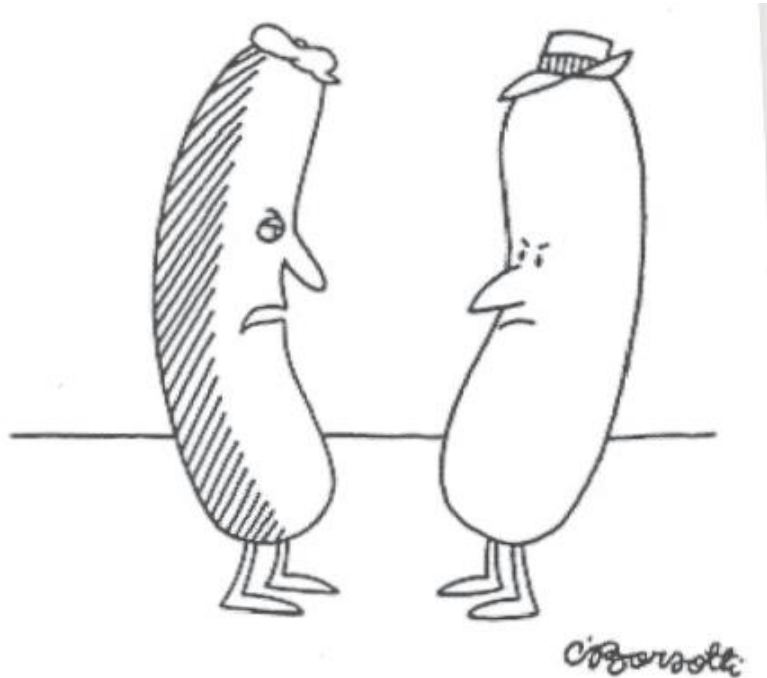


CRIMINAL PROCEDURE
SECTION C

Final Examination
May 10, 2010

3 Hours
1:00-4:00

OPEN BOOK



"They grilled me, Eddie, but I didn't talk."

Instructions

The three problems are of unequal weight. They will be graded in proportion to their 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. (60 Minutes)

Consider the following factual scenario:

“In late December 2005, two South Burlington police officers served a subpoena on an individual in connection with a major drug distribution case. The police had information that the individual in question had sold drugs from a white Jeep, accompanied by an Hispanic male from New York. While serving the subpoena, the officers observed a male who appeared to be Hispanic in the apartment. The individual appeared to be nervous about the officers’ presence, and had a New York accent. He identified himself to the officers as Yosef Pitts. After serving the subpoena, the officers waited outside the apartment, observed Yosef enter a taxi, and decided to follow. The officers called the taxi dispatcher and were informed that the taxi was going to an address on Henry Street in Burlington and that the taxi made the same run to the same address several times a day. This aroused the officers’ suspicions further because they believed that drug dealers routinely use taxis to avoid detection.

“As Yosef exited the taxi, the officers approached, took him by the arm, and asked if they could speak with him. Yosef agreed to talk, and one officer asked him where he was going. He responded with the address on Henry Street. The officer inquired as to whether he had identification; Yosef gave his name and further explained that he was from New York but had been living in Vermont with his sister. The officer then asked if he had any weapons on him. According to the officer, Yosef told him ‘I have a knife in my pocket, here’ and the officer then ‘took the knife off [Yosef], and . . . patted him down for weapons.’ During the pat-down search, the officer felt a ‘big wad of cash’ and asked Yosef how much was there: Yosef indicated several hundred dollars. The officer then asked Yosef if he had any drugs on him. Yosef indicated that he had ‘a little weed’ in his pocket. The officer testified that Yosef ‘guided’ him to the location of the drugs, which the officer then removed, revealing about two grams of marijuana. The officer indicated that he then obtained consent to do a complete search of Yosef’s person. When they were done, the officers placed Yosef in their cruiser and approached the house on Henry Street. The officer testified that their purpose in going to the house was ‘to corroborate Mr. Pitts’ identity and see if there was drug use or drug dealing within the residence.’

“Yosef’s sister, Sequoya, answered the door. After confirming her identity, the officers informed Sequoya that they had Yosef outside, that he had been coming to see her, and that they had taken a large amount of amount of money and some marijuana from him. The officers sought and received permission to enter the house, where they observed what appeared to be a marijuana cigarette on a dresser in the living room. An officer then asked for permission to search the house, explaining that he could apply for a warrant but that it would take several hours and require leaving an officer at the scene. Sequoya was concerned about the effect of the search on her son, who would soon be returning from school, but after the officers told her that they were going to search sooner or later, she signed a consent form allowing the search. Among other items, the search of the house revealed additional marijuana, cocaine, and assorted drug-related paraphernalia. When confronted with the drugs the officers found and asked about it, Sequoya said, ‘It’s all Yosef’s.’”

Cf. State v. Pitts, 978 A.2d 14 (Vt. 2009).

After graduating from Pitt Law School, you moved to Burlington, Vermont, because of your unhealthy obsession with maple sugar. As an Assistant Public Defender there, you have been charged with the defense of Yosef and Sequoya, each of whom has been charged with narcotics possession charges.

- (a) What are your chances of successfully moving to suppress all of the narcotics found on Yosef and in Sequoya’s home? Why? Discuss.
- (b) What are your chances of successfully moving to suppress the statements that Yosef and Sequoya made to the police which the prosecution has indicated it intends to use against *both* defendants to prove their complicity? Why? Discuss.
- (c) If you decide not to move to suppress the narcotics or statements and Yosef and Sequoya are subsequently convicted, and Yosef is now subject to deportation proceedings as a result of his conviction, what are the chances of either or both of them having their convictions reversed on appeal on the grounds of your ineffective assistance of counsel? Why? Discuss.

II. (45 minutes)

“The exclusionary rule, which holds that evidence obtained in violation of the Fourth Amendment’s prohibition of unreasonable searches and seizures is inadmissible, remains highly controversial. Many American academics believe that it is the best, if not the only, way to protect citizens from unreasonable searches. Politicians and judges in other nations, however, have not adopted similar rules, and the exclusionary rule is fairly unpopular with the American general public who recognize that it sometimes permits the guilty to go free.

“The Supreme Court under Chief Justice Roberts has indicated dissatisfaction with the exclusionary rule. Five justices seem prepared to rely on other means to protect Fourth Amendment rights. The question is what these other means will be if the exclusionary rule (as it is currently understood) is abandoned.

“[I] propose[] that an admissibility standard be adopted that is in keeping with virtually every jurisdiction around the world other than the United States. Under this standard, before ruling evidence inadmissible, the court would consider the level of the constitutional violation, the seriousness of the crime, whether the violation casts substantial doubt on the reliability of the evidence, and whether the admission of the evidence would seriously damage the integrity of the proceedings.

“In addition to this admissibility standard, [I] propose that Fourth Amendment violations be treated like direct criminal contempt of court. Thus, if a judge determines that there has been a serious Fourth Amendment violation, the offending officer could be criminally punished. Inasmuch as this punishment can be comparatively severe and is directly aimed at the officer, it should have a strong deterrent effect. Moreover, since a judge would be empowered to enforce the conviction with minimal process beyond that which would have already taken place, it would be a more reliable deterrent than the existing exclusionary rule.

“There are, of course, some questions that remain to be addressed, primarily regarding the best way to protect the rights of officers charged with contempt and concern about over-deterrence and interference with police investigations. This approach, however, seems to satisfy the demand that Fourth Amendment rights be protected without automatically excluding relevant and

material evidence of guilt. As such, it is a remedy worthy of serious consideration.”

Ronald J. Rychlak, “Replacing the Exclusionary Rule: Fourth Amendment Violations As Direct Criminal Contempt,” 85 Chi.-Kent L. Rev. 241, 241-42 (2010).

Referencing issues and relevant Supreme Court decisions discussed in this class, explain why you do or do not agree with both Professor Rychlak’s analysis and his proposal.

III. (75 minutes)

Jake Sully, a paraplegic ex-Marine, was rolling along Fifth Avenue in Spittsburgh, Spennsylvania (one of the states in the United States) around midnight one night, in his wheelchair, when a police officer, James Cameron, yelled to him, “Hey! You there in the chair. Where the hell ya goin’ this time of night?” Sully, who was listening to his iPod through earbuds, didn’t hear the officer, and didn’t stop. Officer Cameron then ran after Sully and planted himself right in front of his wheelchair, bringing Sully to a screeching stop. “So why the f*** didn’t you answer me, boy?” Sully turned off his iPod and said: “What? What are you talking about?”

Officer Cameron then sniffed the air deeply, and said: “Hmm. What’s that I smell? You been smoking some of that funny weed, roller boy?” “No! Hey! Come on! What’s going on here? Leave me alone, man. I’m tired. I gotta get home,” Sully responded. “You let me search your buggy there, and you can go right home. I’m pretty sure you got something funny hidden somewhere in there,” Cameron insisted. “Okay, okay. Let’s get this the f*** over with so I can go home,” Sully said.

And with that, Cameron started going over the wheelchair intently, looking for anything he could find. He found nothing in the wheelchair itself, but when Cameron reached into Sully’s jacket pocket, he found a knotted, orange party balloon which he then seized and which turned out—after subsequent laboratory analysis—to contain cocaine. “Shit,” said Sully, “you found my shit.” [Statement #1]

Sully was then taken to jail. While there, he was given a jail-issued wheelchair, and his own wheelchair was confiscated and searched thoroughly. That search produced an additional baggie full of cocaine which was found inside the seat cushion.

Based upon the discovery of both packets of cocaine, Officer Cameron obtained a search warrant for any narcotics that might be located in Sully’s home. Along with another police officer, Spigourney Weaver, he executed the warrant immediately, at 2:30 a.m in the morning.

When Cameron and Weaver arrived at Sully’s house, there were no lights on and they assumed no one was home. Nonetheless, they pounded on the door, yelled “Police! Open up!,”

and—after waiting five seconds—they broke the door down. As they entered the hallway, they saw Sully’s common-law wife, Neytiri, walking toward them, holding a bed sheet wrapped around her. She appeared to have been awakened by their forcible entry. “What’s going on? Get out of here! You have no right to be here!,” yelled Neytiri. “Calm down, ma’am. And you can just drop that sheet and raise your arms up in the air. Now! *Right now!*,” screamed Weaver. “What? You can’t do that! This is Pandora, I mean . . . this is America. You, you, you can’t do, do things like that here!,” Neytiri stammered. But Weaver reached over and ripped the sheet from her and made her stand there naked for nearly ten minutes before Weaver gave her the sheet back and let her cover herself. While she was standing unclothed, Weaver and Cameron noted that Neytiri had a small tattoo on her hip that was a heart with the words, “The Drugs Are in the Freezer” inked inside it.

“Hey, why is your skin so blue?,” Cameron asked her, “are you a terrorist? Are you from Afghanistan or something?” “I had a bad drug reaction, that’s all. Some bad shit blued me up, that’s all,” explained Neytiri. [Statement #2]

“Drugs, I f***ing knew it!,” yelled Cameron. And while Weaver held Neytiri at gunpoint, Cameron searched the house from top to bottom, starting with the freezer in the kitchen. After a four-hour search, he discovered ten additional grams of cocaine, six grams contained in two packets stuffed into a pair of Sully’s underwear in his underwear drawer, and four grams inside a Coke can that he found in the freezer.

“Hey, Blue Girl or whatever the hell your name is, we want to search your car, too. Where’s the keys?,” Cameron asked. Neytiri merely grunted in response and looked toward the entry hall table where Cameron saw some car keys sitting in a saucer. He grabbed them, went outside, and used them to enter the car parked in the driveway. Inside that car, Cameron found an additional baggie of cocaine inside a paper bag crumpled up and stuffed inside the spare tire in the trunk.

Cameron took the cocaine from the car back into the house and asked Neytiri: “Whose coke is this? Yours or roller boy’s?” Neytiri responded: “Leave Sully alone. He’s suffered enough. It’s mine. All mine.” [Statement #3]

Sully and Neytiri have each been charged with possession of cocaine in Spennsylvania state court. Their defense counsel has told you that he is going to move to suppress all of the cocaine seized (from Sully, his wheelchair, the house, and the car) and Statements #1, #2, and 3, noted above, in each of their cases.

You are an Assistant District Attorney. The District Attorney, John Burkoff (played by a very pregnant Heidi Klum with a beard), has asked you to respond to this motion to suppress. What arguments can defense counsel tenably make in support of his motion? How will you respond? Who will win? Why? Discuss.



Professor Burkoff