

## **CRIMINAL PROCEDURE EXAMINATION**

**Judge Brogan - April 30, 2003**

**Instructions: Answer question number one and four of the remaining six questions. The first question is worth sixty points. The remaining questions are worth thirty points each, for a total of 180 points, matching the amount of minutes of the examination. You will not receive extra credit for answering more than five questions (question one and four of the remaining six). Good luck!**

**Question 1 (One Hour – You must answer this question. 60 points.):**

Homer J. Simpson (a/k/a “H.J”) was driving his brand new silver Jaguar down North Capitol Street in Washington, D.C. He was waiting at the traffic light when a man in a Toyota Pathfinder hit his rear bumper. H.J. was furious. He jumped out of his car, ran back to check out the damage, and noticed a small dent in the bumper. H.J. ran to the driver’s side of the Pathfinder, yanked open the door, and pulled the driver out by the collar. He punched the driver in the face and drove off. The driver called the police on his cell phone and gave a complete description of H.J. and his car as well as the license plate information (UMUSTAQUT).

The following day, Officer Lawman was driving his police cruiser around the circle in front of Union Station. He received a radio transmission that there was a warrant out for a white male in a silver Jaguar with license plate UMUSTAQUT who had assaulted a driver during a road rage incident the previous day. Shortly after turning onto Massachusetts Avenue, he saw H.J. driving a car that fit the description, turned on his siren, and pursued the suspect. He caught up with H.J. at 2<sup>nd</sup> Street and signaled for him to pull over. H.J. looked at Lawman briefly and sped off. Lawman pursued H.J. in a high-speed chase. When H.J. reached his townhouse on 7<sup>th</sup> Street, he jumped out of the car, ran into his house and locked the door. Lawman jumped out, ran behind him, and kicked open the door. When he didn’t see H.J. in the front room, he walked straight back to the kitchen and saw him headed for the back door. Lawman seized him, placed him under arrest, handcuffed him to the kitchen table and called for additional officers to assist with the arrest.

While Officer Lawman was waiting for the other officers to arrive, he looked around in all of the rooms of the house, including all of the closets. He didn’t open any containers in any of the rooms. While in H.J.’s bedroom, Lawman saw some white powder on a silver dish on the bedside table. Based on his experience working in the narcotics division, Lawman recognized the powder as cocaine and placed it in a plastic evidence bag that he conveniently kept in his pocket.

By the time Lawman went back downstairs, the other officers had arrived. Lawman showed the officers the cocaine and told them where he found it. He suggested that one of the

officers go get a warrant to search the entire house. While the officer went for the warrant, Lawman decided to look around some more. He went back up to H.J.'s bedroom and opened the drawer of the bedside table. Inside the drawer, he found ten small bags of white powder that appeared to be cocaine and a small handgun. Lawman closed the drawer without removing the evidence.

The backup officer came back with a warrant authorizing a search of the entire house, including any containers where powder cocaine may be found. Lawman stayed with H.J. in the kitchen while the other officers conducted a search of the entire house. He did *not* tell the officers what he had found while they were away. During the search, the officers found the additional cocaine and handgun in the side table in H.J.'s bedroom.

Officer Lawman placed H.J. in a transport vehicle and drove him to the police station. When they arrived at the station, Lawman read H.J. his *Miranda* rights. H.J. said he wanted to speak with his lawyer before making any statements. The officer did not question H.J. and placed him in a holding cell to wait for transportation to court. After about an hour, H.J. called for Lawman and asked, "What's going to happen when I go to court tomorrow?" Lawman told him that his lawyer would be in court to advise him, but that it would be much better for him if he would give a statement that night. H.J. agreed and told Lawman that the cocaine on the side table was his, but that he didn't know anything about the cocaine and handgun in the drawer.

The next day, H.J. was taken to court and formally charged with possession with intent to distribute cocaine and possession of a handgun. In a separate charging document, he also was formally charged with simple assault. H.J. specifically invoked his right to counsel in both cases. H.J.'s lawyer was successful in convincing the court to release H.J. on bond pending his trials.

A week later, Officer Lawman went back to H.J.'s house and told him that he wanted to talk to him about the fact that he might be charged with some additional offenses. When H.J. asked what these additional charges were about, Lawman asked him if he would come down to the police station. H.J. agreed. When they arrived at the station, Lawman read H.J. his complete *Miranda* warnings and H.J. agreed to answer questions without an attorney present. Lawman then told H.J. that when he yanked open the man's car door during the "road rage" incident, he had broken the door. Lawman also informed H.J. that the driver's jaw was broken so badly that he suffered permanent damage. He further stated that H.J. would probably be charged with destruction of property (for the broken door) and malicious disfigurement (for the permanent damage to the driver's face). Lawman asked H.J. if he had anything he wanted to say about these new charges. H.J. said, "I can't help it if the guy had a glass jaw and a cheap car. That's what he gets for hitting my Jaguar!"

The government will attempt to introduce all of the cocaine, the handgun, and H.J.'s statement about the cocaine as evidence at the trial on these offenses. At his separate trial for simple assault, malicious disfigurement, and destruction of property, the government will attempt to introduce H.J.'s statement about the jaw and the car.

H.J.'s lawyer filed several motions to suppress the evidence and statements. Discuss all possible legal grounds in support of the following motions, the government's responses, and the court's likely rulings:

- 1) Motions to suppress the cocaine on the silver dish and the cocaine and handgun found the drawer.
- 2) Motion to suppress the statement about the cocaine.
- 3) Motion to suppress the statement about the jaw and the car.

**Question 2 (Thirty Minutes. 30 points.):**

**Problem.** The police received a telephone call. The unidentified informant stated that a white male, about 5'10" tall, wearing a black jacket, white t-shirt, and blue jeans was selling powdered cocaine on the sidewalk in front of 726 West Beaver Street, a location known to the officer to be in an area with a high volume of street-level drug sales. The officer had seized crack cocaine two months earlier at this exact location. The caller stated that the drug seller wrapped cocaine inside rolled-up one-dollar bills and placed them in his pants pocket, ready to sell.

The officer went immediately to West Beaver. (It took him approximately 15 minutes to reach the location.) A man who matched the caller's description of the drug seller was standing in front of 726 West Beaver Street. The only other person in the vicinity did not meet the description. The officer approached and patted down the outside of the suspect's clothing. (Assume for present purposes that the officer had the right to do so.) He felt a bulge in the person's left front pants' pocket, which he believed to be money. The suspect explained that he had a lot of one-dollar bills in his pocket. The officer then reached into the pocket and retrieved the folded money, but found no cocaine. He reached into the pocket a second time, and found another folded dollar bill that did contain powdered cocaine.

When the officer searched the suspect's clothing the first time, did he have probable cause? Did he have probable cause the second time? What result under *Aguilar-Spinelli*? According to *Gates*?

In the original hypothetical, the officer acted on the basis of an anonymous informant, but suppose that he had known the informant and had used information from him on 20 prior occasions in the preceding two months, in which 12 of the tips resulted in felony arrests and 8 of the tips proved to be false. How would this information change your analysis, if at all? Does the good-faith exception of *Leon* apply to warrantless arrests? If not, why not?

**Question 3 (Thirty Minutes. 30 points.):**

**Problem.** Shortly after noon, the victim awakened from a nap to find a man holding a knife in the doorway to her bedroom. The man entered the bedroom, threw her face down on the bed, and choked her until she was quiet. After covering his face with a bandana, the intruder partially undressed the victim, forced her to commit oral sodomy, raped her and left. When police arrived, the victim gave them a description of her assailant. Although she did not know who he was and had seen his face for only 10 to 15 seconds during the attack, she thought he was the same man who had made offensive remarks to her in a neighborhood bar the night before. In the week that followed, police showed the victim two groups of photographs of men. From the first group of 200 she picked about 30 who resembled her assailant in height, weight, and build. From the second group of about 10, she picked two or three. One of these was of petitioner.

On the evening of December 20, 1967, police arrested petitioner at his apartment and held him overnight pending a preliminary hearing to determine whether he should be bound over to the grand jury and to set bail. The next morning, a policeman accompanied the victim to the court for the hearing. The policeman told her she was going to view a suspect and should identify him if she could. He also had her sign a complaint that named petitioner as her assailant. At the hearing, petitioner's name was called and he was led before the bench. The judge told petitioner that he was charged with rape and deviate sexual behavior. The judge then called the victim, who had been in the courtroom waiting for the case to be called, to come before the bench. The State's Attorney stated that police had found evidence linking petitioner with the offenses charged. He asked the victim whether she saw her assailant in the courtroom, and she pointed at petitioner.

At trial, the victim testified on direct examination by the prosecution that she had identified petitioner as her assailant at the preliminary hearing. She also testified that petitioner was the man who had raped her. Was petitioner's right to counsel, or his right to due process, violated by the pretrial identification? Should the witness be allowed to make an in court identification of petitioner or to testify regarding the pre-trial identification? What arguments might be made on the defendant's behalf. How might the state respond to those arguments?

**Question 4 (Thirty Minutes. 30 points.):**

**Problem.** A man placed his garbage in opaque bags and left them in garbage cans with closed lids. The cans were kept behind the man's house, and were collected at that location by the garbage service. Police officers entered the property and retrieved the garbage the night before the garbage service was to pick up the garbage. To collect the garbage, the officers approached the cans from the south and hid behind trees and bushes as they approached. The cans were located on a driveway 50 feet south of the house, and 20 feet from the unattached garage. In addition, the cans were 25 to 30 feet west of the street, and 18 feet west of the public sidewalk. What arguments can defense counsel make to distinguish *Greenwood*, and to claim

that his expectation of privacy was reasonable on these facts, and what counter-arguments will the prosecutor make in response?

**Question 5 (Thirty Minutes. 30 points.):**

**Part A: Problem.** What is the “incorporation” doctrine? Which of the Bill of Rights have been incorporated into the Fourteenth Amendment? What is the test for incorporation which has been adopted by the Supreme Court?

**Part B: Problem.** The police stop an automobile on a public road and search the car trunk without consent or probable cause. The police find a blood-stained jacket in the trunk, which they seize. Subsequently, the prosecutor seeks to introduce the jacket in a murder prosecution of Bob, who was in the automobile. After *Rakas*, may Bob successfully challenge the police action in the following circumstances? Why, or why not?

- A. At the time of the search, Alice, the car owner, was driving the vehicle, and Bob, a friend, was her front seat passenger.
- B. The same as A., but Bob was driving, while Alice sat in the front seat.
- C. The same as A., but the two were driving across country. Alice and Bob alternated driving, and Alice furnished Bob with a spare car key for the trip.
- D. The same as A., but Bob wants to contest the car stop, rather than the trunk search.
- E. The same as A., but Bob claims ownership of the jacket.

**Question 6 (Thirty Minutes. 30 points.):**

**Problem.** “Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, ‘Sure, but I don’t know anything about counterfeiting.’ Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him \$10,000 for some quantity of counterfeit bills.” Do you consider this entrapment? How does the “objective” test for entrapment differ from the “subjective” test?

**Question 7: (Thirty Minutes. 30 points.)**

**Problem.** While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test. When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard.

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana.

Respondent was charged with possession of a controlled substance. Evidence was offered at the suppression hearing that the Highway Patrol does not have a mandatory standardized policy regarding opening closed containers found in the inventory of automobiles. What arguments can be made by the prosecutor that the suppression should be denied? What arguments can be made on behalf of the respondent? How should the court decide the motion?