
Relevancy and Excluding Relevant Evidence

1. The trial court should

The jurisdiction in which the defendant is being tried does not allow in evidence lie detector results. On cross-examination by the defendant's attorney, the witness was asked, "The light was too dim to identify the defendant, wasn't it?" She responded, "I'm sure enough that it was the defendant that I passed a lie detector test administered by the police." The defendant's attorney immediately objects and moves to strike. The defendant was charged with stealing furs from a van. At trial, a witness testified that she saw the defendant take the furs.

- Grant the motion, because the question was leading
- **Grant the motion, because the probative value of the unresponsive testimony is substantially outweighed by the danger of unfair prejudice**
- Deny the motion, because it is proper rehabilitation of an impeached witness
- Deny the motion, because the defendant's attorney "opened the door" by asking the question

Note:
B is correct. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Because lie detector results are inadmissible in this jurisdiction, the trial court should grant the motion to strike the testimony referring to inadmissible evidence.

A is incorrect. The leading nature of the question is irrelevant to the determination of whether or not to strike inadmissible testimony. Additionally, an attorney is allowed to lead on cross-examination.

C is incorrect. Lie detector results in this jurisdiction are inadmissible, and to refer to them is to attempt to admit irrelevant evidence, not to properly rehabilitate an impeached witness.

D is incorrect. Lie detector results in this jurisdiction are inadmissible. The witness's response was unresponsive to the simple yes or no question that the defendant's attorney asked.

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2. This evidence is

In presenting the state's case, the prosecutor seeks to introduce evidence that the defendant had robbed two other stores in the past year. The defendant, charged with armed robbery of a store, denied that he was the person who had robbed the store.

- Admissible, to prove a pertinent trait of the defendant's character and the defendant's action in conformity therewith
- Admissible, to prove the defendant's intent and identity
- Inadmissible, because character must be proved by reputation or opinion and may not be proved by specific acts
- **Inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice**

Note:
Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence. Fed. R. Evid. 401. It is the use of character as circumstantial evidence of how a person probably acted that raises the most difficult problems of relevance, especially in criminal cases.

The basic rule is that when a person is charged with a crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition. Thus, under FRE 404(b), the prosecution may not show the accused's bad character to imply criminal disposition.

Evidence of other crimes or misconduct is admissible if these acts are relevant to some issue other than the defendant's character or disposition to commit the crime charged. While acknowledging that prior acts or crimes are not admissible to show conformity or to imply bad character, FRE 404(b) goes on to say that such prior acts or crimes may be admissible for other purposes (e.g., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) whenever these issues are relevant in either a criminal or a civil case.

Under FRE 404(b), independently relevant uncharged misconduct by the defendant will be admissible, without a preliminary ruling, as long as: (i) there is sufficient evidence to support a jury finding that the defendant committed the prior act (i.e., the standard of FRE 104); and (ii) its probative value on the issue of motive, intent, identity, or other independently relevant proposition is not substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403; Huddleston v. United States, 485 U.S. 681 (1988).

D is correct. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of an accused person in order to show action in conformity therewith. Here, the prosecutor is seeking to introduce evidence that the defendant robbed two other stores in order to prove that the defendant robbed this particular store. This evidence is inadmissible because it is attempting to prove bad character. The probative value of the other robberies is substantially outweighed by the danger of unfair prejudice to the defendant. At this point in the trial, the evidence is not admissible for any other purpose.

A is incorrect. The defendant's prior bad acts (the other robberies) do not prove any "pertinent trait" to an armed robbery charge. They are an attempt to demonstrate the defendant's likelihood of committing bad behavior based on prior bad behavior. In other words, because the defendant robbed two other stores, he must have robbed this one. The Rules specifically exclude this type of evidence from being used to show that the defendant's present actions were in conformity with past actions.

B is incorrect. Although evidence of other acts may be admissible to show intent or identity, these prior acts are not being offered for those purposes. There are no facts to indicate that the prior robberies are being used to prove anything other than that the defendant committed this particular robbery, which is an impermissible use of character evidence.

C is incorrect. Although this is a correct statement of the law, it does not apply to the facts in this question. The prior robberies are inadmissible character evidence at this point in the trial, and the analysis should end there. There is no need to determine whether this is the proper method to admit the evidence.

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3. The prosecution witness's testimony should be

At the defendant's trial for stealing an automobile, the defendant called a character witness who testified that the defendant had an excellent reputation for honesty. In rebuttal, the prosecutor calls another witness to testify that he recently saw the defendant cheat on a college examination.

- Admitted, because the defendant has "opened the door" to the prosecutor's proof of bad character evidence
- Admitted, because the cheating involves "dishonesty or false statement."
- Excluded, because it has no probative value on any issue in the case
- **Excluded, because the defendant's cheating can be inquired into only on cross-examination of the defendant's witness**

Note:
A criminal defendant puts her character in issue by calling a qualified witness to testify to the defendant's good reputation (or that he has heard nothing bad) for the trait involved in the case. Under FRE 405, the witness may also give his personal opinion concerning that trait of the defendant. However, the witness may not testify to specific acts of conduct of the defendant to prove the trait at issue.

If the defendant puts her character at issue by having a character witness testify as to his opinion of the defendant or the defendant's reputation, the prosecution may rebut in the following manner: (i) by calling its own character witness to testify to the defendant's bad reputation or their opinion of the defendant's character for the particular trait involved; and (ii) on cross-examination, by inquiring whether the reputation witness knows or has heard of particular instances of the defendant's misconduct pertinent to the trait in question. Fed. R. Evid. 405(a).

D is correct. In all cases in which evidence of character or a trait of character of a person is admissible but not essential, such as in this case, proof of that trait may be made by testimony regarding reputation. The defendant opened the door on his character by calling the witness to testify regarding his reputation for honesty. However, in rebuttal, the prosecution may only inquire into specific instances of the defendant's misconduct on cross-examination of the character witness. Because the defendant's honesty is not an essential element of the charge, the prosecutor cannot use specific incidents of conduct to show that the defendant is guilty. See Fed. R. Evid. 608 (b).

A is incorrect. Even though the defendant "opened the door" regarding the defendant's character for honesty, the prosecutor cannot use specific incidents of prior misconduct to rebut the character evidence testimony given by the defendant's witness, except on cross-examination. Fed. R. Evid. 608 (b).

B is incorrect. Although the defendant's cheating on a college exam involved dishonesty or false statement, it is nevertheless a specific instance of misconduct, not a prior conviction, reputation, or opinion evidence. As such, it may not be introduced extrinsically through a rebuttal witness, it may only be inquired into on cross-examination.

C is incorrect. By calling a witness to testify about the defendant's reputation for honesty, the defendant made his character relevant to the case. Thus, a specific instance of dishonesty would certainly be probative on that issue. The evidence is excluded, however, not because it is irrelevant or non-probative, but because specific instances of dishonest conduct cannot be used to show that the defendant is guilty.

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4. The best ground for objecting to this question would be that

The plaintiff calls an orthopedist who had never examined the plaintiff and poses to the physician a hypothetical question as to the cause of the disability that omits any reference to the horseback riding accident. The question was not provided to opposing counsel before trial. A plaintiff sued a defendant for damages for back injuries received in a car wreck. The defendant disputed the damages and sought to prove that the plaintiff's disability, if any, resulted from a childhood horseback riding accident. The plaintiff admitted to the childhood accident but contended it had no lasting effect.

- The physician lacked firsthand knowledge concerning the plaintiff's condition
- **The hypothetical question omitted a clearly significant fact**
- Hypothetical questions are no longer permitted
- Sufficient notice of the hypothetical question was not given to opposing counsel before trial

Note:
An expert may state an opinion or conclusion provided that: (i) it is relevant and reliable; (ii) the witness is qualified as an expert; (iii) the expert possesses reasonable probability regarding his opinion; and (iv) the opinion is supported by a proper factual basis. Fed. R. Evid. 702.

As to the factual basis, the expert's opinion may be based upon one or more of three possible sources of information: (i) facts that the expert knows from his own observation; (ii) facts presented in evidence at the trial and submitted to the expert, usually through a hypothetical question; or (iii) facts not in evidence that were supplied to the expert out of court, and which are the type reasonably relied upon by experts in the particular field in forming opinions on the subject. Fed. R. Evid. 705. When a hypothetical question is posed to an expert, it may be based on the same types of facts mentioned above.

B is correct. When parties pose hypothetical questions to experts, those questions are typically based on facts presented in evidence at trial. A hypothetical question that does not include all clearly significant facts at issue in a case, which are necessary to reliably answering the hypothetical, would, therefore, be irrelevant. Here, the plaintiff admitted that the horseback riding incident occurred but then failed to reference it when asking the orthopedist the hypothetical question regarding the source of the injury. This means any response by the orthopedist would be based on incomplete information and therefore irrelevant to a determination of the cause of the injury.

A is incorrect. There is no requirement that an expert has firsthand knowledge in order to answer a hypothetical question. The orthopedist may properly base his opinion on hypothetical information, adequately supported by facts, even though he has no firsthand knowledge of the plaintiff's condition. However, this hypothetical did not include all significant facts, and any answer would, therefore, be irrelevant.

C is incorrect. This is a misstatement of the law. Under the Rules, hypothetical questions are still permitted as long as they are based on the relevant facts or data in the particular case.

D is incorrect. There is no notice requirement that hypothetical questions be provided to opposing counsel before trial. The best ground for objecting to the plaintiff's hypothetical question is that it omitted a clearly significant fact in asking for the opinion.

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5. Which of the following would NOT be a sufficient basis for admitting the letter into evidence?

A plaintiff sues a defendant for breach of a promise made in a letter allegedly written by the defendant to the plaintiff. The defendant denies writing the letter.

- Testimony by the plaintiff that she is familiar with the defendant's signature and recognizes it on the letter
- Comparison by the trier of fact of the letter with an admitted signature of the defendant
- **Opinion testimony of a nonexpert witness based upon a familiarity acquired in order to authenticate the signature**
- Evidence that the letter was written in response to one written by the plaintiff to the defendant

Note:
Under the Federal Rules of Evidence (FRE), opinion testimony by lay witnesses is admissible when: (i) it is rationally based on the perception of the witness; (ii) it is helpful to a clear understanding of her testimony or to the determination of a fact in issue; and (iii) it is not based on scientific, technical, or other specialized knowledge (if so based, the witness's testimony would need to meet the requirements for expert testimony in FRE 702). Fed. R. Evid. 701.

Lay opinion is permissible and often essential to identifying handwriting, although a foundation must first be laid to establish familiarity with the handwriting. Moreover, the witness's familiarity with the handwriting must have not been acquired for purposes of the litigation. Specifically, under FRE 901(b)(2), a non-expert may express an opinion that "handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation." An expert witness or the trier of fact (e.g., jury) may also determine the genuineness of a writing by comparing the questioned writing with another writing proved to be genuine. Fed. R. Evid. 901(b)(3).

C is correct. Although a lay witness is allowed to offer an opinion to identify and authenticate handwriting, to do so, the witness's familiarity with the handwriting must have not been acquired for purposes of the litigation. A non-expert who familiarized himself with the defendant's writing for the purpose of authenticating it at trial is not allowed to authenticate the letter.

A is incorrect. A lay witness may properly authenticate a letter if that witness is familiar with the signature and can identify it on the letter. See Fed. R. Evid. 901(b)(2). As such, this is not the least effective basis for admitting the letter into evidence.

B is incorrect. It is permissible for the trier of fact to authenticate a piece of writing by comparing it with other specimens that have been authenticated. This includes identifying the signature of a person, as in this case.

D is incorrect. Under FRE 901(b)(3), a writing can be properly authenticated by evidence that the writing was done in response to another genuine piece of writing from the same parties.

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6. The court should admit evidence of

A defendant is on trial for arson. In its case in chief, the prosecution offers evidence that the defendant had secretly obtained duplicate insurance from two companies on the property that burned and that the defendant had threatened to kill his ex-wife if she testified for the prosecution.

- The defendant's obtaining duplicate insurance only
- The defendant's threatening to kill his ex-wife only
- **Both the defendant's obtaining duplicate insurance and threatening to kill his ex-wife**
- Neither the defendant's obtaining duplicate insurance nor threatening to kill his ex-wife

Note:
The use of character evidence to establish how a person probably acted raises the most difficult problems of relevance, especially in criminal cases. The general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that she is more likely to have committed the crime of which she is accused. When a person is charged with one crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition. Thus, under FRE 404(b), the prosecution may not show the accused's bad character to imply criminal disposition.

Evidence of other crimes or misconduct is admissible, however, if these acts are relevant to some issue other than the defendant's character or disposition to commit the crime charged. Fed. R. Evid. 404(b). While acknowledging that prior acts or crimes are not admissible to show conformity or to imply bad character, FRE 404(b) goes on to say that such prior acts or crimes may be admissible for other purposes (e.g., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) whenever these issues are relevant.

Under FRE 404(b), independently relevant uncharged misconduct by the defendant will be admissible, without a preliminary ruling, as long as: (i) there is sufficient evidence to support a jury finding that the defendant committed the prior act (i.e., the standard of FRE 104); and (ii) its probative value on the issue of motive, intent, identity, or other independently relevant proposition is not substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403; Huddleston v. United States, 485 U.S. 681 (1988).

C is correct. The issue here is whether each piece of evidence - the defendant's obtaining duplicate insurance and the threat to kill his ex-wife - is admissible under the rules governing relevance and character evidence. Evidence of other crimes or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence may be admissible, however, for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The fact that the defendant obtained duplicate insurance of the burned property is relevant because it shows the defendant's motive for committing the arson. Any minor prejudicial effect of the evidence of duplicate insurance would be outweighed by the probative value of the evidence. The defendant's threat to kill his ex-wife if she testifies is also relevant and admissible because it establishes the defendant's plan and knowledge, and his consciousness of his guilt. The highly probative nature of this evidence is not substantially outweighed by the danger of unfair prejudice. Both obtaining duplicate insurance and threatening to kill his ex-wife are therefore admissible.

A is incorrect. Although evidence of the defendant's obtaining duplicate insurance is admissible to establish the defendant's motive for committing arson, the threat to kill his ex-wife is also admissible, as explained above.

B is incorrect. Although evidence of the defendant's threat to kill his ex-wife is admissible to establish the defendant's plan, knowledge, and consciousness of guilt, his obtaining duplicate insurance is also admissible as evidence of motive for committing arson.

D is incorrect. As explained above, both the duplicate insurance and the threat to kill his ex-wife are admissible.

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7. Which of the following items of evidence is LEAST likely to be admitted without a supporting witness?

- In a libel action, a copy of a newspaper purporting to be published by the defendant newspaper publishing company
- In a case involving contaminated food, a can label purporting to identify the canner as the defendant company
- **In a defamation case, a document purporting to be a memorandum from the defendant company president to "All Personnel," printed on the defendant's letterhead**
- In a case involving injury to a pedestrian, a pamphlet on stopping distances issued by the State Highway Department

Note:
Before a writing or any secondary evidence of its content may be received into evidence, the writing must be authenticated by proof showing that the writing is what the proponent claims it is. The writing usually needs a testimonial sponsor to prove that the writing was made, signed, or adopted by the particular relevant person. Fed. R. Evid. 901, 902, 903. Contrary to the general rule, however, there are certain writings that are said to "prove themselves" or to be "self-identifying" on their face. Under FRE 902, extrinsic evidence of authenticity is therefore not required for: (i) printed materials purporting to be newspapers or periodicals; (ii) trade inspections, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin; or (iii) official publications (i.e., books, pamphlets, or other publications purporting to be issued by a public authority).

C is correct. The general rule is that, before an item of evidence can be admitted, it must be authenticated by proof showing that the writing is what the proponent claims it is. Typically this requires a testimonial sponsor. However, there are certain documents that are self-authenticating and do not need a supporting witness before they can be admitted. Of all the choices provided, the only document that is not self-authenticating under FRE 902 is the document purporting to be a memorandum from the defendant company president to "All Personnel," printed on the defendant's letterhead. Therefore, this is the least likely to be admitted without a supporting witness.

A is incorrect. Printed materials purporting to be newspapers or periodicals, such as a copy of a newspaper purporting to be published by the defendant newspaper publishing company, are self-authenticating, and therefore do not require a testimonial sponsor for authentication. See Fed. R. Evid. 902.

B is incorrect. Trade inspections, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin, such as a can label purporting to identify the canner as the defendant company, are self-authenticating, and therefore do not require a testimonial sponsor for identification. See Fed. R. Evid. 902.

D is incorrect. Official publications (i.e., books, pamphlets, or other publications purporting to be issued by a public authority), such as a pamphlet on stopping distances issued by the State Highway Department, are self-authenticating, and therefore do not require a testimonial sponsor for identification. See Fed. R. Evid. 902.

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8. Under the rule allowing exclusion of relevant evidence because its probative value is substantially outweighed by other considerations, which of the following is NOT to be considered?

- The jury may be confused about the appropriate application of the evidence to the issues of the case
- The evidence is likely to arouse unfair prejudice on the part of the jury
- **The opponent is surprised by the evidence and not fairly prepared to meet it**
- The trial will be extended and made cumbersome by hearing evidence of relatively trivial consequence

Note:
C is correct. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue delay, waste of time, or needless presentation of cumulative evidence. Only this answer does not deal with any of those considerations and instead deals with the exclusion of evidence-based on potential discovery violations.

A is incorrect. Juror confusion of the issues is a consideration in determining whether to exclude relevant evidence.

B is incorrect. Unfair prejudice on the part of the jury is also a consideration in determining whether to exclude relevant evidence.

D is incorrect. Waste of time and needless presentation of trivial evidence is also a consideration in determining whether to exclude relevant evidence.

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9. The evidence of the plaintiff's prior theft is

A plaintiff sued a defendant for libel. After the plaintiff testified that the defendant wrote to the plaintiff's employer that the plaintiff was a thief, the defendant offers evidence that the plaintiff once stole money from a former employer.

- **Admissible, as substantive evidence to prove that the plaintiff is a thief**
- Admissible, but only to impeach the plaintiff's credibility
- Inadmissible, because character may not be shown by specific instances of conduct
- Inadmissible, because such evidence is more unfairly prejudicial than probative

Note:
The rules regarding use of character evidence are affected by three major concerns: (i) the purpose for which evidence of character is offered; (ii) the method to be used to prove character; and (iii) the kind of case, civil or criminal.

A person's general character, or a particular trait that he has, may be an essential element of the case because under the substantive law, that character or trait determines the rights and liabilities of the parties. In that circumstance, character evidence is not only allowable, but it is also essential. See Fed. R. Evid. 404(b). Therefore, when a person's character itself is the ultimate issue in the case, character evidence must be admitted. Cases where character is one of the material propositions in issue are confined mostly to civil litigation and are rare even among civil actions. See Fed. R. Evid. 405. Most courts, and the FRE, allow three types of evidence of character when character is in issue: (i) specific acts to demonstrate character; (ii) a witness's opinion of that character; and (iii) evidence as to the subject's reputation for the character trait in issue.

In a libel case, evidence of the plaintiff's despicable character is "in issue" and therefore admissible to support a defense of truth. Such evidence may be offered in the form of specific instances of conduct as well as reputation and opinion.

A trial judge has broad discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403.

A is correct. Evidence of the plaintiff's prior theft is admissible as substantive evidence to prove that he is, in fact, a thief because it is an ultimate issue (or "in issue") in the case. The plaintiff is alleging that the defendant committed libel by writing to the plaintiff's employer falsely claiming that the plaintiff was a thief. A defense to a libel suit is truth, and as such, the defendant's claim that he was telling the truth is directly supported by evidence that the plaintiff had a previous incident of theft.

B is incorrect. This answer is only partially correct. Although evidence that the plaintiff stole money from a former employer is admissible, it may also be used substantively as proof of the plaintiff's character for thievery, in addition to impeachment purposes. As explained above, truth is a defense to libel, which means it is essential for the defendant to be able to introduce evidence of prior acts by the plaintiff to prove that he was telling the truth when he claimed the plaintiff was a thief.

C is incorrect. Character evidence is typically inadmissible to show conformity therewith, but when character itself is an ultimate issue in the case, it is admissible substantively. Here, the plaintiff's prior theft is directly relevant to whether the defendant was telling the truth in his letter to the plaintiff's employer, which means it must be substantively admissible.

D is incorrect. Whether the plaintiff is indeed a thief is an essential issue in the case, and evidence that the plaintiff stole money from his former employer is highly probative and has little danger of unfair prejudice.

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10. The objection should be

A defendant was charged with possession of cocaine. At the defendant's trial, the prosecution established that, when approached by police on a suburban residential street corner, the defendant dropped a plastic bag and ran, and that when the police returned to the corner a few minutes later after catching the defendant, they found a plastic bag containing white powder. The defendant objects to introduction of this bag (the contents of which would later be established to be cocaine), citing lack of adequate identification.

- **Overruled, because there is sufficient evidence to find that the bag was the one the defendant dropped**
- Overruled, because the objection should have been made on the basis of incomplete chain of custody
- Sustained, because the defendant did not have possession of the bag at the time he was arrested
- Sustained, unless the judge makes a finding by a preponderance of the evidence that the bag was the one dropped by the defendant

Note:
The requirement of authentication or identification as a condition to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

An object of real evidence must first be identified as being what the proponent claims it to be. Real evidence is commonly authenticated by recognition testimony or by establishing a chain of custody. If the evidence is of a type that is likely to be confused or can be easily tampered with, the proponent of the object must present evidence of chain of custody. The proponent of the evidence must show that the object has been held in a substantially unbroken chain of possession. The proponent need not negate all possibilities of substitution or tampering, but must show adherence to some system of identification and custody.

A is correct. By establishing that the defendant dropped a plastic bag as the police were approaching, and that, after only a few minutes, the police officers returned to the same spot and found a plastic bag, the prosecution has introduced sufficient evidence for a finding that the bag was the one the defendant dropped. The objection should be overruled.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. Although the objection should be overruled, it is not because the chain of custody should have been challenged. When evidence is of a type that could easily be tampered with, there must be a valid chain of custody. However, the proponent is not required to negate all opportunities of possible substitution or tampering, but rather, can show adherence to some system of identification and custody. Here, the police were present when the defendant dropped the bag, which means they identified it. Then they returned just a few minutes later and saw a bag in that same location where it had been dropped. There is no indication that someone had the opportunity to tamper with it, or that it appeared any different than when the police initially identified it.

C is incorrect. Although the defendant did not have possession of the bag at the time he was caught, the police identified him with the bag just prior to his fleeing. There is sufficient evidence to link the bag to the defendant and to provide sufficient identification and authenticity.

D is incorrect. The judge does not have to make a finding by a preponderance of the evidence that the bag was the one dropped by the defendant; the judge need only find that there was sufficient evidence to support a finding that the plastic bag in question was the one the defendant was holding.
