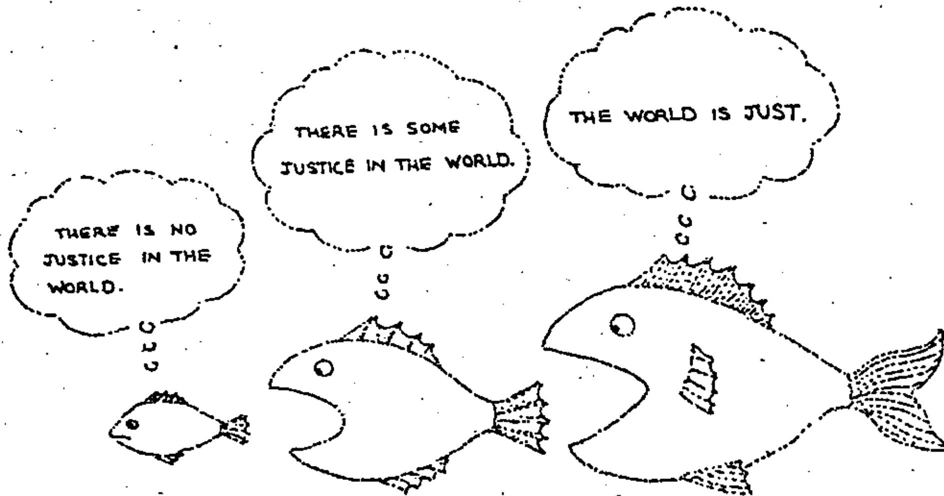
29 EXAMS ✓

CRIMINAL LAW AND PROCEDURE

SECTION B3

Final Examination
April 27, 1981

Three Hours
1:30-4:30



OPEN BOOK

Instructions

The four problems are of unequal weight. Each is worth an amount in grading proportionate to the suggested time limits. 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 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. [Suggested Time: 60 minutes]

The Hawaii Supreme Court, in *State v. Brighter*, 621 P.2d 374 (1980), described the facts of that case as follows:

> At about seven o'clock in the morning of November 13, 1974, an occupant of the defendant Paul Brighter's house telephoned the Kona

Police Station and, after identifying himself as Richard Tavares, stated that the house in Kona Palisades Subdivision was surrounded by guys with guns, or words to that effect. Between six and eight police officers, some of them in plainclothes, were dispatched to defendant's house.

Officer Stewart Dela Cruz was the first to arrive at the house. He spoke to Paul Brighter who said that the persons with guns had left and everything was all right. Officer Dela Cruz related this information to Officers Ronald Aguiar and Ronald Manuela, who had arrived at the scene shortly after Officer Dela Cruz. These two officers observed that there were no other persons surrounding the defendant's house and decided to investigate further to negate the possibility that persons reportedly armed had entered the house and were holding its occupants as hostages. Officers Aguiar and Manuela were met at the door of defendant's house by a person who identified himself as Richard Tavares. Their testimony conflicts on what followed next.

Officer Manuela testified that Tavares said he had seen people with rifles in the bushes in the hills and one armed person on the patio area of a house under construction on one hill. Tavares then confirmed that everything was all right. The officers asked Tavares for permission to enter the house. He refused. After the officers reiterated the importance of checking the house for potential hostages or injured persons, Tavares stepped toward the door frame. The officers pushed open the door and entered.

Richard Tavares denied that the officers asked for permission to enter the house and did not recall a conversation about the gunmen. His version is that Officer Manuela asked to see Paul Brighter, and Tavares told him to wait. As Tavares began to close the partially open door, he stepped toward the jamb; when the door was nearly closed, Officer Manuela "pushed the door in, came in, and hit me on the chest."

The officers went through the kitchen, living room, bathroom, and three bedrooms, finding nothing unusual. Upon returning to

the living area, Officer Manuela was conversing with another occupant, Andrew Versola, when he observed in plain view what appeared to be marijuana leaves in an ashtray, two dry stalks of marijuana, and various drug-related paraphernalia.

At about this time, Officer Dela Cruz, who had been checking the grounds around the house for "guys with guns," informed Officer Manuela that he had observed marijuana plants to the rear of the defendant's residence. Officers Manuela and Aguiar went outside where they found approximately forty to fifty marijuana plants in a vacant lot adjacent to a rock wall which marked the edge of the defendant's premises.

The officers returned to defendant's house and arrested occupants Tavares and Versola for investigation. Shortly thereafter, a frightened Paul Brighter was found hiding in the attic and also was placed under arrest . . ..

Based on an affidavit detailing the events of the morning, a search warrant was issued in the late afternoon, authorizing a search of the defendant's house, garage, and surrounding grounds. Police officers executed this warrant on the morning of November 14, 1974, and seized marijuana and related paraphernalia. During the course of the search, Sergeant Robert Henriques observed a portion of a marijuana plant protruding from a Pan American flight bag located within a Chevrolet van registered to David Brighter and parked in the defendant's garage. Sergeant Henriques immediately searched the van, finding marijuana in the flight bag and phencyclidine, also known as PCP, in the glove compartment of the van.

The trial court denied the defendant's motion to suppress the evidence seized during the search of the house and van. On May 10, 1976, the court found David Brighter guilty of unlawfully possessing more than 2.2 pounds of marijuana and of unlawfully possessing phencyclidine.

What arguments should Brighter's defense attorney have raised at the suppression hearing? How should the Hawaii Supreme Court rule on those arguments in this appeal? Why?

II. [Suggested Time: 45 minutes]

A, B & C, members of the American Nazi Party, were arrested on September 2, 1978, by the Philadelphia police on charges of having participated in an aggravated assault on V, a demonstrator at a civil rights rally, one day earlier. The Philadelphia District Attorney eventually offered A a plea bargain of a 1-3 year sentence recommendation if he would plead guilty as charged. A accepted the bargain and was in fact sentenced to 1-3 years. B & C both asked to receive the same bargain, but their request was denied. Instead, B & C, at the request of the U.S. Attorney for the Eastern District of Pennsylvania, were turned over to federal authorities after their arraignment on state charges, and were tried in federal court on federal charges of violating the civil rights of V. The U.S. Attorney had not obtained the permission of the Justice Department before taking B & C into custody and putting them on trial.

Both B & C were represented by Attorney D at their federal trial. Both B & C presented an alibi defense--they both claimed to have been sunbathing at the beach at the time of the assault. B produced witnesses to support his alibi; C, who had a past criminal record of more than ten assaultive acts, produced no defense witnesses at all. A federal jury convicted B and acquitted C. B was sentenced to serve 20 years to life in a federal penitentiary. There has been no subsequent trial on the state charges.

One year after B's conviction, the Commonwealth of Pennsylvania initiated civil proceedings against B to attempt to recoup the fees paid his appointed counsel prior to the time he was transferred to federal custody. Counsel had billed the commonwealth $250 for that period. The Commonwealth sought no recoupment against A or C.

B's federal court-appointed attorney, D, filed an appeal for B of the federal conviction. However, on January 5, 1981, one week prior to oral argument of B's appeal to the 3rd Circuit Court of Appeals, his attorney contacted B and refused to orally argue the case since, as he put it: "Your case is so weak, they would tear me to shreds at oral argument. Let's just let them decide it on the Brief." One week after oral argument, where the U.S. Attorney was the only counsel making an appearance and presenting arguments, the 3rd Circuit summarily affirmed B's conviction stating, <u>inter alia</u>, that "defendant B has not presented this Court with any serious claims."

B has now hired you to see if there is anything further he can do. Was there error before or at the trial proceedings or on appeal? If so, what was it? Can you do anything for B in the civil suit?

III. [Suggested Time: 45 minutes]

X, a State of Asphyxiation State Trooper, was sitting in his patrol car at the side of the road minding his own business when he observed Y drive by smoking what appeared to be a hand-rolled cigarette. X immediately pulled out and pulled over Y's car. In approaching the car, X noted that the vehicle inspection sticker on the car was outdated. X asked to see Y's driver's license and, after seeing that it was in order, he said to Y: "Look, I can give you a citation on the expired inspection sticker--but, that's nickel and dime stuff. What can you tell me about the pot situation in town? I know you're involved. Give me some good information and I won't hassle you on the vehicle violations." Y, thinking quickly, responded: "I don't personally know anything at all about any pot but my mother was in Z's apartment yesterday and she told me that she noticed that he had a couple of pounds of what looked like pot on his bedroom dresser." X thereupon ordered Y out of the car, searched it, and found one marijuana cigarette in the glove compartment.

After taking Y to the police station to be booked for possession of marijuana, X immediately proceeded to Z's apartment and knocked on the door. There was no response. Instead, he heard a toilet flush inside. X immediately moved to break the door down. Bursting in, he shouted: "Freeze--its the heat!" W emerged from the bathroom immediately and shouted: "I surrender!" Z, who was in the process of baking a cake, raised his hands above his head, his cake fell, and X marched him into the bedroom where two pounds of marijuana sat on the dresser precisely as described by Y. "Aha," said X, "I got ya with the goods!" "That's not my dope," Z blurted out, "that's Y's dope . . . he left it here when he returned from visiting his friend, Paul Brighter, in Hawaii."

Y and Z are charged with possession of marijuana--Y with possession of the marijuana cigarette <u>and</u> the marijuana in Z's apartment, Z with possessing the <u>latter</u> marijuana only. Defense counsel for both defendants have moved to suppress <u>all</u> the marijuana and the statements made by both Y and Z. You are <u>the</u> District Attorney in Breathless County, State of Asphyxiation. What arguments do you anticipate Y and Z will make for suppression? What are your responses? Who will likely prevail? Why?

IV. [Suggested Time: 30 minutes]

Professor Xavier Aesthete of Pandora University Law School has recently commented:

> "The Burger Court has been loathe to allow the exclusionary rule to be applied in cases where the police misconduct in question can be seen to have motivated in any significant degree by a good faith intent to enforce

the criminal laws. Indeed, in any number of recent Supreme Court cases, this good faith 'corrollary' to the exclusionary rule can be seen to have been the sub silentio basis of decisions if not the express basis for the Court's holding. Perhaps the controversy over use of a good faith test would be ameliorated if the Supreme Court simply ruled that the states are free to use a good faith approach to exclusionary rule entitlement but the federal courts are not."

Aesthete, "The Burger Court: Fact or Fantasy?" 62 Guad. L. Rev. 524, 599 (1981).

Are Professor Aesthete's comments an accurate reflection of current constitutional case law and doctrine in the criminal procedure area? (Please use examples of cases and doctrines discussed in the course to support your answer.) In any case, is his suggestion concerning a separate federal and state approach desirable? Why or why not?

Professor Burkoff