

EXAM NO. _____

CRIMINAL PROCEDURE
SECTION C

Final Examination
May 9, 1994

Two ½ Hours
1:00-3:30

THIS EXAMINATION MUST BE RETURNED WITH YOUR BLUEBOOKS

OPEN BOOK

Instructions

The three problems are of unequal weight. They will be graded in proportion 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 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
(80 Minutes)

You are an assistant to a state prosecutor. Your boss tells you that Tonya Pharding, who is charged with driving on a revoked license and who, together with Jeff Phillooly, is also charged with possession of cocaine, have filed a motion to suppress evidence, asserting that the following evidence should be suppressed: (1) Pharding's statement to Detective Kerrigan in which she admitted driving on a revoked license; (2) a substantial quantity of cocaine found in Phillooly's car; (3) Phillooly's statement to Pharding in Detective Kerrigan's patrol car after they were arrested. She further informs you that the following relevant facts were presented at the hearing on Pharding's and Phillooly's motion to suppress:

On April 30, a reliable informant told Detective Kerrigan that John Bobbitt, who lived in a house on Gelding St., was selling narcotics from his house and was going to have a shipment of heroin delivered there on the evening of May 1. Based on this tip, Kerrigan obtained a search warrant for the Gelding St. address. At 7 p.m. on May 1, armed with the search warrant, Kerrigan and other officers staked out the house to await developments. They planned to execute the search warrant sometime after 10 p.m.

At 7:30 p.m., about half an hour after the officers began their stake-out, a car driven by Tonya Pharding, with Jeff Phillooly in the passenger seat, pulled into Bobbitt's driveway. When Pharding got out of the car and started towards Bobbitt's back door, Detective Kerrigan, who was in plain clothes (a silver, sequined skating outfit), approached her and said, "Hold it. I'm a police officer. If you don't mind, I'd like to talk to you before you go in that door."

At Kerrigan's words, Pharding became extremely nervous. She said, "Look, I don't really need to see Bobbitt anyway. How about if I just leave?" Kerrigan replied, "Now calm down. Let's just go over to my car that's parked here on the street. I just want to ask you a few questions. Then you can go."

The two women walked to Kerrigan's car and got inside. Without giving Pharding any Miranda warnings, Kerrigan asked her, "Why are you visiting Bobbitt?" Pharding replied, "It's a social call. Nothing more." Kerrigan persisted, "It doesn't seem like a social call. If that's all it is, why did you get so nervous when I told you I was a police officer. And why is your passenger still sitting in the car? Do you have drugs in your car?" Pharding replied, "No. I don't have any drugs. Look, I'll tell you why I was nervous. I lost my driver's license three weeks ago. I'm driving on a revoked license."

Kerrigan then said, "Okay. I'm going to have to arrest you for that." She placed handcuffs on Pharding and read her her Miranda rights. Then she said, "Will you consent to a search of your car?" Pharding replied, "I don't know. Maybe I should talk to my attorney about that. I tell you what, you can look through the car, but I don't want you to open the suitcase in the back. Its packed and ready for my trip to Japan. I'm going there to become a wrestler." Kerrigan replied, "Okay, we'll be careful."

Kerrigan and the other officers then ordered Phillooly out of the car and searched it. The car, the officers later learned, was actually owned by Phillooly, not Pharding, as was the suitcase in the backseat. After forcing open the suitcase, the officers found a substantial amount of cocaine (and a number of collapsible, steel

batons) in the bottom of the suitcase. As Pharding and Phillooly were being taken to the stationhouse in the back of Detective Kerrigan's patrol car, Kerrigan mumbled to the officer next to her, "The two people in the backseat are acting just like handicapped children who could use a decent Christian burial." At that, Pharding yelled at Phillooly, "You idiot, look what you've gotten us into now!" Phillooly responded, "Me, an idiot? It was your idea to bring the dope over tonight. You're the one that wanted to cut Bobbitt in on the deal. I wanted to stay home and watch Seinfeld."

Your boss tells you that she wants to be well prepared to argue against Pharding's and Phillooly's motion to suppress. She wants you to write a memorandum in which you identify the arguments likely to be made on their behalf and the arguments that can be made in opposition to those arguments.

Write the memorandum.

II
(30 Minutes)

Kevorkian, an attorney, was charged with willful failure to file federal income tax returns. Prior to trial, Kevorkian indicated that he could not afford an attorney. The trial judge denied his request for appointed counsel, however, stating that, "This kills me. You drove to the courthouse in a BMW, wear \$600 suits, and carry a cellular telephone. Request denied."

Kevorkian then said he would represent himself. The judge asked Kevorkian how long he had been a member of the bar. Kevorkian replied that he had been a practicing attorney for more than 20 years. In response to the judge's further question as to whether his practice included criminal cases, Kevorkian replied, "I have never represented a criminal defendant by myself. I take only collections cases, although lately my business has been dying. But I took Criminal Law in Law School and got a C+, a good grade from my law professor, who was a very hard grader." Based on this Record, the judge allowed Kevorkian to represent himself. Kevorkian's request to have an accountant appointed by the court to assist him in his defense was, however, denied.

At trial, Kevorkian's pro se efforts at cross-examination were totally inadequate and his attempt to make a motion at the close of the prosecution's case was feeble. He made no pretrial motions, offered no evidence, and made neither an opening nor a closing statement on his own behalf. After a relatively short trial, he was convicted and sentenced to 2 years in prison.

Should Kevorkian's conviction be reversed? Why or why not?

III
(40 minutes)

How do you think the current Supreme Court would respond to a defendant's challenge to the following two law enforcement activities? Why would the Court reach the decision you describe? Do you agree with the Court's likely decision? Why or why not?

- (1) A search of a sanitary napkin box in a person's bathroom closet (resulting in the seizure of cocaine) based upon the consent of that person's 16-year-old daughter who told the police that they could come

right in and search anywhere because "Mom is a crackhead and its about time you guys caught her."

- (2) A request by a DEA agent to a Hispanic-American traveller flying from Pittsburgh to Houston that he submit to a strip search before boarding his plane, to which the traveller acquiesced, resulting in the discovery of narcotics taped to the individual's waist.

Professor Burkoff