

CRIMINAL PROCEDURE
SECTION AFinal Examination
April 29, 19972 ½ Hours
9:00-11:30THIS EXAMINATION MUST BE RETURNED WITH YOUR BLUEBOOKSOPEN BOOK

*"We had to let the animals go. No one informed them
of their rights when they were arrested."*

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 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.

(60 minutes)

Consider the following factual scenario:

“John Cuva was stopped by an Orlando police officer because Cuva was in downtown Orlando after midnight and appeared to be under age 18. (The police later learned that Cuva was 18 years old.) The city’s Youth Protection Ordinance prohibits the presence of minors in downtown Orlando from 12:01 a.m. to 6:00 a.m. unless they are going to work, coming from work, engaged in approved activities, or accompanied by an adult. The officer asked Cuva’s age and for identification, and, when Cuva could not produce identification, the officer told Cuva that he would have to be detained. The officer also told Cuva that he would be searched whether or not he consented. The officer searched Cuva and found \$1,850 in cash. He testified that the purpose of the search was to find weapons. Cuva was detained and led to a police substation.

“At the substation, no effort was made to contact Cuva’s parents or to verify his age. Another officer asked Cuva where he parked his car and took Cuva’s keys without his permission. Cuva told the officer he might find a joint of marijuana in the car. The officer called for a K-9 unit to walk around the car. When the dog did not alert on the vehicle, the officer unlocked the car and found marijuana under a hubcap on the front seat. Cuva was arrested and read his *Miranda* rights and when asked if he had anything to say, Cuva said: ‘I want to see an attorney. That’s my Mom’s marijuana and she’s going to be plenty mad at me.’

“At the suppression hearing, the first officer testified that Cuva was doing nothing illegal when he first saw him. He stopped Cuva only because he appeared to be under age 18. The second officer said he suspected Cuva was involved in drugs because of the amount of money he was carrying and because Cuva told him he got the money cutting lawns. The officer also testified that once in police detention, Cuva’s keys were no longer his; thus, the officer took the keys and did not obtain Cuva’s permission to search the car. When the second officer arrived at the location of the car, it was lawfully parked in a municipal parking lot.”

Cf. Cuva v. State, 687 So. 2d 274 (Fla. Dist. Ct. App. 1997).

Having moved to Orlando in order to set the record for visits to Tomorrowland (currently 10,652 visits, a record held by Salman Rushdie), you are employed part-time as an Assistant Public Defender in order to earn enough money for your Disney World admissions. You now represent John Cuva and his Mom, Barra Cuva, both of whom have been charged with

possession of marijuana. Discuss your chances in defending these two defendants of suppressing the marijuana and John Cuva's statements to the police.

II.

(60 minutes)

Officer Howard Stern of the Spittsburgh (Spennsylvania) Police Department was asked by his Sergeant to "try out" a new, experimental device which, when pointed at an individual, could "see" beneath that person's clothes and, in addition to revealing the outline of the body, could detect images of weapons and/or contraband. Stern immediately set out for the University of Spittsburgh campus and began using this device by aiming it "randomly" at college students who were walking by. (In fact, it is not clear how "random" his use of the device actually was; of the 32 college students he aimed it at, 31 were female.)

When he aimed it at the thirty-second student, he detected what he believed to be a gun strapped to her waist, "hidden" under her skirt. Stern, who was in uniform, followed this student, Roberta Dole, for two blocks. As he followed, Stern noticed that Dole kept turning her head and looking back at him in what he later called "a nervous fashion," and she ultimately broke into a run. Stern took off after Dole and finally overtook her after running for four more blocks. Running ahead of her, he yelled: "Hey, stop for just a moment. Why are you running away from me like that?"

Dole said: "I don't have to talk to you."

Stern responded: "Yes, you do. Why are you carrying a concealed weapon?"

Dole: "What are you talking about? I'm not carrying any weapon. And I'm not talking without my mother being with me. She's a lawyer."

Stern: "Look, you don't need a lawyer. Let me briefly frisk you and see if you are carrying a weapon. If you aren't, I'll be on my way."

Dole: "Alright. Alright. If you have to do it, do it."

Stern then frisked Dole and felt a hard object right where the device he had used indicated a gun was present. Stern reached into Dole's clothing and removed the object which turned out, however, not to be a gun at all, but a metal box shaped like a gun. Stern opened the box and discovered a large quantity of crack cocaine.

Dole was then arrested and taken to the police station. While she was being detained, Stern prepared an application for a warrant to search Dole's home for narcotics. A magistrate issued the warrant, but failed to indicate whether or not the warrant could be executed at night (as

Stern had requested). Not realizing that the magistrate had not authorized a nighttime search, Stern and two other officers appeared at Dole's home at 9:00 p.m. and knocked loudly at the door, yelling: "Open up. It's the police!" There was no response. But Stern did hear a faint noise that sounded like a garbage disposal. He immediately broke down the door and all three officers entered the home and ran to the kitchen, where they saw Bill Scinton, who was very surprised to see police officers standing there. Scinton stated that he didn't hear the knock at the door because he had been using the coffee grinder to grind coffee. (And there was a coffee grinder on the counter right in front of him.)

Stern told Scinton that they were there to search the house. Scinton said: "Hey, go ahead. Search all you want. I don't care." After a two-hour, top-to-bottom search of the house, Stern discovered one marijuana cigarette hidden in a cute ceramic jar with the word "POT" stenciled on the front. Scinton, who was a burglar who had been in the process of stealing Dole's coffee grinder, left the house unnoticed as the search progressed.

You are an Assistant District Attorney in Spittsburgh, Spennsylvania. Hillary Shrodham is defense counsel for Dole, who has been charged with possession of narcotics (the cocaine and the marijuana). She has moved to suppress all of the narcotics. What do you anticipate her arguments will be at the suppression hearing? How will you respond? What are your chances of success?

III. (30 minutes)

Consider the following analysis:

"[The Supreme Court's decision in] *Ake v. Oklahoma*, 470 U.S. 68 (1985)] institutionalized a double standard of justice: one for those who could pay, and another—the 'basic tools' variety—for those who could not. *Ake* simply failed to come to grips with the problem the Court attempted to address in *Griffin v. Illinois*, 351 U.S. 12 (1956)]—the effect of disparities in wealth on the outcomes of criminal cases. If *Griffin* was too ambitious, surely *Ake* failed to do enough. Moreover, as the services of experts, especially forensic scientists, grow in importance, so too do the implications of unequal access to these services. If indigent defendants cannot persuade courts to grant requests for expert services, the outcomes of criminal cases will continue to be affected

"Instead of trying to make indigent defendants equal (under the equality principle) or giving them basic tools (under *Ake*), I suggest that courts use a theory geared to address directly the disparities of wealth in the criminal justice system. This theory targets the implications of economic disparity in criminal justice by focusing on whether the defendant's poverty could prevent the jury from hearing all of the relevant evidence on contested issues. Based on the Sixth Amendment, this theory would have judges ask two questions in deciding whether

to grant a request for defense services. First, is the issue to which the requested resource pertains in dispute? Second, is the information that could be brought to trial as a result of granting the defendant's request for expert services helpful to the factfinder's decision? In other words, could this information, either by itself or in combination with other information, be the basis for a finding of reasonable doubt?"

David A. Harris, "The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants," 83 *Journal of Criminal Law & Criminology* 469, 472-73, 491-92 (1992).

- (A) Discuss whether or not Professor Harris has correctly explained the holding and import of the *Ake* decision.
- (B) Do you agree with Professor Harris' proposed new test for deciding when and whether to provide indigent defendants with expert services? Why or why not?

Professor Burkoff



"I'm encouraging him to stay in school and go into white-collar crime."