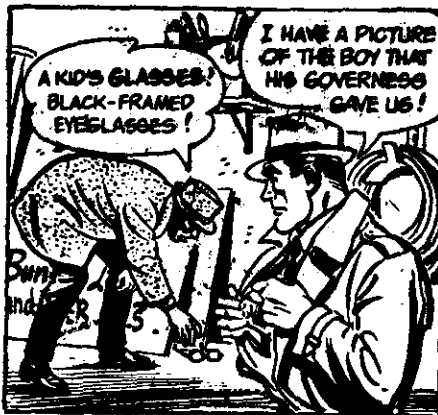
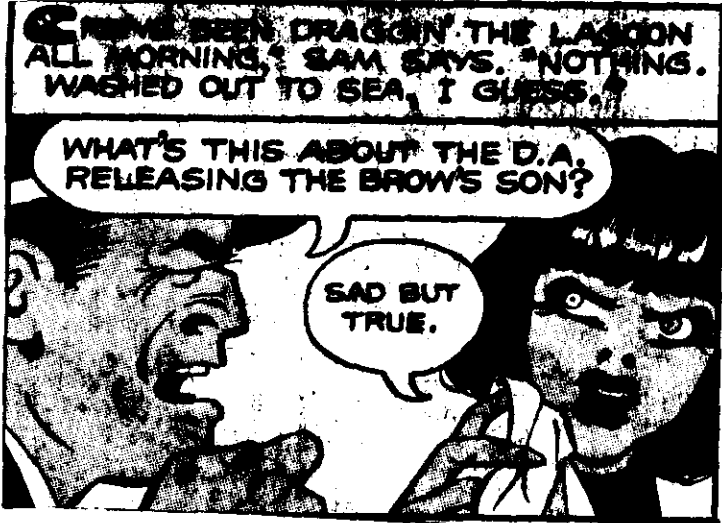


CRIMINAL LAW AND PROCEDURE
SECTION AD

Final Examination
May 3, 1978

Three Hours
1:30 - 4:30



OPEN BOOK

Instructions

Each of the four problems is of equal weight. Budget your time accordingly.

Answer all the questions reasonably raised in each problem even though your resolution of a prior issue in the same problem may technically make decision of the other issues immaterial. If you believe that you need more facts than are presented to adequately resolve an issue, indicate specifically what facts you believe you need and why.

Specific citations to cases are welcome but not as a substitute for thinking, i.e. do not use citations instead of clearly stating the relevant point of law.

I

"On January 1 or 2, 1977, D[rug] E[nforcement] A[gency] Special Agent Cairo was told by an informer that Vidal-Garcia, a stewardess for Aerocondor Airlines, would be [carrying] an unknown quantity of cocaine . . . Cairo had not known the informer previously, but he did determine that the informer had no criminal record, had not previously supplied information to the DEA, and was not paid for the information concerning Vidal-Garcia. The informer gave Cairo the departure point [Caracas], the flight, and the date, and said that Vidal-Garcia would be 'carrying' cocaine. Upon the flight's arrival at Miami International Airport [after a stop-over in Atlanta] . . . authorities verified that Vidal-Garcia was indeed a stewardess on the specific flight and date. The crew's luggage was examined . . . but apparently nothing suspicious was found. Nor were the crew members questioned. However, solely on the basis of the tip, [DEA agents] were instructed to search six members of the crew. Afanador was searched first, and the female [DEA Agent] found two cocaine packages on her body, one in the crotch area and the other taped slightly below the waist. A similar strip search of Vidal-Garcia also revealed two packages carried in the same manner." United States v. Afanador __F.2d__, 22 Crim.Law Rptr. 2494 (5th Cir. 2/17/78).

Having found the job market rather tight, you now find yourself employed as an attorney for the Drug Enforcement Agency. Given the facts above, what grounds do you have to argue that the cocaine found on defendants Afanador and Vidal-Garcia should not be suppressed as the fruits of an unlawful search and seizure? What is your likelihood of success with these arguments?

II

Dudley Degas is serving 1 to 3 years in state prison for possession of heroin. Degas' mother approaches you about appealing his conviction, telling you the following story:

Degas was a passenger in a car driven by Melvin Monet which was stopped by the police for speeding. While standing outside Monet's window writing a ticket, the stopping officer, Richard Renoir, noticed a pistol partially protruding from under Degas' seat. Renoir immediately ordered Degas and Monet out of the car and arrested Degas for carrying a concealed weapon [CCW]. In a concomitant search of Degas' person, Renoir discovered a small vial containing heroin.

Degas' mother hired Solomon Seurat, a well known criminal defense lawyer to handle Degas' defense to charges of CCW and possession of heroin. Seurat met with Degas only once prior to trial and ended up advising him to accept a proffered plea bargain: if Degas would plead guilty to the CCW charge, the drug possession count would be dropped. Degas refused the bargain; he argued vehemently that he was wholly innocent of both charges: Monet

owned the gun and Degas was not aware that it was under the seat; the heroin was also Monet's --Monet had told him it was insulin and he knew that Monet was a diabetic. Seurat told Degas that he was perfectly free to refuse the bargain, but that "it was stupid" to go to trial because the State had a very strong case against Degas on these facts particularly since Monet could not be found. After Seurat left, Degas approached a jail-house lawyer acquaintance, Gerard Gauguin, and prepared and filed a pro se petition with the trial court alleging that paying for trial counsel, Seurat, used up all the family funds, and asking the trial court to appoint an investigator to help the defense find Monet in order to gain his critical testimony relating to ownership of the pistol and heroin. Degas' petition was summarily denied by the trial court without comment.

The day of trial, Seurat showed up intoxicated. When his condition became clear to all in the courtroom, the trial judge initially ordered Seurat removed from the case. However, Degas immediately jumped to his feet and objected, complaining that "I've paid Seurat \$1500 already --and he's the best around-- I want him!" Upon hearing Degas' outburst, the trial judge withdrew his order that Seurat be dropped from the case; instead, he ordered a two hour continuance to sober Seurat up. During the delay, the Prosecutor informed Degas in the hallway that Seurat was a notoriously heavy drinker who was tolerated by the judiciary only because he was an excellent lawyer when sober - which was most of the time. But, the Prosecutor added, "Today, he's totally out of it; you poor devil, you don't stand a chance. I wonder if anyone has ever gotten the chair for carrying a concealed weapon!"

When trial reconvened, Seurat did a perfunctory job of defending Degas; he raised no objections at all, but did an adequate job examining Degas and three character witnesses and cross-examining Officer Renoir. After a two hour trial, Degas was quickly convicted of possession of heroin, but he was acquitted of the CCW charge due to the judge's finding that there was an insufficient prosecutorial showing that the gun belonged to Degas or that he knew that it was in the car.

Degas' mother asks you the following questions. What are your reasoned responses?

- (1) Was it constitutional error for the trial court to refuse to appoint a criminal investigator for Degas?
- (2) Did the trial judge have the power to remove counsel over Degas' objections? Did his failure to do so create constitutional error?
- (3) What chance is there for a new trial based upon the conduct of trial counsel? Why?

- (4) What chance is there for a successful civil lawsuit against the Prosecutor for proceeding with trial where it was admittedly clear that Seurat was incapable of providing Degas adequate representation?

III

Defendant Green was lawfully stopped by the police in Tucson, Arizona, while driving an automobile loaded with marijuana. He was placed under arrest and taken to the station house for questioning by Officer Brown. As to what followed, Officer Brown testified as follows:

"I told him that I would read his rights to him . . . At the end of the reading of these rights, the final question is, 'Do you understand the rights?' And he said, yes, I understand, but I don't have money to pay for an attorney.' I explained to him again that in that case, the Court here in Tucson would provide him an attorney.

"I then asked him if he wanted to talk about what he had [done] and he said, Okay, okay, but with an attorney.' And I said, 'Do you want to talk to me now without an attorney?' And to that he said, 'That's fine.'"

In the conversation which followed, Green made a number of incriminating statements. These statements have now been repeated by the prosecuting attorney to a local grand jury which is investigating illegal drug sales in the Tucson area; the statements implicate both Green and another individual, White, in a massive drug smuggling operation.

You are counsel for Green and White before the grand jury. Can you properly claim that neither Green nor White need answer these questions before the grand jury? Why or why not? Can the incriminating statements, or any additional statements garnered before the grand jury in these proceedings, come in at trial against Green or White?

[Cf. United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978) (en banc).]

IV

The Commentary to the Model Penal Code (Tent. Draft #8) observes that the Code provision on the retreat doctrine "denies a justification for the use of deadly force if the actor knows that he can avoid the necessity of using such force with complete safety by retreating. Exceptions are, however, made for a person attacked in his dwelling or his place of work . . ." The text of the Model Penal Code provision under scrutiny is substantially similar to Pennsylvania Crimes Code § 505(b)(2)(ii).

The question arises, however, whether this exception to the retreat doctrine is still justified or justifiable. Since Katz (1967) and Chadwick (1977), it is theoretically clear (isn't it?) that artificial property conceptions are no longer dispositive of the scope of an individual's due constitutional entitlements. The predominant focus today is on one's state of mind and the reasonableness of one's expectations rather than where one is standing, e.g., in one's own driveway or on the curb.

If you agree that the foregoing is true, in this light, isn't the exception to the retreat doctrine for a person attacked in his or her dwelling or place of work arguably unconstitutional today? Moreover, whether you agree with that conclusion or not, isn't this exception to the retreat doctrine nonsensical as a modern policy matter since it is based upon artificial property notions? Explain exactly why you have answered these questions the way you have.

Professor Burkoff