

EXAM NO. \_\_\_\_\_

CRIMINAL PROCEDURE  
SECTION A

Final Examination  
May 2, 2005

2½ Hours  
1:00 - 3:30

OPEN BOOK



*"I find in these cases that the best defense is a pack of lies."*

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.

L.  
(60 minutes)

Consider the following factual scenario:

“In late May 2000, Officer Nichols of the Thompson Falls Police Department was assigned to investigate suspected illegal drug activity occurring at a rented house in Thompson Falls. During the course of the investigation, Nichols concluded that the occupants of the house were involved in operating a clandestine methamphetamine lab. Hence, on July 11, Nichols requested the assistance of Sergeant Bardwell, team leader of the Kalispell Police Department SWAT team, in serving a search warrant. After learning that the house to be searched was a large structure consisting of three levels with numerous rooms and that it might be occupied by as many as fifteen individuals, Bardwell contacted the Flathead County Sheriff Department’s SWAT team for assistance.

“On July 24, Nichols obtained a warrant to search the residence. In his application for the warrant, Nichols related that ‘out of the ordinary traffic’ was seen coming and going from the residence and that a great number of the vehicles were from Washington state. Nichols also stated that he checked the license plates on three of the vehicles that he had seen at the residence. One of them was registered to Troy Klein. Nichols had checked with Spokane County and discovered that Klein had been charged in the past with committing drug offenses and had three active felony warrants.

“Nichols also related in his warrant application that several other individuals who had been seen near the residence had been charged with drug offenses. Nichols also stated that he discovered that there was a surveillance camera located in the second story window of the residence pointed at the driveway. Nichols also averred that an individual matching Klein’s description had purchased ammunition from a local hardware store. However, he added, the two-and-a-half month investigation yielded no observation or reports of weapons sighted in the home. A warrant was issued, but the issuing magistrate declined to make it a ‘no-knock’ warrant.

“On the night of July 25, two SWAT teams, totaling fifteen men, converged on Thompson Falls at approximately 1:45 a.m. Officer Nichols ordered that the teams should enter the house at 4:00 a.m. without knocking and announcing.

“On the morning of the raid, Officer Reinschmidt was watching the front of the house at 2:20 a.m. when a car, which had left the house about five minutes earlier, returned, and the driver got out of the car and yelled at everyone to get inside and turn off the lights. Reinschmidt reported her observations to the

SWAT team. Fearing that their presence may have been detected, the officers decided not to wait to execute the warrant. Reinschmidt continued to observe the house and although she saw some movement in the kitchen, her observations were entirely consistent with the occupants preparing to retire for the night.

“The officers executed their no-knock raid at 3:00 a.m. As the officers approached the house they observed that it was quiet and most of the lights were off. None of the officers detected any activity or heard anything consistent with attempts to escape or resist arrest, although one officer ‘believed’ he heard a toilet flushing.

“The officers approached the home from the west and the north, outside of the range of the surveillance camera located on the east side of the house. Six officers from the Kalispell SWAT team entered the top floor by using a steel ram to break the doorjamb. They confronted four occupants who were in various stages of sleep and preparation for sleep. One of those occupants, Klein, yelled out, ‘Code Blue! Code Blue! Flush the shit!’ when he saw the officers enter. Another seven or eight officers from the Flathead County SWAT team entered the house through the downstairs kitchen door confronting two more occupants.

“All six occupants were arrested, removed from the house, given *Miranda* warnings, decontaminated and issued clean jail clothing. The officers discovered a sophisticated meth lab inside the house. At the police station, one of the arrestees, Tanya Anyan, asked to see a lawyer. She was told that she couldn’t see anyone until morning, but that she could talk to the police ‘right now, honey, if you’d like to make a deal and give up Klein.’ Anyan responded: ‘No deal ’til I get a lawyer to deal for me. And you got to let me walk if I’m going to give you Klein and his lab.’”

*Cf. State v. Anyan*, 325 Mont. 245, 104 P.3d 511 (2004).

1. Having moved to rural Montana to get away from all of the crime in the rest of the country, you now represent Anyan who has been charged with various drug-related felonies. You are planning to file a motion to suppress all of the physical evidence related to the meth lab, Klein’s “flush” statement, and Anyan’s “deal” comments. What arguments can you make in support of that motion? Are they likely to be successful? Why or why not?

2. Suppose that you decide not to file the motion to suppress and that Anyan is subsequently convicted. Your best friend at Pitt Law School has also moved to Montana and she is now representing Anyan on appeal. Her primary argument is that you were ineffective at trial for failing to file the suppression motion. Is this argument likely to be successful? Why or why not?

II.  
(60 minutes)

Principal McGee of Rydell High School was an inventor in her spare time and she invented a device that she believed would tell her when one of her students had used narcotics. (Actually, it only indicated when a student had recently smoked tobacco.) When she tried the machine out, it (incorrectly) indicated that a student, Danny Zuko, was high on cocaine. McGee then called the police, and Officer Vince Fontaine responded, heard Principal McGee's story, and asked if he could try out the device himself. McGee agreed and Officer Fontaine took it to the shop class, aimed it at the class, and the device indicated that everyone in the class, including Zuko, was high on cocaine. "Can I search them all?," Fontaine asked McGee. "Of course," McGee answered.

Fontaine approached Zuko, who was sitting in the driver's seat of a car that was being "souped up" in the shop class for a race at Thunder Road, while McGee blocked the only door in and out of the classroom. "Are you high on something, young man?," Fontaine asked Zuko, "or are you always like that?" "Of course I'm high, man, but it's a natural high," Zuko responded. "Then you don't mind if I search your person, do you?," Fontaine countered. "What person?," Zuko answered, "You can search Rizzo who's sitting here next to me. If you can call her a 'person.'" As Rizzo started punching Zuko, he turned away and quickly jumped out of the car. Officer Fontaine pursued him, and reached out and grabbed him by his shoulder as Zuko reached the door and tried to slip past Principal McGee. "Hey, man! Don't touch me!," Zuko yelled, and, as he twisted away from Fontaine, a small packet of white powder fell from his shirt pocket to the floor. (The powder, tested later, turned out to be a legal dietary supplement.)

But, thinking the powder was cocaine, Fontaine seized the packet, grabbed Zuko, and immediately put him in handcuffs. He then searched Zuko's clothing and, after squeezing and manipulating Zuko's front pants pocket, he discovered (and removed) a baggie of marijuana from Zuko's underwear. A subsequent search of the car in which Zuko had been sitting turned up a hand grenade under the front passenger seat, another baggie of marijuana in a purse laying on the front console, and a severed hand in the trunk. When Fontaine seized the purse to search it, Rizzo, who was still sitting in the front passenger seat of the car then, exclaimed: "Don't you search my f\*\*\*\*\* purse! Leave my weed alone!" After finding the marijuana in the purse, Fontaine then searched Rizzo, too, and found another baggie of marijuana stashed in her underwear.

Officer Fontaine then took Zuko and Rizzo back to the Principal's office and started to give them both *Miranda* warnings, but Rizzo cut him off before he could finish, saying that she knew all about the warnings from watching TV, and that he should "shut his trap." McGee exploded, "Don't you tell a police officer to shut up, missie! Were you raised on a farm?" "No," Zuko interjected, before Rizzo could say a word, "she grows her marijuana in the basement."

The preceding events all took place in the state of Grease, one of the states in the United States (the 54th state, after Puerto Rico, Canada, and Iraq). A beauty school dropout, you are

now an Assistant District Attorney in Kenickie County in the state of Grease. The District Attorney there, John Burkoff (played by John Travolta, when he was younger and hotter looking) has charged Zuko and Rizzo with possession of marijuana, possession of a hand grenade, and carrying a concealed severed hand (all of these are crimes under the Greasian Crimes Code). Burkoff has asked you to respond to Zuko's and Rizzo's defense counsel, Sandra Dee (played by Olivia Newton-John), who has filed a motion to suppress the marijuana, the hand grenade, the severed hand, and the statements made by Zuko ("natural high"; "marijuana in the basement") and Rizzo ("leave my weed alone"). What arguments should Dee make in support of her motion? How will you respond? Who will prevail? Why?

### III.

(30 minutes)

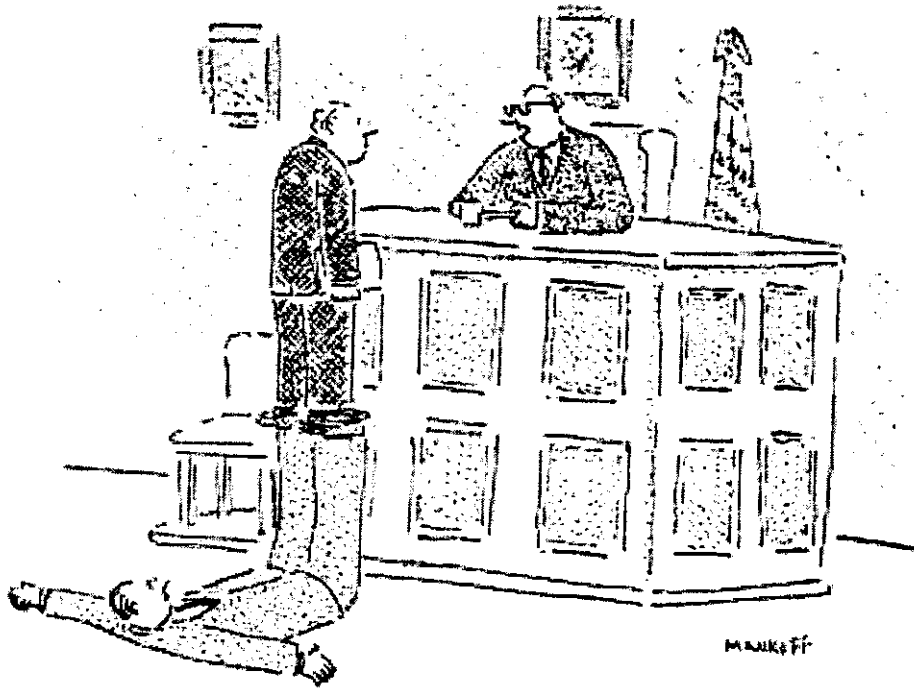
Consider the following excerpt from Craig Bradley, "The Fourth Amendment: 'Be Reasonable,'" in *THE REHNQUIST LEGACY* (Cambridge University Press) (forthcoming 2005):

When it comes to the Fourth Amendment, the police have had no greater friend on the Supreme Court than William Rehnquist. [To] the extent that personal feelings and experiences underlie a Justice's attitudes about the law, the prospect of being stopped or searched by police would not seem to be a personal concern of Rehnquist's. Nor does he empathize with those people for whom it is a more realistic possibility . . . . Rehnquist would deny the claim that his narrow view of Fourth Amendment rights is primarily based on a conservative political philosophy. Rather he points out that "it is often forgotten that nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants. The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which may issue shall only issue upon probable cause." Each search must be assessed according to its reasonableness.

[But] this ignores the basic function of criminal procedure jurisprudence which Rehnquist has often endorsed: to make "rules" for police "in carrying out their work . . . ." Something that case-by-case "reasonableness" analysis will not achieve. Rehnquist had no difficulty joining Court holdings that searches of open fields and curbside trash containers were not "searches," despite the fact that these activities would seem to fall under the literal terms of the Fourth Amendment. Just as it may be necessary to define the Fourth Amendment narrowly in order to give police direction as to when they may need probable cause or warrants, so, on other occasions, may it be necessary to read it broadly—to require search warrants to search dwellings or other places, even though the Amendment by its terms imposes no such requirement. There is certainly nothing in the Constitution that suggests that the Court may only read the Bill of Rights narrowly [when] a

majority of the Court believes that it should be read broadly to effectuate its overarching goal of protecting individual liberty.

Bradley, Chief Justice Rehnquist's former law clerk, is a law professor at Indiana University. Do you agree with his analysis? Using examples of cases and/or issues discussed in this course, explain why you do or do not agree.



*"Be advised, Counsellor, the court will not tolerate  
a circuslike atmosphere."*

Professor Burkoff