed 26 grammes in total;
 - (2) The transparent resealable plastic bag containing a powder in crystalline form suspected to be the dangerous drug cocaine weighed 6 grammes;
 - (3) The transparent resealable plastic bag containing a crystalline substance in pellet form suspected to be the dangerous drug ketamine weighed 6 grammes.

Then, PC 222 continued to keep the suspected dangerous drugs.

From 9:43 p.m. to 9:52 p.m., the DO issued and explained a Pol.1123 to Carol Chan. Carol Chan signed it.

From 9:53 p.m. to 9:55 p.m., in the Search Room, WPC 555 and another WPC searched Carol Chan again. No suspicious items were found.

At 9:56 p.m., PC 111 handed over Carol Chan to the Report Room for detention.

At 10:44 p.m., PC 111 signed out Carol Chan from the Report Room to go through the procedures of the handover of the dangerous drugs.

At 10:45 p.m., since the procedures of the handover of the dangerous drugs could not be gone through at that time, PC 111 handed over Carol Chan back to the Report Room for detention.

At 11:29 p.m., PC 111 signed out Carol Chan from the Report Room to go through the procedures of the handover of the dangerous drugs.

From 11:31 p.m. to 11:37 p.m., in the presence of SSGT Lam, the DO (on the next shift after SSGT Luck) of the Report Room, Carol Chan and Thomas Tsoi, PC 222 sealed the suspected dangerous drugs in six Tamper Evident Property Envelopes.

At 11:39 p.m., PC 222 handed over the six sealed Tamper Evident Property Envelopes to SSGT Lam for safekeeping.

At 11:40 p.m., PC 222 signed out the six sealed Tamper Evident Property Envelopes from the Duty Officer.

At 11:42 p.m., Carol Chan signed a Pol.157 and received a copy of 4 pages of a cautioned statement from PC 111.

At 11:47 p.m., since the equipment for video recorded interviews of Kwai Chung Police Station malfunctioned, the squad escorted Carol Chan to Tsuen Wan Police Station for a video recorded interview in police private vehicle MV 1234.

At 11:56 p.m., the squad arrived at Tsuen Wan Police Station.

At 00:01 a.m. on 25 May 2016, the squad escorted Carol Chan to Room 210, Video Interview Room at Tsuen Wan Police Station, for a video recorded interview.

From 00:05 a.m. to 00:13 a.m., PC 111 issued and explained a Pol.153 to Carol Chan. Carol Chan signed to acknowledge receipt of its copy.

From 00:16 a.m. to 00:35 a.m., PC 111 and PC 222 conducted a video recorded interview ("VRI") with Carol Chan. The highlights of the video recorded interview can be summarized as follows:

- (1) Carol Chan's cautioned statement upon arrest in the Premises meant that the dangerous drug was for her own consumption as well as for treating any friends who might come up;
- (2) She did not want to disclose the details of the friends who might be treated.
- (3) When she invited her friends for a treat, i.e. inviting them to take dangerous drugs, she did not collect money or other remunerations from them.
- (4) She bought the dangerous drugs on 20 May 2016 in Pak Tin Estate, Shek Kip Mei from an unnamed man.
- (5) Thomas Tsoi was her boyfriend, but he did not know about the dangerous drugs in the Premises.
- (6) She rented the Premises, and only she had the keys.
- (7) She was a part-time clerk at a funeral services company, earning a monthly income of about \$5,000 to 6,000.
- (8) The money inside the blue plastic handbag found on the table in the Premises was the wage she just got.
- (9) The small plastic bags were used to store ornaments.
- (10) The pair of metal pliers was used for repairing electrical appliances.
- (11) The electronic scale was used for weighing the dangerous drugs, because she feared she might be cheated by the seller.
- (12) She spent \$4,000 on the cocaine, \$600 on the ketamine, and \$2,500 on the ice.

At 00:37 a.m., Carol Chan signed to acknowledge receipt of a VRI DVD.

From 00:50 a.m. to 01:10 a.m., at Interview Room 3 of the Report Room, Tsuen Wan Police Station, PC 111 took an antecedents statement from Carol Chan.

From 01:27 a.m. to 01:38 a.m., PC 222 and PC 333 conducted a VRI with Thomas Tsoi.

From 01:40 a.m. to 02:30 a.m., PC 111, PC 222 and WPC 555 took fingerprints from Carol Chan.

At 02:37 a.m., the squad escorted Carol Chan to Kwai Chung Police Station in police private vehicle SD 1234.

At 02:46 a.m., the squad arrived at Kwai Chung Police Station.

At 02:48 a.m., PC 111 handed over Carol Chan to the Report Room, Kwai Chung Police Station, for detention.

At 03:41 a.m., PC 222 handed over the six sealed Tamper Evident Property Envelopes to the DO for safekeeping.

At 09:27 a.m., the DO of Kwai Chung Police Station handed over the six sealed Tamper Evident Property Envelopes to SPC 12345 for delivering to Government Chemist.

At 10:10 a.m., SPC 12345 delivered the said envelopes to the Government Chemist.

On 8 June 2016, SPC 12345 retrieved 7 sealed packages which purported to contain the dangerous drugs and the Dangerous Drugs Certificate from the Government Chemist.

Other Evidence

On 8 June 2016, the Government Chemist certified that the six sealed Tamper Evident Property Envelopes contained the following dangerous drugs:

- (1) 8.10 grammes of a crystalline solid containing 8.02 grammes of methamphetamine hydrochloride;
- (2) 11.8 grammes of a crystalline solid containing 11.7 grammes of methamphetamine hydrochloride;
- (3) 1.40 grammes of a crystalline solid containing 1.28 grammes of methamphetamine hydrochloride;
- (4) 1.22 grammes of a crystalline solid containing 1.20 grammes of methamphetamine hydrochloride;
- (5) 5.18 grammes of a solid containing 4.80 grammes of cocaine;
- (6) 4 tablet fragments (weight: 0.20 grammes) containing sildenafil;
- (7) 6.03 grammes of a powder containing 2.99 grammes of ketamine.

(Carol Chan was charged with trafficking in dangerous drugs, namely, 22.52 grammes of a crystalline solid containing 22.20 grammes of methamphetamine hydrochloride, 5.18 grammes of a solid containing 4.80 grammes of cocaine and 6.03 grammes of a powder containing 2.99 grammes of ketamine.)

On 22 July 2016, IP Lo, an officer attached to the Intelligence Division of Narcotics Bureau, Crime Wing, Police Headquarters, gave a statement on the market value of the dangerous drugs in the month of May 2016 as follows:

- (1) The average retail price for crystalline solid containing methamphetamine was HK\$ 302 per gramme;
- (2) 22.52 grammes of crystalline solid containing 22.2 grammes of methamphetamine hydrochloride could have been sold at street level for HK\$6,801 (HK\$302 per gramme x 22.52 grammes);
- (3) The average retail price for solid containing cocaine was HK\$1,061 per gramme;
- (4) 5.18 grammes of a solid containing 4.8 grammes of cocaine could have been sold at street level for HK\$5,496 (HK\$1,061 per gramme x 5.18 grammes).

On 29 July 2016, PC 444 took a statement from an estate agent Madam Leung who handled the lease of the Premises. Her evidence can be summarized as follows:

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- (1) In June 2015, Carol Chan approached her with the intention of renting a flat for storing miscellaneous items.
 - (2) On 26 June 2015, Carol Chan confirmed that she wanted to rent Unit 101, 1/F of Venture Building, Kwai Chung and signed the tenancy agreement which came into effect on 1 July 2015.
 - (3) The Premises were owned by a company, which had entrusted all leasing matters to Madam Leung for handling. One of the directors of the landlord countersigned the tenancy agreement, but he was not present when Carol Chan signed the agreement. Nor did any director of the company ever see Carol Chan afterwards.
 - (4) On the date of signing the agreement, Madam Leung handed 2 keys to the main door, 1 mail box key and 1 key to the main gate of Venture Building to Carol Chan.
 - (5) After Carol Chan rented the Premises, she paid in person the monthly rent of HK\$4,800 to Madam Leung in cash.
 - (6) Since February 2016, she has fallen into arrears with the rent.
 - (7) Neither the landlord nor Madam would enquire into the purpose that Carol Chan had put to the Premises.

Defence notes

Family Background

Carol Chan is 39-year old. She received education up to equivalent of Form 6 in Hong Kong.

She has been living in Hong Kong since 2006. Her parents live in China, and her father runs a small ship construction company. In 2002, she married her late husband, who passed away in early 2016 due to heart disease.

Employment

In 2010, her late husband's logistics business closed down. He changed to work as a driver in a funeral services company. Through his introduction, Carol Chan started to work as a full-time clerk in the same company with a monthly salary of \$20,000.

In 2011 or 2012, Carol Chan separated with her late husband due to differences in opinions. As she found it awkward to come across him in workplace, she changed to work on a casual basis. The salary was unstable but on average she earned around \$5,000 to 6,000 per month. Her father would sometimes remit money to her to support her living. On average, he remitted RMB10,000 per month to Carol Chan prior to the arrest.

Drug Addition

Carol Chan admits that she was a drug addict. She first tried ice in 2011 or 2012 and later also cocaine and ketamine. She started using drugs as she was depressed when she separated with her late husband.

At that time, she would take 0.3 to 0.5 grammes of ice every day at the monthly expense of \$1,500, 1 to 2 grammes of cocaine 2 to 3 times a month at the monthly expense of \$5,000, and 1 gramme of ketamine 3 times a month at the monthly expense of \$300.

She bought all the dangerous drugs from Ah Ming whom she knew through friends. Whenever she wanted to purchase dangerous drugs, she would call him and place the order. Ah Ming would then deliver the dangerous drugs to her home or workplace.

Criminal Record

Carol Chan has a clear record.

The Plea and the Instructions

Carol Chan shall plead NOT GUILTY to one count of trafficking in a dangerous drug.

Her defence is that all the dangerous drugs seized were for her own consumption.

She estimated that the surplus between the monthly income (consisting of her salary and contribution from her father) and expenditure was \$5,000, which was sufficient for her to buy dangerous drug for self-consumption. She maintained that there was no need for her to sell dangerous drugs for profit.

On 22 May 2016, she placed an order with Ah Ming for one ounce of ice, 7 grammes of cocaine and 7 grammes of ketamine. Ah Ming then delivered the dangerous drugs to her home. She paid \$2,500 for ice, \$600 for ketamine and \$4,000 for cocaine. After she paid \$7,100 to Ah Ming, she still had about \$3,000 cash with her. She bought larger quantity of dangerous drugs from Ah Ming because he would charge her cheaper for larger quantity.

After Ah Ming left, she repacked the dangerous drugs and placed them inside a white paper box under the sofa. Prior to the arrest, she had consumed around 1 gramme of ice, but not ketamine or cocaine.

At about 5:50 p.m. on 24 May 2016, Carol Chan heard a knock on the door. She therefore opened the door. Before Thomas Tsoi went in, three police officers in plainclothes rushed to him and pushed him into the Premises. They showed their police warrant cards, and SGT 666 showed her a search warrant. One police officer took Thomas Tsoi to the toilet.

SGT 666 asked Carol Chan where the dangerous drugs were. She pointed to the white paper box. The police officers took the dangerous drugs out from the white paper box and put them on the round table. No one cautioned Carol Chan.

The police soon conducted a house search. Carol Chan was sitting on the sofa and guarded by WPC 555. The search lasted for about one hour. Thomas Tsoi was kept inside the toilet during the whole time (until he was taken to the Police Station).

No more dangerous drug was found. SGT 666 sat down on the sofa next to Carol Chan and asked if there was more. Carol Chan told him that those were all and those were for her own consumption. SGT 666 then told Carol Chan that they would make a post record entry and suggested her to admit that the dangerous drugs found were for her own consumption as well as for treating friends “so as to explain why such large quantity of dangerous drugs were found”. After consideration, Carol Chan decided to follow what SGT 666 said because she did not know that treating others dangerous drug would amount to a more serious crime of trafficking. PC 111 then wrote down the post record entry and asked Carol Chan to write down the declaration and sign at the end. He had not read over the content of the post record entry to her or let her read it before she wrote down the declaration and signed.

A police officer put all the dangerous drugs into the pink box placed on the round table. This pink box was previously used for keeping earrings and rings on the dressing table. Another police officer took some banknotes out from her Gucci wallet, which was probably placed in her bed, and then put the money into her blue wallet. Indeed, the blue wallet was previously used only for keeping cigarettes and lighters.

Before leaving for Tsuen Wan Police Station, PC 111 and PC 222 told Carol Chan to sit at a table next to the police cell. They told her that a VRI would be conducted on her later. PC 111 said he would like to have a rehearsal with her before the formal video record of interview. He then started asking from whom and from where she obtained the dangerous drugs. He also reminded her that she should state in the VRI that part of the dangerous drugs was for own consumption whereas part was for treating friends. He said he would ask for the names of the friends, but if she did not want to say, she could simply say she forgot or did not want to disclose.

Questions

Question 1

[8 marks]

On her first appearance in the Tsuen Wan Magistrates' Court on 25 May 2016, Carol Chan's bail application was refused. Assume for this question that you were assigned by the Duty Lawyer Service to represent her.

- (1) Advise Carol Chan as to her right to be heard on subsequent bail applications. **[3 marks]**

The case was adjourned for the prosecution to obtain further evidence e.g. the Government Chemist's Certificate. On the return day, Carol Chan suggested to you that Thomas Tsoi, her boyfriend, who has not been charged with any criminal offence, has agreed to stand as surety for her to give a recognizance of \$50,000.

- (2) What matters would you discuss with Thomas Tsoi to ensure that he will be acceptable as a surety? **[3 marks]**
- (3) At the beginning of the hearing, Carol Chan tells you for the first time that as Thomas Tsoi in fact has very little available funds, her father has agreed to indemnify him for any loss. What is your advice to her? What would be your position if your advice is not accepted? **[2 marks]**

Question 2

[9 marks]

Legal aid was granted to Carol Chan on 8 September 2016. You were assigned to represent her.

- (1) Advise Carol Chan as to whether or not treating her friends with dangerous drugs free of charge constitutes 'trafficking' for the purpose of the offence? **[4 marks]**

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- (2) What, if any, is (are) the alternative offence(s) that Carol Chan may be convicted of even if the evidence at trial is not sufficient to support a guilty verdict of the offence of trafficking? **[2 marks]**
- (3) Carol Chan is very nervous at the prospect of a full trial. Advise her whether there are possible alternative ways of disposing of the matter while still seeking to protect her interests. **[3 marks]**

Question 3
[10 marks]

On the return day, you informed the court that Carol Chan had elected not to have a preliminary inquiry, and she would not plead guilty. She was committed to Court of First Instance for trial.

- (1) Why would you advise her not to elect a preliminary inquiry? **[4 marks]**
- (2) After the committal, Carol Chan regretted that she did not challenge the prosecution case on the ground that it disclosed no prima facie case. What, if any, is her relief? **[3 marks]**
- (3) Assume that Carol Chan pleaded guilty on the return day.
- (a) What would be the impact of her guilty plea in respect of any sentence? **[1 mark]**
- (b) What procedure must the court follow before accepting the guilty plea? **[1 mark]**
- (c) Will the court conducting proceedings on the return day be able to pass sentence? **[1 mark]**

Question 4

[9 marks]

After the committal, Carol Chan being committed to the Court of First Instance for trial, the prosecution writes to you issuing (i) a notice to admit facts under section 65C and (ii) a notice to tender written statements in evidence under section 65B.

- (1) What would be admitted under section 65C and what would not be admitted? **[3 marks]**

The Defence would challenge the admissibility of (i) the cautioned statement and the post-recording in the police notebook and (ii) the video recorded interview.

- (2) Advise Carol Chan as to the merits of the challenge and the procedure. **[6 marks]**

Question 5

[7 marks]

When the trial takes place, it is conducted in English. Seven persons are empaneled as jurors. At the end of the prosecution case, you ask for an adjournment. Carol Chan, your client, has been uncertain whether to give evidence or not. You are discussing the matter with her when the legal executive who has been assisting you in the trial comes through to your room. He shows you a piece of paper that has fallen from the front bench of the jury box onto the floor. Drawn on it is a hangman's noose with the question in Chinese characters: "What do you think so far?" Beneath that question, in what appear to be Chinese characters written by a different person, there is the following response: "So far I agree with you. But, to be honest, I don't understand too much of what has been going on." You show the paper to your client, Carol Chan, who is upset.

- (1)(a) In protecting Carol Chan's interest, what would be your advice as to the likelihood of obtaining a discharge of the jury? **[2 marks]**
- (b) If not a discharge of the full jury, what would be the likelihood of a discharge of either of the two jury members? **[2 marks]**

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- (c) What practical steps, as defence counsel, would you take to bring any application before the court? **[2 marks]**
- (2) Assume that the judge does not discharge the entire jury but discharges two of the jurors only. Can the trial continue? **[1 mark]**

Question 6

[7 marks]

During the final submissions, when dealing with the police evidence rejecting Carol Chan's assertion that she had been "coached" to admit untrue events and/ or "misled" into believing that she would be helping her own case by making certain admissions, the prosecutor tells the jury that, when considering the credibility of the police witnesses, they can take into account the fact that they would be unlikely to behave in such an unlawful manner because, as police officers, they are bound to tell the truth and because of the risk of disciplinary action or even a criminal prosecution that would destroy their careers.

- (1) As defence counsel, would you seek to challenge this and, if so, why? If you decide to make a challenge, what procedure would you adopt? **[4 marks]**
- (2) Carol Chan, your client, believes that the case has gone badly for her and having regard to what the prosecutor has told the jury, she wants you to apply to discharge the jury. What advice would you give to her as to the likelihood of success in obtaining a discharge of the jury? **[3 marks]**

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